Report on the Allegation that San Jose City Officials, the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals Obstructed Justice during Litigation of the Case Bates v. City of San Jose, et. al. in order to Cover up Discrimination and Racism by the City of San Jose

By Plaintiff Frederick Bates
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Recipients:

United States Congress
United States Department of Justice
United States Supreme Court

October 2024

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OVERVIEW

This report was completed in order to document criminal misconduct by San Jose city officials, my attorney, officials with the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals that obstructed justice during litigation of a lawsuit I filed against the City of San Jose and three police administrators in U.S. District Court, in August 2006. This report was also completed in order to initiate an investigation into the misconduct of the above officials by the appropriate authorities. The lawsuit is titled Frederick Bates v. City of San Jose, et. al., case number C06-05302 RMW.

My lawsuit resulted after San Jose city officials violated my constitutional rights by denying me a CCW permit without a due process hearing required by state law, upon my medical disability retirement from the San Jose Police Department as a sergeant, in April 2004. The violation of my rights was done knowingly and with the specific intent to cause me financial harm and extreme emotional distress. Facts and evidence will show that San Jose city officials' deprivation of my rights was motivated by my disability and race. I'm black/African American.

It will be sufficiently clear from this report that during litigation of my lawsuit, the U.S. District Court in San Jose, the Ninth Circuit Court of Appeals, and my attorney conspired with San Jose city officials to perpetrate fraud on the court with the intent to obstruct justice. It will also be clear that the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals' rulings were biased in favor of the City of San Jose, they violated the Constitution, statutory law, and precedent. **It is reasonable to conclude from this report that the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose are weaponized and rigged.**

Facts and evidence will show that as a part of the conspiracy to obstruct justice, San Jose police officials committed perjury during depositions, and that attorneys for the City of San Jose and my attorney entered a fraudulent stipulation to dismiss a defendant from my lawsuit without my consent that clearly violated my rights. The purpose of this stipulation of dismissal was to obstruct justice by preventing the U.S. District Court from ruling on that defendant's actions and to facilitate the City's motion for summary judgment, which was a total fabrication. That same defendant committed perjury in a declaration in support of the City's motion for summary judgment. Facts and evidence will show that U.S. District Court officials in San Jose violated federal law by filing false docket entries relative to a motion for relief I filed, then conducted a fraudulent hearing on that motion with a transcript and civil minutes. Facts will also show that U.S. District Court Judge Beth Labson Freeman fixed the decision in favor of the City on an independent action in equity for relief from judgment that I filed in October 2020, then declared me to be a vexatious litigant in act of retribution.

This report relies on my personal experience, case law, court filings, court hearings, as well as my efforts to initiate an investigation into the misconduct that occurred during litigation of my lawsuit. This report is organized into six (6) sections. Section 1 proves conclusively that the judgment in my lawsuit is based on fraud, a misapplication of the law by the U.S. District Court and Ninth Circuit Court of Appeals, and bias against me by both courts. Section 2 addresses my efforts to obtain relief from the clearly erroneous and legally void judgment in my lawsuit, all to no avail. Section 3 addresses the lack of oversight of judges in the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose, and it presents evidence against named judges in both courts for impeachment considerations. Section 4 addresses misconduct complaints I made with

high-ranking government officials at the local, state, and federal level, as well as the media. Section 5, titled Findings, details the misconduct of San Jose city officials, my attorney, the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals that has been established by this report. Section 6 states my recommendations.

This case is representative of the systemic discrimination against pro se litigants by the courts, and reveals that memorandum dispositions and summary dispositions are used by the courts to kill off cases, thereby, undermining the Constitution and democracy

This case is an example of the apparently widespread discrimination by the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals against self-represented or pro se litigants. This appears to be the case in other federal courts as well. Also, the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals' widespread misuse of summary dispositions and memorandum dispositions, particularly in cases involving pro se litigants, is problematic and evidence of corruption, dysfunction, and bias. Memorandum dispositions appear to be used largely by Courts of Appeals. Many of the summary dispositions and memorandum dispositions are nothing more than a means to kill off cases. Summary dispositions and memorandum dispositions appear to be written by non-judges, perhaps staff attorneys and clerks. These summary dispositions and memorandum dispositions are quite often inconsistent with the facts, the evidence, published opinions, as well as the Constitution and federal statutory law. Memorandum dispositions and summary dispositions are unconstitutional and undemocratic by their very nature. **This case is likely the tip of the iceberg**.

Appendix A, Appendix B, and Appendix C are included at the end of this report containing evidence and documents that support my claims. The corruption of the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose as laid out in this report is likely to be the case in other federal circuits as well.

SECTION 1

Judgments in the case of Bates v. City of San Jose, et al. are based on fraud, a misapplication of the law, and bias

I. Introduction

As stated in the overview, this section will prove conclusively that the judgment of the District Court in this case granting the City of San Jose its motion for summary judgment relies on fraud, bias, and a misapplication of the law. The judgment is clearly erroneous. On my appeal of the District Court's judgment, the Ninth Circuit Court of Appeals made findings in the appeal's hearing that undermine the District Court's judgment and totally discredit the defenses of the City as stated in its motion for summary judgment, its answering brief, and in the appeal's hearing. Yet, the Ninth Circuit Court of Appeals affirmed the clearly erroneous and discredited judgment of the District Court in its memorandum disposition, exhibiting blatant bias in favor of the City.

False statements of facts by the City of San Jose in its motion for summary judgment that were repeated in the hearing on my appeal is the smoking gun evidence of the fraud by attorneys for the City. The fraud perpetrated by the City in the appeals' hearing is documented in the official audio recording of the hearing by the Ninth Circuit Court of Appeals. The audio recording also contains evidence that the Ninth Circuit Court of Appeals misapplied the law as to collateral estoppel, and that the Court exhibited bias against me. The audio recording is undeniable evidence that the decision in my case was fixed, and that there is a cover-up occurring. A certified, but unofficial transcript of the audio recording is included in the Appendix. (See Appendix A, page A-1) It should be noted that the hearing in the Ninth Circuit Court of Appeals was voice-recorded only and no official transcript is available. An official copy of the voice recording is attached to this report, or it can be accessed on the website of the Ninth Circuit Court of Appeals, case number 08-16757. The City's motion for summary judgment and answering brief are also included in the Appendix. (See Appendix A, pages A-20 and A-41)

II. Details about my case against the City of San Jose

Details about my case provide context to my claims of fraud by the City in the City's motion for summary judgment, and in the hearing on my appeal of the District Court's ruling granting the City's motion. I retired on a medical disability from the San Jose Police Department as a sergeant in April 2004. I was denied a CCW permit without a due process hearing required by law. As a result, I sued the City and three police officials in federal district court after a small claims complaint was unsuccessful.

California Penal Code Section 12027.1 grants CCW privileges to all retiring peace officers except for those that retire on a psychological disability. A due process hearing is required under Section 12027.1 in all cases of denial or revocation of a CCW permit to retiring officers, except for psychological disability retirements. The hearing requirement implicates a constitutionally protected interest because it places a significant substantive restriction on law enforcement administrators when making decisions regarding the issuance of CCW permits to retiring law enforcement officers. It is worthy to note that the California legislature amended Section 12027.1 in 1988 to require a hearing due in part to a lawsuit filed by the San Jose Police Officers' Association against the City of San Jose in a case similar to mine.

I was initially denied a CCW permit, without a hearing, by Deputy Chief Adonna Amoroso. In her deposition, she stated that she believed I retired on a psychological disability based on my work restriction of "preclusion from psychological stress." She stated that she misinterpreted my work restriction because she did not have authority to read my confidential medical records. (See Appendix A, pages A-70 through A-84 for excerpts of Amoroso's deposition) Amoroso's claim that she had no authority to read my confidential medical records is a total falsehood. California law, as is established by the case of Unland v. Block, authorizes police administrators to read an officer's confidential medical and psychological records to determine if they are a suitable candidate to carry a concealed weapon. I signed a consent form giving City officials the authority to read all of my medical and psychological records to determine the nature of my disability as well. (See Appendix A, page A-85) Furthermore, the medical records of an officer that retire on a disability are discussed in the retirement board hearing that is open to the public. The transcript and minutes of the retirement board hearing are available to the public. (See Appendix A, pages A-86 through A-88 for the transcript of the retirement board hearing) (See Appendix A, pages A-89 and A-90 for the minutes of the retirement board hearing)

In a letter that Amoroso wrote to an officer in 1999, it is clear that she read the medical records of officers that apply for disability retirements. She was well aware that she was being untruthful when she stated in her deposition that she did not have authority to read my medical records. She states in the letter that the officer's medical information that formed the basis of his disability retirement was read into the record at the retirement board hearing, it appeared on his application for disability retirement, and as just mentioned above, it is public information.

The letter is proof that Amoroso' decision to deny me a CCW permit was malicious and blatantly discriminatory because she treated me differently from that officer. In the letter, Amoroso explained to the officer why his CCW permit was denied. I never received anything in writing from Amoroso regarding the reasons why my CCW permit was denied. Amoroso also stated in the letter to the retiring officer that he made a specific claim of a psychiatric disability. I made it clear to Amoroso that my disability was medically related when I attempted to appeal her decision to deny me a CCW permit. (See Appendix A, page A-91 for the letter sent to the retired officer)

Further evidence that Amoroso discriminated against me by treating me differently from other retiring officers is the statement in her deposition that her decision whether to issue or deny a retiring officer a CCW permit is usually based on what happened at the retirement board. Yet, she made it clear that she relied solely on my work restriction to avoid psychological stress in her decision to deny me a CCW permit. It is indisputable that the retirement board approved of my medical disability retirement with a unanimous vote based on injuries to my heart that were caused by hypertension. (See Appendix A, page A-79, for the excerpt of Amoroso's deposition) (See Appendix A, page A-88 for the transcript of the retirement board hearing) (See Appendix A, page A-90 for the minutes of the retirement board hearing)

It should be clear from what has been presented so far is that Amoroso had authority to access my medical records. My medical records make it clear that my work restriction to avoid stress was provided in order to help control my high blood pressure. Amoroso was aware of this fact because she stated in her deposition that she had an independent recollection that I had a heart condition affected by psychological stress. She also stated that she was not aware of me being required to have a mental fitness examination. (See Appendix A, pages A-70, A-71, and A-72 for excerpts of Amoroso's deposition) In the hearing on my appeal, my attorney points out that there is no mention in my medical records of me having any psychological problems. (See Appendix A, pages A-4 and A-5) Further discrediting Amoroso's claim that she believed I retired on a

psychological disability is her access to a letter from my doctor recommending that I consider early retirement because I had significant high blood pressure that was difficult to control. (See Appendix A, page A-82 for the doctor's letter recommending early retirement) Amoroso was also aware that I had the work restriction of "preclusion from psychological stress" for three years prior to my retirement, and that the work restriction was provided by the City's doctor, Dr. Das, in order to help control my blood pressure that had caused injuries to my heart. (See Appendix A, pages A-93 to A-96 for a memo completed by Dr. Das explaining my work restriction)

During the three years prior to my retirement, Amoroso approved of two of my work assignments that were directly related to my work restriction of "preclusion from psychological and physical stress." She approved of my transfer from Internal Affairs to patrol as a supervisor; and my transfer from patrol to manager of the School Crossing Guard Program. All three of these assignments required me to make sound judgments under stressful conditions. At no time during these assignments was I prohibited from carrying a firearm on duty, or off-duty concealed. At no time did Amoroso or the City express any concerns that my work restriction meant I had a psychological disability. As a matter of fact, I was allowed by the City and police department to purchase the 9mm pistol that I carried on duty; and the large capacity pistol magazines used with that firearm were transferred to my control upon my retirement. At that time, ordinary citizens could not possess large capacity pistol magazines. (See Appendix A, page A-97 for the form transferring the large capacity pistol magazines)

Also discrediting Amoroso's claim that she believed my work restriction to avoid stress meant I had a psychological disability is my disability application that was in her possession, and my performance appraisal that she could have easily accessed, since it was under her control. In my disability retirement application, it states my injuries were cumulative, heart and cardiovascular. My performance appraisal was completed a few weeks prior to my retirement. The performance appraisal gave me an overall rating of "Above Standard," with three individual rating categories as "Exceptional." In the "Job Expertise," category rated "Exceptional," it states: "I don't usually rate a new supervisor exceptional in this area, but I'd like to recognize your accomplishments in getting to know a new unit, a new team, and a new job very quickly and effectively, Thanks for your efforts!" In the "Judgement" category rated "Above Standard," it states: "You anticipate and handle routine and emergency issues quickly and effectively. Your decisions are logical and appropriate." In the "Initiative and Reliability" category rated "Above Standard," it states: "You are reliable and dependable; your presence and assignments are completed on-time. Your performance under pressure was above the expectations for this position. You are a very conscientious and productive supervisor. Your high standards are also applied to your subordinates." Under the "Supervision," category rated "Exceptional," it states: "You supervise your employees in a professional manner. You inspect, evaluate, and guide their work to maximize productivity. You provide appropriate direction and correction as needed. You are never overbearing or timid. You delegate tasks properly." Under the category of "Overall Rating," it states: "You have been a member of this agency for 20 years. You have consistently performed at least above standard, if not exceptionally in all areas during your career, and especially while in the Community Services Division." (See Appendix A, pages A-98 and A-99 for my disability retirement application) (See Appendix A, pages A-100 through A-105 for my performance appraisal)

The facts are clear and convincing that prove Amoroso was being untruthful when she said she misunderstood my work restriction because she had no authority to read my medical records. But her admission in her deposition that she was not supposed to interpret work restrictions as to

whether someone has a psychological condition or a medical condition is undeniable evidence that she violated my constitutional rights knowingly and maliciously. It is actual police department policy that police officials are prohibited from interpreting work restrictions. (See Appendix A, page A-106 for the police department's policy regarding compliance with work restrictions)

After I was denied a CCW permit by Deputy Chief Amoroso, Police Captain Tuck Younis and Chief of Police Rob Davis also denied me a CCW permit, without a hearing, after receiving information in the form of a letter from my doctor clarifying that Amoroso's decision was wrong because she misinterpreted my work restriction. The City stated, subsequently, it was crystal clear from the clarifying information that I retired on a medical disability instead of a psychological disability, and that I was a suitable candidate to carry a concealed weapon. Therefore, I was entitled to a CCW permit or a hearing under California Penal Code Section 12027.1. There is no doubt that Younis and Davis violated my constitutional rights when they denied me a CCW permit, without the mandatory hearing required by Section 12027.1, after receiving the clarifying information about my work restriction. It is clear that their actions against me were malicious, discriminatory, and racist. (See Appendix A, page A-107 through A-110, for copies of the letters sent to Younis and Davis)

I sued the City, Deputy Chief Amoroso, Captain Younis, and Chief of Police Rob Davis in U.S. District Court in 2006 for violating my constitutional rights by denying me a CCW permit without the due process hearing required by Section 12027.1 of the California Penal Code. My lawsuit is commonly referred to as a Monell Claim or a Section 1983 Claim.

III. The City perpetrated fraud on the U.S. District Court and the Ninth Circuit Court of Appeals

To get a full appreciation of my fraud on the court claim, a discussion about what constitutes fraud on the court should be helpful. The Ninth Circuit Court of Appeals in In re: Lavander v. Prober opined that the U.S. Supreme Court in Chambers v. NASCO, Inc. recognized the inherent power of federal courts to vacate judgments when proof has been presented that a fraud on the court has been committed. The Supreme Court justified setting aside judgments obtained by fraud on the basis that "tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

The Ninth Circuit Court explained that not all fraud constitute fraud on the court. The fraud alleged must harm the integrity of the judicial process. The Ninth Circuit stated when determining whether a fraud on the court has been committed, it applies Professor Moore's definition:

> "'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."
>
> (See Appendix A, pages A-111, A-113, and A-114, for the case of In re: Lavander v. Prober)

As already mentioned, the City of San Jose through its attorney Michael Dodson, filed a motion for summary judgment in my lawsuit filed in 2006. In its motion, the City put forth the

false narrative that my CCW privileges were denied by Deputy Chief Amoroso because she was confused about my work restriction to avoid psychological stress and that she was entitled to qualified immunity. The City then made the false claim that four months after Amoroso denied me a CCW permit, police captain Tuck Younis reversed Amoroso's decision and granted me a CCW permit after receiving clarifying information about my work restriction from my doctor. Below is an excerpt from the City's motion reflecting the above false statement:

"Several months after the initial denial, the San Jose Police Department received clarifying information from Bates' physician which essentially stated that Bates did not have a psychological disability and was an appropriate candidate to carry a concealed weapon. It is undisputed that upon receipt of this clarifying information from Bates' physician the Police Department reversed its earlier decision and granted Bates the right to carry a concealed weapon."

(See Appendix A, pages A-20, and A-26, for the City's motion for summary judgment)

The District Court granted the City its motion for summary judgment. I appealed the judgment of the District Court to the Ninth Circuit Court of Appeals. The hearing on my appeal was held in November 2009. The City's attorney, Michael Dodson, made the same false claim in the City's answering brief that he made in the City's motion for summary judgment. That false claim is that the City reversed the decision to deny me a CCW permit four months later after it was initially denied by Deputy Chief Amoroso in April 2004, after the City received clarifying information regarding my work restriction to avoid psychological stress. Below is an excerpt from the answering brief that states the City's false claim.

"Several months later, the City's Police Department received clarifying information from Bates' physician stating that Bates did not in fact have a psychological disability and that he was an appropriate candidate to carry a concealed weapon. Upon receipt of this additional clarifying information, the Police Department reversed its earlier decision and granted Bates a permit to carry a concealed weapon in August 2004.

Thus, approximately four months elapsed between the time of Bates' disability retirement, in April 2004, and his obtaining a permit to carry a concealed weapon in August 2004. As a result of this, Bates asserts that his civil rights were violated."

(See Appendix A, pages A-41, and A-49, for the excerpt from the City's answering brief)

Dodson made the same false claims in the hearing on my appeal that he made in the City's answering brief. Below are the claims Dodson made in the hearing in the Ninth Circuit Court of Appeals:

> "**It's important to keep in mind that Sergeant Bates ultimately was given his right to carry a conceal weapon. He was without it for approximately a four-month period between the decision - determination made by Deputy Chief Amoroso and the decision made four months later by a different deputy chief who had taken her position over, when presented with clarifying information from the doctor that it was not in fact a psychological disability. At that point the City reversed its earlier decision and granted him his right to carry a concealed weapon**."
>
> (See Appendix A, pages A-1, A-12, and A-13, of the transcript of the hearing reflecting the above statements by Dodson)

The false claims of Dodson in the City's motion for summary judgment and answering brief that he repeated in the appeals' hearing, as noted above, are discredited by what Captain Tuck Younis said in his deposition that was taken prior to the City filing its summary judgment motion. Younis stated during his deposition that he denied my request to reconsider the initial decision of Deputy Chief Amoroso to deny me a CCW permit. Younis also stated that he told a police union representative that the police department would not allow me to appeal Amoroso's decision to deny me a CCW permit. Below are excerpts from Younis' deposition disputing Dodson claims. It should be noted that Dodson was present during Younis' deposition:

'Q' are questions from my attorney Stuart Kirchick. '**A**' are answers by Tuck Younis:

Q. Now, you're aware we are here regarding the denial and reissuance of a CCW permit for retired Sergeant Frederick Bates?

A. Yes, I am.

Q. And what was the first thing that you did with regard to this issue?

A. In my position as the captain for the bureau of administration I received a phone call from retired Sergeant Bates, indicating that he had been denied his CCW privileges by the previous administration. And Sergeant Bates and I were friends in the department, and we played baseball together, other sports and socialized.

And he asked me if in light of the administration change, being Chief Davis, the chief of administration, which was Pete Oliver at the time, if we would consider – reconsider his denial of his CCW.

Q. And did you do that?

A. After – basically what I told him, I would check with my boss, who is Deputy Chief Oliver, and get back to him.

I checked with Deputy Chief Oliver. Basically said that the inquiry was from Fred. And Chief Oliver said that we would not be reopening cases that were already decided by the previous administration.

At that point I went back and I called Fred and provided him that information.

Q. Primarily the most important thing is you've been placed under oath.

A. Absolutely

Q. It is the same legal force and effect as if we were in court.

A. Absolutely.

Q. So when you – going back to when you talked to Fred Bates and you said that it was based on your discussion with Lieutenant Pete Oliver at the time that no –

A. If I may correct. Chief Oliver, Deputy Chief Oliver.

Q. I'm sorry. Why did I say Lieutenant Oliver? Obviously he was lieutenant before he was deputy chief.

A. Yes, eventually. At some point he was.

Q. At the time that you talked to him he was a deputy chief?

A. Correct. He was my boss.

Q. And then you went back to Fred, and you told him on the phone, sorry, decision of the administration is we are not going to reopen those issues that a prior administration, if you will, made?

A. Yes, sir.

Q. Do you know who POA director Jeff Ricketts is?

A. Yes, I do.

Q. Did you ever talk to him about this matter?

A. Yes, I did.

Q. And what was that conversation?

A. I don't remember the details of the conversation other than the fact that he was calling on behalf of Fred, and I don't know if Fred was in the office with him or not at the time. But basically along the same questions as Fred had from our phone conversation.

Q. Do you recall advising POA director Jeff Ricketts that Frederick Bates did not have a right to an appeal?

A. I don't recall that.

Q. That would be consistent with your opinion, if at the time you made that statement, that he was on a psychological disability, though, wouldn't it?

A. No. It would be based on the fact that the right to appeal – I don't remember making that statement. My conversation with Jeff, as I remember, is that we already visited this with Fred, and we are not going to relook at the decisions made from prior administrations. As far as the right to appeal, I don't remember that.

Q. So if that was your belief at the time, saying you have no right to appeal would be consistent with what the law is, right?

A. As – putting it in context with your statement, yes. That is the definition of that. But my conversation with Jeff Ricketts, I can't characterize that's what I said or that's what I meant.

All I do remember is the fact that having had a conversation with Fred Bates before, is that we were not going to look at the matter because the decision had already been made by a prior administration. As far as the appeal process and time line or stress or not stress, I don't remember having any conversations with Jeff about that.

(See Appendix A, pages A-120, A-122, A-123, A-124, A-127, and A-128 for the excerpts from Younis' deposition)

Younis states truthfully that police officials denied my CCW permit four months after it was denied by Deputy Chief Amoroso, which contradicts what Dodson argued in the City's answering brief and in the appeals' hearing as discussed above.

From Younis' deposition, during which Dodson was present, it is clear that Dodson knowingly perpetrated fraud on the court with the false claim that the decision to deny me a CCW permit was reversed after my doctor presented clarifying information about my work restriction to Younis. The clarifying information was in the form of a letter. (See Appendix A, page A-107) A letter sent to Chief of Police Rob Davis by my attorney, Stuart Kirchick, further discredits Dodson's claim that Amoroso's decision to deny me a CCW permit was reversed four months later in August 2004. The letter to Chief Davis is dated October 5, 2004. It is date-stamped as being received in the Chief's Office on October 7, 2004. It demands that Davis issue me a CCW permit based on the letter my doctor sent to Captain Younis in August 2004 clarifying my work restriction. (See Appendix A, pages A-108 through A-110)

In his deposition, Younis made a statement on a material issue that is misleading. He implied that the decision to deny me a CCW permit by Deputy Chief Amoroso in April 2004 was made during the police administration prior to Chief of Police Rob Davis, a defendant in this case. That claim by Younis is not credible. It is not in dispute that Amoroso denied me a CCW permit after I retired on April 1, 2004. Davis was sworn in as Chief of Police on January 22, 2004. Clearly, the decision of Amoroso to deny me a CCW permit, unlawfully, occurred during Chief of Police Rob Davis's administration. The implication here is obvious. Davis was the police official authorized by law to issue CCW permits to retiring officers. Davis delegated that authority to Amoroso, and subsequently to Captain Younis. The decisions of Amoroso and Younis to deny me a CCW permit in violation of my constitutional rights are the same as if Davis made the decisions himself, since he delegated his authority to Amoroso and Younis. The false claim that the decision of Amoroso to deny me a CCW permit occurred during the previous administration was important to the City's scheme to perpetuate fraud on the court.

An article in the San Jose Police Officers' Association newsletter, the "Vanguard," stating that Davis was sworn-in as Chief of the San Jose Police Department on January 22, 2004, and the form signed by Chief of Police "Robert L. Davis" transferring large capacity pistol magazines to my control dated April 6, 2004, proves conclusively that my CCW permit was denied during the Davis administration and not under the prior police chief. (See Appendix A, page A-129 for the SJPOA article) (See Appendix A, page A-97 for the form transferring custody of the large capacity pistol magazines) The false claim that the initial decision by Amoroso to deny me a CCW permit occurred during the administration prior to Chief Davis was to deflect liability from Davis.

As noted in the details of the case, the form transferring large capacity pistol magazines to my control presents additional credibility issues for Deputy Chief Amoroso and Chief of Police Rob Davis. It discredits Amoroso's claim that she believed my work restriction to avoid psychological stress meant I retired on a psychological disability. The form is also addressed by my attorney in the hearing on my appeal of the judgment granting the City's motion for summary judgment. (See Appendix A, pages A-1, A-16 and A-17)

The statements Younis made in his deposition and the letter sent to Chief Davis are by no means the only evidence that Dodson stated falsely in the City's motion for summary judgment, the City's answering brief, and in the appeals' hearing that the decision to deny me a CCW permit

by Amoroso was reversed four months later by Younis. Statements I made in my deposition taken on August 29, 2007, prior to the City filing its motion for summary judgment, also discredits Dodson's claim that the initial decision of Deputy Chief Amoroso to deny me a CCW permit was reversed by Captain Younis in August 2004. Since Dodson questioned me during my deposition, he was well aware that my testimony was consistent with Younis' testimony in his deposition as stated above that he did not reverse Amoroso's decision to deny me a CCW permit in August 2004. My deposition makes it sufficiently clear that Younis told me that I did not have a right to appeal the denial of my CCW permit by Amoroso when I spoke to him on or about September 10, 2004. My deposition also establishes that Younis told my union representative on September 24, 2004, that I did not have the right to appeal the initial decision of Amoroso to deny me a CCW permit in April 2004. My deposition also establishes by credible evidence that Amoroso's decision to deny me a CCW permit was reversed by Younis on December 14, 2004 and not in August 2004 as Dodson claims. Below are excerpts from my deposition that corroborates my testimony as stated above:

"Q" are questions by Dodson, attorney for the City of San Jose. "A" are my answers to Dodson's questions.

Dodson asked me the following question in reference to the letter Captain Younis received from a Dr. Jonathan Ng clarifying that I had no problem or difficulty carrying a concealed weapon because of my work restriction to avoid psychological stress:

Q. All right. And then, how is it that you know that he received it on August 25, 2004?

A. I believe I read somewhere on the letter that it was - - a date. That's why I'm assuming that's when he received it at. So it's just a guess that he received it on or about that time.

Q. And further in paragraph 8 [of my complaint], it says, "In response, on or about September 10, 2004, Defendant Younis advised Plaintiff" - - that's you - - "that Plaintiff was not entitled to an appeal of the denial of the CCW permit because it was, quote, 'It was not made within 45 days,' period unquote." Did he say that?

A. Yes.

Q. Paragraph 9 of your complaint says that a couple of weeks later - - "Approximately 2 weeks later, September 24, 2004, Defendant Younis advised a director of the Police Officer's

Association that plaintiff did not have the right to appeal the denial of his CCW authorization." What do you base that claim on?

A. Can I - - if you'll give me 1 minute to read it, please.

Q. Sure.

A. I think I understand your question. And after my second conversation with Captain Younis where he told me that, first, it was not done in a timely manner, it wasn't done in 45, and I explained that didn't apply in this case. And then he made the statement that my conversation with Amoroso was my appeal, that was my second - - that was my - - that was during my second conversation. So after that conversation, I said that I would do everything I could reasonably possible to resolve this issue without having to seek legal representation. And that was my goal.

So I said I was going to contact the POA; maybe they could use their influence to help resolve this matter. So I went over to the POA office and I spoke to Sergeant Jeff Ricketts, who is a POA director, to see if he could intervene and maybe we could resolve this.

Q. And what did Sergeant Ricketts tell you?

A. Well, I explained to Sergeant Ricketts that, you know, it had been denied, and it was based on that work restriction. And I explained to him that - - the law, 12027, and I explained to him the law required that I have a hearing and I didn't get a hearing. So he called Captain Younis because he wanted to get an understanding of what was going on.

Q. Now, following that conversation in September of 2004 with Sergeant Ricketts, what's the next thing you did relative to the issue of your concealed weapons permit?

A. I believe I contacted Stuart Kirchick's office.

Q. And your complaint, paragraph 10, says that in October of 2004, you were forced to hire an attorney to pursue your CCW authorization. Do you see that?

A. Yes.

Q. Now, in between the - - Withdraw that. Paragraph 11 says "Towards the end of December 2004, Defendant Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff." Is that true?

A. That is correct. Well, let me clear - - makes a correction on that. I initially thought it was toward the end of December 2004, but actually, my notes, I have it being December 14th when he actually called me.

Q. December 14, 2004?

A. Right.

Q. My question is, between the time that you hired Mr. Kirchick and December 14, 2004, did you yourself take any action or contact anyone or do anything relative to this issue, or did you just leave it all to him?

A. No, I did something on my own.

Q. And what was that?

A. I made a complaint with the Department of Fair Housing, Fair Employment and Housing.

Q. And what was that complaint based on, the fact that you were denied a hearing?

A. Exactly. I was - - I was denied due process. My constitutional rights were violated.

Q. What were you advised by the Department of Fair Employment and Housing?

MR. KIRCHICK: You can answer.

THE WITNESS: I can answer? Okay. They informed me, I believe it was a week later or a few days later, that they would take my case.

BY MR. DODSON:

Q. And what was the outcome of that, what happened?

A. Well, prior to them taking the case and doing any further investigation or whatever, I was contacted by Captain Younis and told that, you know, I would - - they had reversed the decision, the department had reversed the decision to deny me a CCW permit. So I called back the Department of Fair Employment and Housing and told them that the issue had been resolved.

Q. And when you were contacted by - - When you were contacted by Captain Younis on December 14, 2004, did he relate to you that he and the department had received additional follow-up medical documentation from your doctor clarifying the nature of your disability?

A. No, he did not. And I specifically asked him why the department changed its mind, and he said all I need to know - - the only thing is the decision was changed, and that's all he could say.

Q. So he didn't - - he didn't state a reason why the department reversed its decision and granted you the CCW, correct?

A. No, he did not. Even after I asked him.

Just as Captain Younis' testimony in his deposition, my deposition testimony, as stated above, totally discredits Dodson's false claim in the City's answering brief on my appeal of the judgment on the City's motion for summary judgment, and the same false claim he made in the hearing on my appeal of that judgment. Dodson's false claim is that Amoroso's decision to deny me a CCW permit in April 2004 was reversed by Younis in August 2004, after Younis received a letter from my doctor clarifying that I was a suitable candidate to carry a concealed weapon.

As noted above, Captain Younis stated truthfully in his deposition that he did not reverse Amoroso's decision to deny me a CCW permit in August 2004, contradicting Dodson's false claims. However, as also noted above, Younis made misleading statements that he told me and my union representative, POA director Jeff Ricketts, that the reason for not reversing Amoroso's decision to deny me a CCW permit was that the department would not change decisions made by a prior administration. Younis made no such statement to me or Jeff Ricketts. As stated in the excerpts of my deposition above, Younis told me that I was not entitled to an appeal because I didn't make my request within 45 days and that my telephone conversation with Amoroso in April 2004 was my appeal. Younis also told Ricketts that I did not have the right to appeal Amoroso's

decision to deny me a CCW permit, and that Amoroso's decision would not be reversed. It is clearly established above that Younis' implied statement that Amoroso's decision to deny me a CCW permit occurred during a prior police chief's administration is not credible. Because the evidence is irrefutable that Robert L. Davis, a defendant in this case, was Chief of Police at the time Amoroso denied me a CCW permit in April 2004. It is undeniable that Chief Davis delegated his authority to make a decision regarding my CCW permit to Amoroso. (See Appendix A, pages A-130 through A-139, pages A-141 through A-143, and pages A-150 through A-154 for excerpts from my deposition that corroborates the testimony alleged above)

In the City's answer to my lawsuit written by Dodson, the City made admissions that also contradict the claims Dodson made in the City's motion for summary judgment, the City's answering brief, and in the hearing on my appeal of the judgment that favors the City. Below are excerpts of the relevant allegations in my complaint and the City's answers that contradict Dodson false claims.

Paragraph 7 of my complaint reads:

7) On or about April 16, 2004, plaintiff contacted defendant ADONNA AMOROSO, a deputy chief with the defendant CITY OF SAN JOSE. Approximately one (1) week later, defendant AMOROSO advised plaintiff that the CCW authorization was denied based on a work restriction he had on his medical records which was for him to avoid psychological stress. Defendant AMOROSO further informed plaintiff that he had no right to appeal since "his disability was based on a psychological disability." Plaintiff never received anything in writing from defendant AMOROSO or defendant CITY OF SAN JOSE that he was denied CCW authorization due to his psychological disability or otherwise.

The City's response in their answer to paragraph 7 reads:

7. Answering paragraph 7 of Plaintiff's Complaint, Defendants admit that on or about April 16, 2004, Plaintiff contacted Adonna Amoroso who thereafter communicated with Plaintiff regarding his concealed weapon permit. Defendants deny the remaining allegations contained in paragraph 7.

Paragraph 8 of my complaint reads:

8) On or about August 25, 2004, defendant TUCK YOUNIS, an acting captain for the police department of the defendant CITY OF SAN JOSE, received a letter from a Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and clarified that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability. In response, on or about September 10, 2004, defendant YOUNIS advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because "it was not made within 45 days." Defendant YOUNIS further told plaintiff that plaintiff's telephone conversation in April 2004 with defendant AMOROSO was his appeal.

The City's response in their answer to paragraph 8 reads:

8. Answering paragraph 8 of Plaintiff's Complaint, Defendants admit that on or about August 25, 2004, Defendant Tuck Younis received a letter from Dr. Jonathan Ng regarding Plaintiff's medical disability. Defendants deny the remaining allegations contained in paragraph 8.

Paragraph 9 of my complaint reads:

9) Approximately two (2) weeks thereafter, on or about September 24, 2004, defendant YOUNIS advised a director of the Police Officer's Association that plaintiff did not have the right to appeal the denial of his CCW authorization.

The City's response in their answer to paragraph 9 reads:

9. Answering paragraph 9 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

Paragraph 11 of my complaint reads:

11) Toward the end of December 2004, defendant YOUNIS informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff.

The City's response in their answer to paragraph 11 reads:

11. Answering paragraph 11 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

It is without a doubt that the City's admissions to the allegations in paragraphs 8, 9, and 11 of my complaint, written by Dodson, contradict the claims he made in the City's motion for summary judgment, its answering brief on my appeal of the judgment in that motion, and in the hearing on my appeal. The allegations in my complaint and the admissions to those allegations by the City establishes that Deputy Chief Amoroso denied me a CCW permit in April 2004, and that four months later Younis also denied me a CCW permit in August 2004 and September 2004. Also established was the fact that Amoroso's decision to deny me a CCW permit was not reversed by the City until December 2004, eight months after it was denied by Amoroso in April 2004, and not four months as Dodson claims in the City's answering brief and in the hearing on my appeal of the judgment on the City's motion for summary judgment. (See Appendix A, page A-155 for my complaint for damages) (See Appendix A, page A-160 for the City's answer to my complaint for damages)

The claim by Dodson that the decision to deny me a CCW permit was reversed four months later is also contradicted by the statements Dodson and my attorney, Stuart Kirchick, made to the judge in the hearing on the City's motion for summary judgment. In the hearing, Dodson and Kirchick told the judge (Ronald M. Whyte) I was without my CCW permit for eight months and not four months. Below is an excerpt of the relevant statements from the transcript of the hearing:

MR. DODSON:

IT WAS ONLY UNTIL EIGHT OR NINE MONTHS LATER WHEN ADDITIONAL

MEDICAL DOCUMENTATION WAS SUBMITTED TO THE CITY, AND THEN THE CITY REVERSED ITS DECISION AND GAVE HIM HIS PERMIT. SO --

THE COURT: IT WASN'T EIGHT OR NINE MONTHS, WAS IT?

MR. DODSON: SOMETHING LIKE THAT. IT WAS LESS THAN A YEAR.

THE COURT: I WAS THINKING IT WAS FOUR. DO YOU REMEMBER?

MR: KIRCHICK: HE WAS WITHOUT HIS PERMIT FOR ABOUT EIGHT MONTHS.

THE COURT: EIGHT MONTHS, OKAY. OKAY. THANK YOU.

Dodson's claim in the City's answering brief, and in the appeals' hearing, asserting that the decision of Amoroso to deny me a CCW permit was changed four months later after telling Judge Whyte in the hearing on the City's summary judgement motion that it was not four months and that it was eight or nine months is evidence of his willful intent to perpetrate fraud on the Ninth Circuit Court of Appeals. The claim is also outside the record of the District Court because it is inconsistent with what Captain Tuck Younis and I stated in our depositions, the claims made by Dodson in the City's answer to my lawsuit, and the claim by Dodson and my attorney to Judge Whyte in the hearing on the City's motion for summary judgment that I was without my CCW permit for eight/nine months. This established the record on appeal in this matter. It is fundamental appellate procedure that a party cannot argue facts on appeal that are not in the record of the District Court. (See Appendix A, pages A-164, and page A-180 for an excerpt from the transcript documenting the alleged comments above)

Dodson's false claim that the decision of Amoroso to deny me a CCW permit in April 2004 was reversed by Younis four months later in August 2004, after Younis received the clarifying information from my doctor regarding my work restriction was not an insignificant oversight. Rather, it was an essential part of an unconscionable scheme by Dodson and the City to obtain a favorable judgment on the City's motion for summary judgment. In its summary judgment motion, the City argued that Deputy Chief Amoroso was entitled to qualified immunity because she was confused about my work restriction to avoid psychological stress. The City could not make the same argument that Captain Tuck Younis and Chief of Police Rob Davis were also entitled to qualified immunity because they received the letter from my doctor clarifying that I did not retire on a psychological disability. Therefore, it was necessary for Dodson to make the false claim that the decision to deny me a CCW permit was reversed by Younis soon after he received the letter from my doctor in August 2004. Below are comments Dodson made during the hearing in District Court on the City's motion for summary judgment regarding the information received from my doctor clarifying my work restriction:

THE COURT: OKAY. ANYTHING FURTHER?

MR. DODSON: JUST 20 SECONDS, YOUR HONOR.

IT'S A CLASSIC HINDSIGHT ARGUMENT THAT'S BEING MADE. AS MR.

KIRCHICK SAYS, IT'S CRYSTAL CLEAR THAT THE EVIDENCE SHOWS THAT HE DIDN'T HAVE A PSYCHOLOGICAL DISABILITY.

(See Appendix A, page A-179 for an excerpt from the transcript corroborating the above comments)

It cannot be refuted credibility that Captain Tuck Younis and Chief of Police Rob Davis violated my constitutional rights. They denied me a CCW permit, without the mandatory due process hearing required by Section 12027.1 of the California Penal Code, after receiving the evidence from my doctor clarifying my work restriction to avoid psychological stress. Because the evidence from my doctor is "crystal clear" according to Dodson that I did not retire on a psychological disability. A psychological disability retirement is the only exception to the hearing requirement of Section 12027.1. Since Dodson and the City could not argue for qualified immunity for Younis, as it did for Amoroso in its motion for summary judgment, they entered a fraudulent stipulation with my attorney, Stuart Kirchick, to dismiss Younis from my lawsuit without my authorization. This was done in order to prevent the District Court from ruling on the decision of Younis to deny me a CCW permit in clear violation of my constitutional right to a due process hearing. In turn, Younis filed a declaration in support of the City's summary judgment motion falsely stating under penalty of perjury that Chief of Police Rob Davis played no role in the denial and later granting of my CCW permit. These fraudulent acts by Dodson and the City, with complicity from my attorney, Stuart Kirchick, improperly influenced the District Court into ruling in the City's favor on its motion for summary judgment. Not only is this fraud on the court, but it is obstruction of justice as well. (See Appendix A, page A-182 for a copy of the stipulation of dismissal of Younis) (See Appendix A, page A-184 for a copy of Younis' declaration in support of the City's summary judgment motion)

What is clear from the City's motion for summary judgment, the transcript of the hearing on the City's motion for summary judgment, the City's answering brief and the audio recording of the hearing on my appeal of the judgment in that motion is that there are no discussions of the actions of Captain Tuck Younis and Chief of Police Rob Davis. Only the actions of Deputy Chief Adonna Amoroso are discussed with the dubious claim of qualified immunity. Also, it is not mentioned in any of the rulings of the courts the unconstitutional actions of Younis and Davis. It is as if the actions of Younis and Davis never occurred. On the other hand, the evidence that Younis and Davis violated my constitutional rights, as discussed above, cannot be disputed with any credibility. This is evidence of a cover-up.

Perhaps, what is most disturbing about this fraudulent scheme by the City is that my attorney, Stuart Kirchick, was well aware that the City was making false claims in its motion for summary judgment, its answering brief on my appeal of that judgment, and in the hearing on my appeal. Kirchick wrote my complaint for damages, my opposition to the City's motion for summary judgment, and the initial brief on my appeal of the order granting the City's motion for summary judgment. In those three filings, he made claims that refute Dodson's claims that the City granted me a CCW permit in August 2004 after it was initially denied by Deputy Chief Amoroso in April 2004. The allegations in my complaint for damages that contradict Dodson's claims are discussed above. Below is the excerpt from my opposition to the City's motion for summary judgment that also contradicts Dodson's claims:

"On or about August 25, 2004, Tuck Younis, an acting captain for the police department of the CITY, received a letter from Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and stated that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability. In response, on or about September 10, 2004, Younis advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because "it was not made within 45 days." Younis further told BATES that his telephone conversation in April 2004 with AMOROSO was his appeal. Thereafter, in October 2004, plaintiff was forced to hire an attorney to pursue his CCW authorization. Additionally, plaintiff filed a complaint with the Department of Fair Employment and Housing on December 9, 2004. Toward the end of December 2004, Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to BATES."

(See Appendix A, page A-186 for a copy of my opposition to the City's motion for summary judgment)

Below are the relevant statements by Kirchick from my initial brief on my appeal that are essentially the same claims he made in my opposition to the City's motion for summary judgment that contradicts Dodson's claim that the initial decision of Amoroso in April 2004 to deny me a CCW permit was reversed in August 2004, Ninth Circuit case No. 08-16757:

"On or about August 25, 2004, Tuck Younis, an acting captain for the police department of the CITY, received a letter from Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and stated that plaintiff has no problems or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability. In response, on or about September 10, 2004, Younis advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because 'it was not made within 45 days.' Younis

further told BATES that his telephone conversation in April 2004 with AMOROSO was his appeal."

Thereafter, in October 2004, plaintiff was forced to hire an attorney to pursue his CCW authorization. Additionally, plaintiff filed a complaint with the Department of Fair Employment and Housing on December 9, 2004. Towards the end of December 2004, Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to BATES."

> (See Appendix A, page A-212 for a copy of my initial brief on my appeal of the judgment in the City's motion for summary judgment)

It is sufficiently clear that the false claims by Dodson that the initial decision of Deputy Chief Amoroso to deny me a CCW permit in April 2004 was reversed by the City [Captain Tuck Younis] in August 2004 is contradicted by Kirchick in my complaint for damages, my opposition to the City's motion for summary judgment, and in my initial brief on my appeal of the District Court's order granting the City's motion for summary judgment. Additionally, Kirchick questioned defendant Tuck Younis during Younis' deposition, and he was present for my deposition. Both depositions that are discussed above also contradicts Dodson's false claims. Kirchick was also aware that he sent defendant Chief of Police Rob Davis a letter dated October 5, 2004 demanding that Davis issue me a CCW permit after it was denied by Deputy Chief Amoroso and Captain Tuck Younis. The letter, which is mentioned several times above, further discredits Dodson's claims that I received authorization to carry a concealed weapon in August 2004. Yet, Kirchick did not challenge the false claims of Dodson and the City in the hearing on the City's motion for summary judgment or in the hearing on my appeal of that judgment in the Ninth Circuit Court of Appeals. Kirchick made no mention in either hearing that Younis and Davis violated my constitutional rights because they denied me a CCW permit, without the hearing required by Section 12027.1 of the California Penal Code, after both received information from my doctor clarifying that I was a suitable candidate to carry a concealed weapon. This fact, along with Kirchick's agreement with the City to dismiss Younis from my lawsuit without my consent or a settlement agreement, is evidence that he was a willing participant in the City's scheme to perpetrate fraud on the District Court and the Ninth Circuit Court of Appeals by covering up the unconstitutional decisions of Younis and Davis to deny me a CCW permit. It should be noted that I sent Kirchick an email pointing out the false claims of Dodson that the initial decision to deny me a CCW permit was reversed four months later. (See Appendix A, page A-237 for a copy of the email sent to Kirchick)

IV. The Ninth Circuit Court of Appeals misapplied the law regarding collateral estoppel knowingly

As discussed above, the City of San Jose was granted its motion for summary judgment based on qualified immunity for defendant Deputy Chief Adonna Amoroso. My lawsuit was also

dismissed on the basis of collateral estoppel as to the City. The City's collateral estoppel defense is based on a judgment the City won against me in a small claims complaint that I filed in 2005. In that case, I sought damages from the City in the form of $1,500.00 I paid my attorney, Stuart Kirchick, to assist me in obtaining a CCW permit. The basis for my small claim's complaint was the same as that of my lawsuit in federal court that is the focus of this report. It is that the City had deprived me of my constitutional rights by denying me a CCW permit without the due process hearing required by California Penal Code Section 12027.1. The small claims court made its ruling without any actual litigation. It made an implied finding that it had no authority to grant me compensation for the damages resulting from the fees I paid my attorney.

Collateral estoppel is commonly referred to as issue preclusion. It is the second aspect of the preclusion doctrine of res judicata. The first aspect is claim preclusion, also known as res judicata. The doctrine of res judicata precludes a claim or issue that was decided in a prior legal proceeding from being relitigated in a subsequent legal proceeding providing certain threshold requirements are met. The goals of res judicata are judicial economy, to avoid inconsistency in judgments, and to spare defendants the costs of having to defend against claims and issues that have already been decided by a court.

When determining the preclusive effect of a state court judgment, 28 U.S.C. Section 1738 (the full faith and credit act), requires a federal court to follow the preclusion law of the state where the judgment was rendered. The full faith and credit act implements the full faith and credit clause of the U.S. Constitution (Article IV, Section 1). The U.S. Supreme Court in Kremer v. Chemical Construction Company held the following:

Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments, but rather goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

(See Appendix A, pages A-238 and A-239 for a copy of the Supreme Court case Kremer v. Chemical Construction Company)

In Marrese v. American Academy of Orthopedic Surgeons, the U.S. Supreme Court opinion states the following:

More generally, *Kremer* indicates that § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment.

(See Appendix A, pages A-240 and A-247 for the Supreme Court case of Marrese v. American Academy of Orthopedic Surgeons)

When looking at California preclusion law, it is unmistakable that the collateral estoppel aspect of res judicata does not apply to judgments rendered in small claims courts. The U.S. District Court's ruling granting the City of San Jose's motion for summary judgment based on the collateral estoppel effect of the judgment favoring the City in my small claims case is clearly erroneous and in violation of 28 U.S.C. Section 1738 (the full faith and credit act). Since Section 1738 implements Article IV, Section 1(the full faith and credit clause) of the Constitution, the District Court's violation of Section 1738 is also a violation of the Constitution and my rights to

due process. The ruling of the Ninth Circuit Court of Appeals affirming the District Court violates the Constitution and my rights to due process just as the ruling of the District Court.

Below is an excerpt from the California Supreme Court Case of Sanderson v. Niemann addressing the collateral estoppel effect of judgments rendered in small claims court:

An examination of the significant portions of the California statute creating a small claims court serves to emphasize its peculiarly informal character. The action is commenced by an affidavit which states a claim for money due from the defendant, with no indication of the nature of the claim (Code Civ. Proc., sec. 117b). The claim must be prosecuted and defended by the parties themselves without the aid of attorneys (Code Civ. Proc., sec. 117g). No formal pleading, other than the claim and notice, is necessary, and the hearing and disposition of all such actions is informal, "with the sole object of dispensing speedy justice between the parties" (Code Civ. Proc., sec. 117h). The judge or justice may also informally make any investigation of the controversy between the parties "either in or out of court and give judgment and make such orders as to time of payment or otherwise as may, by him, be deemed to be right and just" (Code Civ. Proc., sec. 117g). The judgment is conclusive upon the plaintiff; only the defendant may appeal (Code Civ. Proc., sec. 117j).

The foregoing characteristics are of the utmost significance in disclosing sound theoretical grounds for refusing to apply the second aspect of the doctrine of *res judicata* to judgments of small claims courts.

(See Appendix A, pages A-248, and A-255 for the case of Sanderson v. Niemann)

From looking at Sanderson v. Nieman, it is sufficiently clear that the rulings of the District Court and the Ninth Circuit Court of Appeals giving preclusive effect to the small claims court judgment are clearly erroneous. The case of Rosse v. DeSoto Cab Co., a California Court of Appeals case, also affirms that collateral estoppel may not be applied to a judgment rendered in a small claims court or a superior court in an action arising under the Small Claims Act in California.

(See Appendix A, pages A-257, A-259, and A-260 for the case Rosse v. DeSoto Cab Co)

The transcript of the hearing on my appeal of the judgment on the City of San Jose's motion for summary judgment proves without a doubt that the Ninth Circuit Court of Appeals misapplied the collateral estoppel doctrine knowingly in its memorandum disposition affirming the judgement of the District Court. The transcript of the hearing reveals that the Court of Appeals had reservations about the City's collateral estoppel defense. When the attorney for the City, Michael Dodson, asserted his belief that collateral estoppel prevented me from relitigating the issues I brought up in small claims court, a judge on the panel, presumably Judge William Fletcher, responded with the following:

"I have to say I'm a little dubious on the collateral estoppel because it has to be, quote, actually litigated. And further, it has to be actually litigated and decided in a proceeding in which the consequences of collateral estoppel are

sufficiently foreseeable that the parties know they are going to have to live with it later. So, maybe there's collateral estoppel, and maybe not."

(See Appendix A, page A-14 of the unofficial transcript of the hearing referenced above)

Even before making the above comments, Judge Fletcher had established other facts that undermine the City's collateral estoppel defense. He established that there was no transcript or a record from the small claims proceeding; an important requirement for the application of collateral estoppel to a judgment rendered in a state court. Below are responses by my attorney, Stuart Kirchick, to questions by Judge Fletcher as to the issue of a record:

Judge Fletcher: Did you have in hand any records from the small claims court when you began this suit?
Attorney Stuart Kirchick: Only his complaint.
Judge Fletcher: Were there other records in the case?
Attorney Stuart Kirchick: No.
Judge Fletcher: So, what could you have discovered?
Attorney Stuart Kirchick: I don't know if there's a transcript in the courtroom.
Judge Fletcher: Yes, you do. There is none. (chuckle)

(See Appendix A, pages A-9, and A-10 of the unofficial transcript of the hearing)

Ninth Circuit Court of Appeals precedent addresses the issue of a record when applying collateral estoppel. In Clark v. Bear Stearns & Co., Inc., the Ninth Circuit Court of Appeals held the following:

> The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. United States v. Lasky, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979). "It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." Id. Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal. Id. See also Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir.1980).

(See Appendix A, pages A-261, and A-264 for the Ninth Circuit Court of Appeals' case Clark v. Bear Stearns)

In the case of Khalil Janjua v. Donald Neufeld, Associate Director, USCIS Nebraska Service Center, et al., the Ninth Circuit Court of Appeals states in its ruling how judges in the Ninth Circuit determine if an issue was actually litigated. The Court stated:

> Accordingly, when applying issue preclusion, we have consistently looked to the record of the prior proceeding to determine whether an issue was in fact raised, contested, and submitted for determination.

(See Appendix A, page, A-268, and 278 for the case of Khalil Janjua v. Donald Neufeld, et al.)

In the case of Harris v. Jacobs, the Ninth Circuit Court of Appeals addresses the issue of doubt when a court is deciding whether to apply collateral estoppel to a state court judgment. The Court held the following:

A party asserting the defense of collateral estoppel has the burden of showing that the issue for which an estoppel is claimed was actually adjudicated in a prior proceeding. *McNellis v. First Federal Savings Loan Ass'n,* 364 F.2d 251, 257 n.8 (2d Cir. 1966); *In re Merrill,* 594 F.2d 1064, 1067 (5th Cir. 1979). If there is doubt on this score, collateral estoppel will not be applied. *McNellis v. First Federal Savings Loan Ass'n, supra,* 364 F.2d at 257.

(See Appendix A, pages A-284, and A-286 for the case Harris v. Jacobs)

It is clear from the Ninth Circuit's very own precedent that the issue of collateral estoppel should never have been considered on my appeal because there is no record that pinpoints what issue(s) were litigated; and that the judgment of the District Court should not have been affirmed because there was no actual litigation in my small claims case. A copy of a letter I sent to the Presiding Judge of the Santa Clara County Superior Court makes a complaint that the Commissioner of the Small Claims Court made his ruling without allowing any litigation in my case. (See Appendix A, page A-290 for the letter)

What the transcript of the hearing on my appeal shows is that the panel of judges (John Noonan, William Fletcher, and Kevin Duffy) hearing my appeal failed to look first to the preclusion law of California as is required by Kremer v. Chemical Construction Co., the U.S. Supreme Court precedent setting case. In a published case subsequent to this one, Scafidi v. Las Vegas Metropolitan Police Department, Judge Fletcher demonstrated his knowledge of preclusion law as it relates to state-court judgments. In the opinion that he wrote, he stated: Federal courts must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. This is further proof that Judge Fletcher was aware that the District Court's decision on collateral estoppel was clearly erroneous. (See Appendix A, pages 295, and A-300 for Scafidi v. Las Vegas Metropolitan Police Department)

The filings of the City in its motion for summary judgment, its answering brief on my appeal of the judgment on that motion, and the transcript of the hearing on my appeal proves that the City did not meet its burden of producing a record that pinpoint what issues were litigated and determined in the small claims proceedings as is required by Ninth Circuit Court of Appeals' precedent in Clark v. Bear Stearns & Co., Inc. Collateral estoppel was not applicable whether applying California preclusion law or simply following the precedent of the Ninth Circuit Court of Appeals. For these reasons, the judgment of the District Court giving preclusive effect to the small claims court judgment and the Ninth Circuit Court of Appeals memorandum disposition affirming that judgment is unconstitutional.

V. The Ninth Circuit Court of Appeals exhibited bias against me that violated my Fifth Amendment right

Comments by the court during the hearing on my appeal of the judgment granting the motion for summary judgment by the City of San Jose, referenced above, is proof of the blatant

bias against me by the Ninth Circuit Court of Appeals. In the hearing, Judge Fletcher made the following comments during an exchange with my attorney, Stuart Kirchick, that were not only biased against me, but were also inappropriate because they were outside the record:

> **Judge Fletcher: I'm going to cut to the chase a little bit. I understand all the legal arguments that we have been going through. I mean it's a cliché to say, why did you make a federal case out of this? He asked for the concealed weapons' permit. He's denied. He requested it again. He's granted. Why doesn't he just drop the darn thing?**
> **Attorney Stuart Kirchick: This is obviously outside the record, but I'd love to answer. It's very important to Sergeant Bates to have his gun...**
> **Judge Fletcher: Well, he has it!**
> **Attorney Stuart Kirchick: to protect himself.**
> **Judge Fletcher: He has it! And he got it very quickly!**
> **Attorney Stuart Kirchick: It was very upsetting for him to not have it for 5 or 6 months. And quite frankly, it was still a due process violation in our opinion. And he chose to make a federal case out of it.**
> **Judge Fletcher: Yeah, he did.**
> **Attorney Stuart Kirchick: Because civil rights are important to him.**
> **Judge Fletcher: Fair enough. Fair answer.**
>
> (See Appendix A, pages A-1, A-17, and A-18 for the unofficial transcript of the official voice recording of the hearing)

Judge Fletcher's hostile comments clearly show that he was not impartial and disinterested in the outcome of my lawsuit. They also show that he had little regard for the law. His lack of regard for the law is reflected in his statement that he was going to cut to the chase because he understood all the legal arguments. For Judge Fletcher, the cliché of why I made this a federal case was more important than the fact that City officials violated the law when they repeatedly denied me a due process hearing required by California Penal Code Section 12027.1. Judge Fletcher also believed that the cliché was more important than the fact that the District Court violated the Constitution by giving preclusive effect to the small claims court judgment. More important than the law in the eyes of Judge Fletcher was the reason why I did not "just drop the darn thing," apparently referring to my efforts to hold the City and police officials accountable for violating my rights repeatedly. Judge Fletcher's apparent disapproval of my lawsuit is based on an erroneous view of the facts. He believed that I was only denied my CCW permit one time and that I received it very quickly after I requested it a second time. This is far from the truth. As has been discussed already, after I was initially denied a CCW permit by Deputy Chief of Police Adonna Amoroso, it was denied at least two more times by police captain Tuck Younis, and once by Chief of Police Rob Davis. I did not get my CCW permit very quickly as Judge Fletcher asserts. It was 8 months after I was initially denied a CCW permit that I received authorization to carry a concealed weapon. **I was only granted a CCW permit because I filed a complaint with the California Department of Fair Employment and Housing and City officials believed the City would lose a lawsuit. I did not receive my CCW permit because City officials were acting in good faith.**

The U.S. Supreme Court in the case of Marshall v. Jerrico held that the Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. Below is the excerpt from Marshall v. Jerrico regarding the Due Process Clause:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus,* 435 U. S. 247, 435 U. S. 259-262, 435 U. S. 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge,* 424 U. S. 319, 424 U. S. 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath,* 341 U. S. 123, 341 U. S. 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

(See Appendix A, pages A-307, and A-310 for the case Marshall v. Jerrico)

Judge Fletcher's egregious and blatant lack of impartiality or neutrality during the hearing on my appeal is a clear violation of the Fifth Amendment Due Process Clause, and it shows that he was 'predisposed to find against me.' His biased questions asking why I made this a federal case and why I didn't just drop the darn thing are shocking considering he discredited the City's defense of collateral estoppel as described above. Judge Fletcher also refuted the City's claim stated by the City's attorney, Michael Dodson, that there was not sufficient evidence in the record to support a Monell Claim against the City; because there is no evidence of any custom, practice or procedure police officials relied upon when violating my rights. When Dodson made those claims, Judge Fletcher interjected the following:

Well, you know for a Monell claim, all you need is a decision by a policy maker. You don't need a policy. You need a decision by a policy maker.

(See Appendix A, pages A-1, and A-15 for Judge Fletcher's comments)

The above finding by Judge Fletcher makes it clear that my lawsuit against the City is not frivolous, and that the claims in my lawsuit are plausible. Judge Fletcher's finding is, in fact, supported by the opinion of the U.S. Supreme Court in Pembaur v. City of Cincinnati. Below is an excerpt from Pembaur v. Cincinnati that supports Judge Fletcher's finding:

1. The "official policy" requirement of *Monell* was intended to distinguish acts of the *municipality* from acts of the municipality's *employees,* and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible. *Monell* held that recovery from a municipality is limited to acts that are, properly speaking, "of the municipality," *i.e.,* acts that the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

(See Appendix A, pages A-319, A-320, A-326, and A-327 for the case Pembaur v. City of Cincinnati)

It is sufficiently clear that the San Jose police officials that denied me a CCW permit were policymakers for the City of San Jose, and that they were the final decisionmakers regarding the issuance of my CCW permit. Chief of Police Rob Davis was a final-decisionmaker for the City of San Jose because he was head of the police department. California state law also granted authority to Chief Davis to make final decisions regarding CCW permits. Chief Davis delegated his authority to Deputy Chief Adonna Amoroso and Captain Tuck Younis. Davis, Amoroso, and Younis each denied me a CCW permit without a hearing required by law, thereby violating my constitutional rights to due process. The City of San Jose is equally responsible for the unconstitutional decisions of Chief Davis, Deputy Chief Amoroso, and Captain Younis because their decisions established City policy. The evidence in my case firmly supports a Monell Claim.

A. The memorandum disposition of the Ninth Circuit Court of Appeals is inconsistent with the findings of Judge Fletcher in the appeals' hearing: As discussed already, Judge Fletcher's findings in the hearing on my appeal discredits the judgment of the District Court on the issue of collateral estoppel. As just stated, Judge Fletcher also discredited the claim of the City that there was not sufficient evidence in the record to support my Monell Claim. Despite the findings of Judge Fletcher in the appeals' hearing that undermines the judgment of the District Court, the Ninth Circuit Court of Appeals' memorandum disposition affirms the judgment. This is clear evidence of bias in favor of the City that violates the Due Process Clause of the Constitution. (See Appendix A, page A-329 for a copy of the memorandum disposition of the Ninth Circuit Court of Appeals)

B. The District Court exhibited bias against me just as Judge Fletcher and the Ninth Circuit Court of Appeals during my lawsuit filed in 2006: In the civil minute order of the District Court following the settlement conference held on March 16, 2007, it states that "defendant" [City of San Jose] needs to make a "motion" [motion for summary judgment]. This indicates that the District Court lacked impartiality and was showing a preference for the City and the individual defendants, Deputy Chief Amoroso, Captain Tuck Younis, and Chief of Police Rob Davis to prevail in my lawsuit. This legal advice provided to the City deeply offends the neutrality requirement imposed on courts by the Constitution. This bias in favor of the City is quite shocking since the City admitted in its answer to my complaint that the individual defendants had violated

my constitutional rights to a due process hearing mandated by California law. (See Appendix A, pages A-333, and A-334 for a copy of the civil minute order)

VI. Summary

It is indisputable that San Jose police officials denied me a CCW permit with the knowledge that they were depriving me of my constitutional rights. Deputy Chief Amoroso falsely stated that she misinterpreted my work restriction to avoid psychological stress because she lacked the authority to read my medical records when she initially denied me a CCW permit. Captain Tuck Younis and Chief of Police Rob Davis violated my rights by denying me a CCW permit, without the due process hearing required by California Penal Code Section 12027.1, after they received information from my doctor making it crystal clear that my work restriction to avoid psychological stress did not preclude me from carrying a concealed weapon.

The claims made by the City in its motion for summary judgment, its answering brief in my appeal of that judgment, and claims made during the hearing on my appeal is indisputable evidence that the City perpetrated fraud on the court. It is sufficiently clear that the District Court and the Ninth Circuit Court of Appeals relied on the City's false claims to rule in favor of the City. It is undeniable that San Jose Deputy City Attorney Michael Dodson, with complicity from my attorney (Stuart Kirchick), perpetrated fraud on the court based on Professor Moore's definition. Both Dodson and Kirchick are officers of the court. Dodson's false claims about the date that Younis reversed Amoroso's decision to deny me a CCW permit and Dodson and Kirchick's fraudulent stipulation of dismissal of Younis from my lawsuit, without my consent or a settlement agreement that provided me a benefit, harmed the integrity of the judicial process.

The case law cited and the findings of Judge Fletcher stated in the appeals' hearing, proves that the District Court's dismissal of my lawsuit based on the collateral estoppel effect of the small claims court judgment relied upon by the City for its collateral estoppel defense violates 28 U.S.C. Section 1738 (the full faith and credit act). Therefore, the District Court's ruling violates the Constitution and my rights to due process of law. The Ninth Circuit Court of Appeals' memorandum disposition affirming the judgment of the District Court is in violation of the Constitution and my due process rights as well. Comments by the judges and attorneys in the hearing on my appeal exposes their glaring incompetence as it relates to the issue of collateral estoppel. Because it is undeniable that collateral estoppel does not apply to judgments entered in small claims courts in the State of California based on the cases discussed above. The City's collateral estoppel defense should have been rejected outright without any discussion.

It is clear that the Ninth Circuit Court of Appeals was not impartial and disinterested in the outcome of my lawsuit against the City based on Judge Fletcher's hostile questions asking why I was making this a federal case, and why I didn't just drop the darn thing. This is a violation of my rights under the Fifth Amendment Due Process Clause. **A more reasonable question would have been one directed to the City asking why didn't they just settle my lawsuit. But the answer is clear why the City didn't settle my lawsuit, the racist desire for retribution because of my medical disability and race**. The Ninth Circuit's memorandum disposition affirming the judgment of the District Court, despite Judge Fletcher discrediting the City's collateral estoppel defense and the City's unmeritorious claim that there was not enough evidence in the record to support a Monell Claim reflects bias in favor of the City of San Jose and the individual defendants in the case.

VII. Conclusion

The judgment of the Ninth Circuit Court of Appeals affirming the discredited judgment of the District Court on the City's motion for summary judgment in my lawsuit filed in 2006 must be vacated for these reasons: It rids the courts of the defilement caused by the fraud committed by the attorney for the City of San Jose (Michael Dodson) and my attorney (Stuart Kirchick). The judgment must be vacated because of the failure of the courts to follow the Constitution and 28 U.S.C. Section 1738 as it relates to the application of collateral estoppel. The judgment must also be vacated because of the blatant bias of the courts that violate my due process rights under the Constitution. A failure to vacate the judgment would mean our Constitutional Republic faces an existential threat because judges no longer have to adhere to the rule of law and precedent. It is important to note that I have made several attempts to obtain relief from the judgment in this case. Four of those efforts will be discussed in detail in the following section, Section 2.

SECTION 2

Efforts to obtain relief were unsuccessful due to the corruption and misconduct of the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose

I. Introduction

Section 1 proves authoritatively with clear and convincing evidence that the judgment of the U.S. District Court and the judgment of the Ninth Circuit Court of Appeals affirming the District Court in the case being discussed here, Frederick Bates vs. City of San Jose, et al. (filed in 2006) are based on fraud by the City of San Jose, a violation of 28 U.S.C. Section 1738 (full faith and credit act) by the Courts, and a lack of impartiality or neutrality by the courts. In this section, Section 2, my efforts to obtain relief from judgment in the lawsuit in the form of two Rule 60 motions, an independent action in equity [new lawsuit] filed in the U.S. District Court in San Jose, and a petition for a writ of certiorari filed in the U.S. Supreme Court will be discussed. My Rule 60 motions and independent action in equity were denied by the District Court. The judgments on one of my Rule 60 motions and independent action in equity were affirmed by the Ninth Circuit Court of Appeals. An appeal on one of my Rule 60 motions was rejected. My petition for writ of certiorari seeking a review of the judgment of the Ninth Circuit Court of Appeals on my independent action in equity was denied by the Supreme Court. Evidence will be presented proving that the judgments on my Rule 60 motions and independent action in equity are inconsistent with the facts and law; and they are based on the courts' blatant bias against me. Section 2 will also show that District Court officials engaged in serious criminal misconduct relative to the filing and litigation of one of my Rule 60 motions, and that the Supreme Court took an active role in covering up the misconduct of the Ninth Circuit Court of Appeals and the U.S. District Court that occurred during litigation related to my lawsuit.

II. Rule 60 motion for relief from stipulation of dismissal of defendant Tuck Younis

It was discussed in Section 1 that my attorney (Stuart Kirchick) and the attorney for the City of San Jose (Michael Dodson) entered a stipulation to dismiss defendant Tuck Younis from my lawsuit filed in 2006 without my authority prior to the City filing its motion for summary judgment. There is no reason given for the dismissal of Younis. (See Appendix A, page A-182 for a copy of the stipulation of dismissal of Younis)

Facts and evidence are presented in Section 1 showing that Younis denied me a CCW permit without a hearing required by California Penal Code Section 12027.1, after he received information from my doctor that I was a suitable candidate to carry a concealed weapon. District Court Judge Ronald M. Whyte, who presided over the City's summary judgment motion in my lawsuit, found that the hearing requirement implicated a constitutionally protected interest because it placed a significant substantive restriction on law enforcement administrators when making decisions whether to deny or revoke CCW permits to retiring law enforcement officers.

Since no reason was given for the stipulation of dismissal, and it was not based on a settlement agreement, its purpose was meant to obstruct justice and perpetrate fraud on the court.

The stipulation falsely represents that I agreed to its filing, even though I had no knowledge about it prior to its filing. The stipulation of dismissal helped facilitate the City of San Jose's motion for summary judgment based on the false narrative that I was issued a CCW permit by Younis in August 2004, four months after it was initially denied by Deputy Chief of Police Adonna Amoroso in April 2004. And that I was only denied a CCW permit one time by police officials; when in fact, I was denied a CCW permit several times by Captain Tuck Younis and Chief of Police Rob Davis in September and October 2004, without a hearing, in violation of California Penal Code Section 12027.1. As just stated, Section 12027.1 implicates a constitutional right. The stipulation of dismissal of Younis prevented the district court from ruling on the actions of Younis that violated my rights to a due process hearing.

On September 16, 2013, I filed a Rule 60 motion seeking to vacate the unauthorized stipulation of dismissal of Tuck Younis alleging that the stipulation was tantamount to fraud on the court. It should be noted that the right to dismiss a cause of action or a defendant is the absolute right of the plaintiff as is established by Federal Rules of Civil Procedure (FRCP) 41(a)(1) and case law. An attorney cannot stipulate to a dismissal of a plaintiff's cause of action or a defendant without the plaintiff's actual or implied consent if the stipulation impairs the client's substantive rights or the cause of action itself. It is abundantly clear that the stipulation between my attorney and the attorney for the City impaired my substantive rights by destroying my cause of action as to defendant Tuck Younis. As noted already, the stipulation of dismissal of Younis is not based on a settlement agreement. It provided no benefit to me whatsoever. All of the benefits of the stipulation went to Younis and the City of San Jose. This fact further invalidates the stipulation of dismissal of Younis.

My Rule 60 motion was accompanied by my declaration in support of the motion. My declaration laid out facts and evidence supporting my claim that the stipulation of dismissal of Tuck Younis was entered between my attorney Suart Kirchick and the City's attorney, Michael Dodson, without my actual or implied consent.

My motion was opposed by the City of San Jose based on the meritless arguments that I failed to obtain leave of court to file the motion, my motion was untimely, my motion was precluded on the doctrine of res judicata, and that there was no evidence that the stipulation of dismissal of Tuck Younis was the result of fraud.

The order of the district court on my Rule 60 motion for relief: The district court's order denying my motion was filed on December 11, 2013. The district court's ruling denying my motion is blatantly biased and wholly inconsistent with the facts and the law. The court found that fraud on the court is an extraordinary remedy only appropriate for fraud that defiles the court itself, or is a fraud perpetrated by officers of the court. The court stated that a court should only vacate a judgment for fraud on the court if the moving party establishes fraud by clear and convincing evidence. The court's ruling also states that to be fraud on the court, the fraud must undermine the workings of the adversary process.

The denial of my motion is not consistent with the above findings by the court. The denial is also inconsistent with the facts, evidence, and the law as argued in my Rule 60 motion for relief. It is inarguable that the stipulation of dismissal of Tuck Younis was not based on a settlement agreement, and that it only benefitted Younis and the City of San Jose. The evidence is compelling, based on my declaration in support of my motion, that I did not authorize my attorney to enter the

stipulation. It is clear that the stipulation defiled the court because it rendered the court powerless to rule on the unlawful conduct of defendant Tuck Younis. Certainly, my attorney Stuart Kirchick and Michael Dodson, attorney for the City, are officers of the court. It is unmistakable that the stipulation of dismissal Kirchick and Dodson entered was to undermine the workings of the adversary process because the stipulation destroyed my cause of action against Tuck Younis, who clearly violated my rights.

The court found that if my claims were true that the stipulation of dismissal of Tuck Younis was entered without my knowledge or authorization the adversary process itself was not undermined; because the dismissal did not end the case or prevent the adversary process from working. The court stated that after Younis was dismissed, the case proceeded to summary judgment. The district court granted summary judgment for the remaining individual defendants, Chief of Police Robert Davis, and former Deputy Chief Adonna Amoroso because qualified immunity shielded them. In granting summary judgment to defendant Amoroso, the court found that a reasonable official under the same circumstances would not know that her conduct violated my rights to a good cause hearing. The court found that the same reasoning would have applied to Younis and thus the adversary process has not been undermined. That is irrational because Younis denied me a CCW permit and violated my rights to a due process hearing after he received information from my doctor that was "crystal clear" I was a suitable candidate to carry a concealed weapon. Furthermore, the right of a plaintiff to dismiss a cause of action or defendant does not depend upon how a court may rule in a case. The right is absolute. FRCP 41(a)(1) and case law is clear that a plaintiff's attorney cannot stipulate to the dismissal of the plaintiff's cause of action or a defendant without the knowledge and authorization of the client, without exceptions.

III. Rule 60 motion for relief from judgment granting the City's motion for summary judgment

My Rule 60 motion was filed on February 21, 2013. My motion sought relief from the judgment in the above referenced lawsuit on essentially the same claims that were proven in Section 1. It was stated in Section 1 that my lawsuit was based on a denial of my permit to carry a concealed weapon (CCW) by San Jose Police Department officials in violation of California law that implicates a right under the U.S. Constitution. It was established in Section 1 that the City of San Jose's motion for summary judgment was discredited in the hearing on my appeal in the Ninth Circuit Court of Appeals by Judge William Fletcher. My Rule 60 motion was 23 pages long, and it was supported by at least 25 exhibits that prove credibly that the City concocted a scheme to perpetuate fraud on the court by filing its motion for summary judgment. In its summary judgment motion, the City made false claims that my CCW permit was denied by Deputy Chief Adonna Amoroso because she misinterpreted my work restriction to avoid psychological stress, and that Captain Tuck Younis reversed Amoroso's decision four months later after he received information from my doctor clarifying that my work restriction should not preclude me from carrying a concealed weapon. My Rule 60 motion was also based on the claim that the District Court and the Ninth Circuit Court of Appeals violated the full faith and credit act (28 U.S.C. Section 1738) by dismissing my lawsuit on the basis of collateral estoppel. Section 1 proves that the decisions by the courts are clearly erroneous. The final basis of my Rule 60 motion was that the courts were not impartial and that their decisions were biased in favor of the City.

As it relates to my Rule 60 motion, the District Court misrepresented my motion to be regarding "Costs Taxed" in docket entries rather than fraud, bias, and the courts' misapplication of the doctrine of collateral estoppel as is stated in the motion. See relevant docket entries for my Rule 60 motion below for details:

36	*Filed & Entered:*	08/06/2008	Costs Taxed
	Docket Text: Costs Taxed in amount of $ $621.95 against Plaintiff, Frederick Bates. (srm, COURT STAFF) (Filed on 8/6/2008)		

43	*Filed:*	02/21/2013	Motion for Miscellaneous Relief
	Entered:	02/22/2013	
	Terminated:	04/26/2013	
	Docket Text: Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] filed by Frederick Bates. Motion Hearing set for 3/29/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 3/7/2013. Replies due by 3/14/2013. (bwS, COURT STAFF) (Filed on 2/21/2013)		

50	*Filed & Entered:*	03/18/2013	Stipulation and Order
	Docket Text: STIPULATION AND ORDER [47] Continuing Hearing Date and Setting Briefing Schedule on Plaintiff's Rue 60 Motion for Relief From Judgment. Set/Reset Deadlines as to [43] MOTION Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] Costs Taxed. Motion Hearing set for 4/26/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Signed by Judge Ronald M. Whyte on 3/18/13. (jg, COURT STAFF) (Filed on 3/18/2013)		

56	*Filed:*	04/26/2013	Motion Hearing
	Entered:	05/01/2013	
	Docket Text: Minute Entry: Motion Hearing held on 4/26/2013 before Ronald M. Whyte (Date Filed: 4/26/2013) re [43] MOTION Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] Costs Taxed filed by Frederick Bates. (Court Reporter Lee-Anne Shortridge.) (jg, COURT STAFF) (Date Filed: 4/26/2013)		

(See Appendix B, pages B-1 through B-8 for relevant pages of the District Court docket)

It is clear from Docket entries 36, 43, 50, and 56 that my Rule 60 motion was incorrectly filed by the court as seeking relief from judgment regarding "Costs Taxed." Below is a verbatim account of the grounds for my motion that refutes what is stated in the docket entries:

"Plaintiff seeks relief from judgment pursuant to FRCP 60(b)(4) on the following

grounds: (1) The decision of this court granting Defendants' motion on the basis of collateral estoppel relies on a "constitutionally infirm" state court judgment; and (2) Plaintiff was deprived of an impartial and disinterested tribunal during the hearing on Defendants' summary judgment motion. Plaintiff seeks relief from judgment pursuant to FRCP 60(d)(3) on the grounds that the decision of this court granting qualified immunity to Defendants Amoroso and Davis was induced by 'fraud on the court.' Plaintiff is entitled to relief from judgment as a matter of law because the judgment of this court is a 'void judgment' and is unenforceable, and due to the manifest injustice of the result."

(See Appendix B, pages B-9, and B-14 for a copy of my Rule 60 motion)

A. The hearing on my Rule 60 motion: It is indisputable that my Rule 60 motion had nothing to do with "Costs Taxed" as is incorrectly stated in the docket entries. This was no honest mistake by the Court. This was done for nefarious reasons. After I was told twice by a court official (Cita Escolano) that my motion would be decided on the papers and that there would be no hearing on my motion, a hearing was held on my motion on April 26, 2013. It is reasonable to conclude that court officials, by incorrectly stating the grounds for my motion, were setting the stage for a make-believe hearing on my motion under the false pretense that I was challenging the court costs awarded to the City, after the City was granted its motion for summary judgment. The transcript and civil minutes have contradicting accounts of what occurred in the hearing. The transcript by Court Reporter Lee-Anne Shortridge shows that Judge Ronald M. Whyte dismissed my motion during the hearing based on a motion to dismiss by the City because I failed to appear. As just noted, I was told by Cita Escolano that there would be no hearing and that I did not have to appear in court. Interestingly enough, there is no verbatim account of the City's motion in the transcript. The City's motion to dismiss as referenced in the transcript is a mystery. It appears that the motion is pure fiction or it was made ex parte. The civil minutes by Court Clerk Jackie Garcia states that the court would take the matter under submission and enter a ruling at a later time. Below are excerpts of the relevant portions of the transcript and civil minutes:

(Excerpt from transcript)

(A RECESS WAS TAKEN AND THE MATTER WAS RECALLED.)

THE CLERK: RECALLING THE BATES MATTER.

MR. NORTH: RICHARD NORTH FOR THE DEFENDANTS, YOUR HONOR.

THE COURT: ALL RIGHT. YOUR MOTION IS – OR THE MOTION TO DISMISS IS GRANTED.

MR. NORTH: THANK YOU.

(THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

(See Appendix B, pages B-38, and B-39 for a Copy of the transcript of the hearing)

(Excerpt from civil minutes)

Hearing held. No appearance from the plaintiff. The Court to deny the motion. Plaintiff's motion is untimely and he has failed to present adequate evidence supporting either of his theories for relief. The Court to issue a written ruling. The matter is deemed submitted.

(See Appendix B, page B-40 for a copy of the civil minutes)

It is sufficiently clear that the transcript of the hearing and civil minutes lack consistency as to what occurred during the purported hearing on my Rule 60 motion. The transcript clearly indicates that the court granted the City its "motion to dismiss," even though there is no evidence of the City's motion. The civil minutes indicates that the court found during the hearing that my motion was untimely and that I failed to present adequate evidence to support my theories for relief, and that the court would issue a written ruling. The inconsistency between the transcript and the civil minutes, and the inaccurate docket entries, is evidence of the court's lack of neutrality and that the hearing on my Rule 60 motion was a sham. Not only was this a fraud on the court, it was an obstruction of justice as well.

The written ruling of the court denying my motion for relief from judgment reflects what is stated in the civil minutes: "His motion is untimely and he has failed to present adequate evidence supporting either of his theories for relief." The court made this finding despite my motion being at least 23 pages long, with approximately 25 exhibits that supports the grounds for my motion; and despite the fact that Judge William Fletcher had totally discredited the City's summary judgment motion in my earlier appeal that is discussed in Section 1. The written ruling is further evidence of the court's bias against me, and it suggests that the intent of the court was to cover up the City's misconduct, as well as the misconduct of the courts. (See Appendix B, page B-41 for a copy of the court's written ruling)

Further evidence that the purported hearing on my Rule 60 motion was a sham is the District Court's response when I requested clarification by email and letter on the apparent discrepancy between the transcript and civil minutes. The court's response is incoherent and contradictory. The court first stated that there was no substantive hearing held on my motion and that a hearing was not necessary or required. In a subsequent response to my request for an indicative ruling seeking clarification of the discrepancy between the transcript and civil minutes, the court acknowledged that what it said during the hearing on my motion was incorrect. The court stated it should have said the motion for relief is denied rather than defendants' motion to dismiss is granted. As to the existence of a motion to dismiss by defendants, the court stated that defendants did not file a motion to dismiss. The court further explained that its statement that the defendants' motion to dismiss was granted was in error; and that its intention was to indicate that it had found in favor of defendants as to my Rule 60 motion for relief.

At the time the District Court gave its response to my request for an indicative ruling, it did not have jurisdiction over its judgment denying my Rule 60 motion because it was in the jurisdiction of the Ninth Circuit Court of Appeals based on my appeal. Therefore, the District Court's explanation or apparent attempt to correct its judgment has no legal standing because it lacked jurisdiction. But, one thing is for certain. **The hearing on my Rule 60 motion was a sham**. (See Appendix B, pages B-42 through B-50 for the relevant documents that support my claims: an email to Court Clerk Jackie Garcia, a follow-up letter to Jackie Garcia, a response letter by the District Court, my request for indicative ruling, and a statement from the District Court regarding my request for indicative ruling)

B. My appeal of the District Court's order denying my Rule 60 motion: The Ninth Circuit Court of Appeals affirmed the District Court's order without a hearing being held on my appeal. The court ruled that the District Court properly determined that I was not entitled to relief under Rule 60(b)(4) because the District Court's prior judgment was not void due to jurisdictional error or a violation of due process. The Ninth Circuit Court also found that the District Court did not abuse its discretion in denying me relief under Rule 60(d)(3) because I failed to establish by clear and convincing evidence that the alleged "scheme" produced a "fraud on the court." The fact that the court did not address any of my claims directly, just as the District Court, is evidence that the ruling on my appeal is a farce, in much the same way as the order of the District Court. (See Appendix B, page B-51 for a copy of the Ninth Circuit's order)

IV. Independent action in equity for relief from judgment

Just as my Rule 60 motion for relief from judgment on the City's motion for summary judgment discussed above, my independent action in equity sought to set aside the judgment in my lawsuit filed in 2006. My independent action in equity was filed on October 29, 2020. It is a new lawsuit. District Court Judge Beth Labson Freeman was the presiding judge. The City filed a motion to dismiss arguing that my claims of fraud, my "res judicata" argument, and my claim that the courts were biased against me are barred by the law-of-the-case doctrine. The City also motioned the court to declare me a vexatious litigant, arguing that my filings have been numerous and without merit. The substance of the City's motion based on the law-of-the-case doctrine is that my claims have been repeatedly rejected by the Ninth Circuit Court of Appeals and the District Court, even though, as noted in Section 1, Ninth Circuit Court of Appeals' judge William Fletcher discredited the City's claims in its motion for summary judgment.

A. The hearing on the City's motion to dismiss: Judge Freeman presided over the hearing on the City's motion to dismiss. A great deal of my testimony during the hearing consisted of making arguments explaining the facts, evidence, and the laws that support the claims in my independent action in equity of fraud, bias, and the courts' misapplication of the doctrine of collateral estoppel. I stated that I was just standing up for my rights. I pointed out that one of the issues in this case was the City's fraud, and that the courts had turned a deaf ear to this claim by me in prior litigation. I informed Judge Feeman that she had the authority and obligation to preserve the integrity of the judicial system by addressing the City's fraud. I reminded Judge Freeman and the attorney for the City, Ardell Johnson, that they were "officers of the court." I also expressed how the discriminatory conduct of the City and courts had a negative impact on me

based on my experiences growing up in the South during Jim Crow. I am black/African American. I stated that I was being treated as a second-class citizen; even though, I was only asking that the courts follow the law when ruling on my cases. Judge Freeman totally rejected my arguments and didn't give even the slightest appearance of impartiality. She made it clear that she was going to rule in favor of the City. (See Appendix B, page B-54, pages B-56 through B-59, pages B-61 through B-64, and pages B-66 through B-68 for excerpts from the transcript of the hearing)

B. The order on my independent action in equity: Just as she indicated during the hearing, Judge Freeman dismissed my action by granting the City its motion to dismiss based on the law-of-the-case doctrine. The law-of-the-case doctrine, however, does not apply outside the confines of the same lawsuit. An independent action in equity is a new lawsuit. The law-of-the-case doctrine does not apply in a new lawsuit. In a footnote at the bottom of page 7 of her order, Judge Freeman gives an explanation for applying the law-of-the-case doctrine to my independent action in equity. In the footnote, she explains that an independent action is a continuation of the former suit that contains the judgment the independent action seeks to set aside. That is simply not true. The case that Judge Freeman cites as precedent, United States v. Beggerly, does not support her reason for applying the law-of-the-case doctrine. Beggerly holds that an independent action in equity is regarded as a continuation of the former case only as to the jurisdiction of the court to entertain the independent action. Also, the law-of-the-case doctrine does not apply to a judgment that is clearly erroneous. Judge Freeman's claim to the contrary in her order is incorrect. As proven in Section 1 and in the discussion of my Rule 60 motion above, the order granting the City's motion for summary judgment in my lawsuit filed in 2006 is clearly erroneous.

Judge Freeman also granted the City its motion to declare me a vexatious and harassing litigant that subjects me to a pre-filing screening order. The order is inappropriate. To be declared a vexatious and harassing litigant under precedent of the Ninth Circuit Court of Appeals, a litigant not only must file an excessive number of claims; but the claims must also be "wholly fanciful" or "patently without merit" just as Judge Freeman states in her order. My court filings have not been excessive, and the evidence presented in Section 1, in my Rule 60 motion discussed above, and in my independent action in equity proves convincingly that my claims are not "wholly fanciful" or "patently without merit." (See Appendix B, pages B-70, pages B-76 and B-77, and pages B-79 and B-80 for a copy of Judge Freeman's order on my independent action in equity)

C. The City and Judge Freeman's deception regarding my collateral estoppel claim: The City and Judge Freeman understood collateral estoppel to be a significant issue in this case. They were well aware that collateral estoppel or issue preclusion does not apply to judgments rendered in small claims courts in California just as I have consistently argued. As noted above, I pointed out to Judge Freeman in the hearing on the City's motion to dismiss that collateral estoppel does not apply based on a ruling she made in the case of In Re Speilbauer. (See Appendix B, pages B-54 and B-58)

With the understanding that collateral estoppel or issue preclusion does not apply to judgments rendered in small claims court, the City deliberately misstates my collateral estoppel claim (issue preclusion) to be a res judicata claim (claim preclusion) in its motion to dismiss my independent action in equity. (See Appendix B, pages B-87, and B-98 for a copy of the City's motion to dismiss my independent action) The District Court repeats the City's res judicata claim in its order granting the City's motion to dismiss. Res judicata (claim preclusion) does apply to

small claims judgments. (See Appendix B, pages B-70, and B-77 for the District Court's order granting the City's motion to dismiss)

The City's prior positions on the issue of collateral estoppel are in stark contrast to what it now says. In a conversation with Senior Deputy San Jose City Attorney Matthew Pritchard relative to my independent action in equity, he told me, unequivocally, that the decisions of the courts giving collateral estoppel effect to the small claims court judgment are wrong. The City also admits in its answering brief in my appeal of Judge Freeman's order that collateral estoppel does not apply to judgments entered in small claims courts in California. The City argues the following in its brief:

"Even though judgments in small claims actions do not have collateral estoppel effect (Rosse v. DeSoto Cab Co. (1995) 34 Cal.App.4th 1047, 1052-53), a final small claims judgment is entitled to res judicata effect. (See Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal.App.4th 901, 907.)"

(See Appendix B, pages B-85 and B-86 for the relevant portion of the City's answering brief)

Unlike what the City now claims, the City made repeated claims in its prior filings that the courts were correct in dismissing my lawsuit based on the collateral estoppel effect of the judgment from the small claims court, and that the decisions of the courts on this issue are law-of-the-case. This was done despite my repeated claims in prior filings that I supported with precedent that collateral estoppel does not apply to small claims court judgments. Refer back to the hearing in the Ninth Circuit Court of Appeals in November 2009, on my appeal of the judgment in the City's summary judgment motion. In the hearing, Deputy City Attorney Michael Dodson says more than once that the City believes that I was "collaterally estopped" from relitigating the issues as to the City. Also note that the judge (William Fletcher) cast doubt on Dodson's argument. (See Appendix A, page A-14 of the transcript of the hearing)

Additional evidence of the City's prior position is in the order of the District Court granting the City's motion for summary judgment in my lawsuit filed in 2006. In that order, the Court notes: "Defendants further contend that Bates is collaterally estopped from asserting the instant civil rights claim against the City because the issue was previously adjudicated in the state court." (See Appendix B, pages B-103, B-109 and B-110 for the order granting the City's motion for summary judgment)

Also compelling is the City's own arguments in it answering brief in my appeal of the order of the District Court granting the City's summary judgment motion. The City states: "The District Court correctly ruled that Bates' action against the City was barred by collateral estoppel" just as it argued in the appeals' hearing as noted above. (See Appendix A, pages A-41, and A-60 through A-62 for a copy of the City's answering brief, case number 08-16757)

Finally, take note of the memorandum disposition of the Ninth Circuit Court of Appeals affirming the order of the District Court on the City's summary judgment motion. The Court of Appeals states that the City raised its collateral estoppel claim in its motion for summary judgment and therefore did not waive it. (See Appendix A, pages A-329, A-330, and A-331 for a copy of the Ninth Circuit's memorandum disposition)

It is indisputable that the rulings of the District Court and the Ninth Circuit Court of Appeals relating to the City's summary judgment motion in my 2006 lawsuit only relate to the

issue of collateral estoppel and not res judicata or claim preclusion. The City and Judge Freeman's mischaracterization of my collateral estoppel claim as being a res judicata claim was purposeful. It was meant to undermine my credible claim that collateral estoppel does not apply to judgments rendered in small claims court. The City and Judge Freeman understood that my credible collateral estoppel claim undermines the City's position on the preclusive effect of the small claims' judgment. My collateral estoppel claim undermines Judge Freeman's order granting the City's motion to dismiss, because my claim proves that the courts' decisions on collateral estoppel are clearly erroneous. My collateral estoppel claim also undermines Judge Freeman's order declaring me to be a vexatious litigant because it is not "wholly fanciful" or "patently without merit." These are the reasons for the deceptive mischaracterization of my collateral estoppel claim as being a res judicata claim.

The res judicata claim by the City lacks merit as well because res judicata also does not apply to the small claims judgment at issue because there was no litigation and there is no record from the small claims court. The small claims court made an implicit finding that it had no authority or jurisdiction to grant the compensation I was seeking, without allowing any testimony. Res Judicata does not apply to judgments based on a lack of jurisdiction. Furthermore, my small claims complaint against the City was based on a state law violation, whereas, my federal lawsuit against the City filed in 2006 was a Section 1983 claim based on federal law, also known as a Monell Claim. Res judicata or claim preclusion does not apply in this case.

D. The ruling of the Ninth Circuit Court on my appeal of Judge Freeman's order dismissing my independent action in equity and declaring me a vexatious litigant: In a memorandum disposition filed on April 21, 2023, the Ninth Circuit Court of Appeals affirmed Judge Freeman's order. The Ninth Circuit held, in essence, that the District Court [Judge Freeman] had properly treated my independent action in equity as a Rule 60 motion and dismissed it because the issues I raised had already been litigated and decided in a prior case. The Court of Appeals cited Nev. VTN v. Gen. Ins. Co. of Am as precedent for the District Court treating my independent action for relief as being interchangeable with a Rule 60 motion. But this misstates the precedent of Nev. VTN. Nev. VTN holds that treating an independent action and a Rule 60 motion as interchangeable may only happen in an appropriate case. Bankers Mortgage Company v. United States of America held that a Rule 60 motion and an independent action for relief are not interchangeable if the adverse party is prejudiced.

The Court of Appeals also found that Judge Freeman did not abuse her discretion in declaring me a vexatious litigant and subjecting me to a pre-filing screening order, because the procedural requirements were followed. What is noticeably absent is that the Court of Appeals did not address whether or not my claims were "wholly fanciful" or "patently without merit," an important requirement for a vexatious litigant declaration. The Court of Appeals summary affirmance of Judge Freeman's order was a farce and further evidence of bias and a cover-up of the misconduct of the courts and the City of San Jose. (See Appendix B, pages B-112 through B-114 for a copy of the Ninth Circuit's memorandum disposition)

V. Petition for writ of certiorari

I filed a petition for a writ of certiorari in the U.S. Supreme Court dated July 18, 2023, seeking a review of the judgment of the Ninth Circuit Court of Appeals that affirms the judgment of the District Court dismissing by independent action in equity, and declaring me a vexatious

litigant. In a letter dated September 11, 2023, that was received in the Supreme Court Clerk's Office on September 15, 2023, I submitted additional facts and evidence in support of my petition. The evidence includes the audio recording of the hearing on my appeal of the judgment on the City of San Jose's motion for summary judgment in my lawsuit filed in 2006 that is the centerpiece for this report. The audio recording is discussed in Section 1. (See Appendix A, pages A-1 through A-19 for an unofficial transcript of the official audio recording) Also included with the letter was the false docket entries of the District Court incorrectly stating the grounds for my Rule 60 motion discussed above in this section. (See Appendix B, pages B-1 through B-8) The letter and exhibits prove that the claims in my petition for writ of certiorari are not just credible, but that they also cannot be credibly refuted. The letter was returned to me by the Supreme Court Clerk's Office without being filed.

In its response to my letter, the Clerk's Office stated that it was unable to assist me because under Article III of the Constitution, the jurisdiction of the Court extends only to the consideration of cases properly brought before it from lower courts in accordance with federal law and filed pursuant to the rules of the Supreme Court. The response went on to state that the rules of the Supreme Court make no provision for filing via electronic media. The response of the Clerk's Office is disingenuous. My petition for a writ of certiorari was properly filed on July 18, 2023. The docket number is 23-53. My letter and exhibits were submitted via the U.S. Postal Service and not electronically.

My petition for writ of certiorari was denied on October 2, 2023. My petition for a writ of certiorari speaks for itself. (See Appendix B, pages B-115 through B-148 for a copy of the petition) (See Appendix B, page B-149 for a copy of the letter I sent to the Supreme Court Clerk's Office) (See Appendix B, page B-152 for the Clerk's Office reply letter) The Clerk's Office response to the letter I submitted in support of my petition, and the denial of my petition is clear evidence of a cover-up by the Office of the Clerk of the Supreme Court of the United States. The cover-up is as clear as day.

VI. Summary and Conclusion

The actions and rulings of the Courts relative to my Rule 60 motions, my independent action in equity, and petition for writ of certiorari show a blatant disregard for the Constitution, the foundation for our rule of law. Furthermore, the conduct of the courts epitomizes what was told to me by San Jose Senior Deputy City Attorney Matthew Pritchard. As I stated above, Pritchard said that the rulings of the courts on the issue of collateral estoppel were clearly erroneous. But he made other comments that are alarming. He boasted that I would lose my case because the courts never change their decisions, even those that are clearly wrong. He said I should accept the erroneous decisions of the courts because he accepted decisions by the courts that were wrong when he was a Public Defender. Pritchard stated that the courts do not have to follow the law, and that the law is whatever the courts say it is. Pritchard also stated that the City does not care that I am black and suffered discrimination while growing up in the South during Jim Crow. Judge Freeman expressed little concern about the discrimination I suffered as well.

The refusals of the courts to reverse the clearly erroneous decisions relative to my lawsuit filed in 2006 indicates that Pritchard is right. It also demonstrates that the City has been allowed to weaponize the courts in order to purse a grudge against me, to humiliate me, and to cause me emotional distress because I am black, and because of my medical disability.

The fraudulent misconduct, the total disregard for the facts, the rule of law, and blatant bias by the District Court and the Ninth Circuit Court of Appeals against me relative to the litigation in my Rule 60 motions and independent action in equity is clear evidence of a cover-up. The fact that the Supreme Court denied my petition for writ of certiorari without considering the letter and exhibits in support of my petition implicates the Supreme Court in the cover-up as well. However, Judge Freeman's order declaring me a vexatious litigant and subjecting me to a pre-filing screening order was malicious and retaliatory, and it deprives me of my right of access to the courts in violation of the First Amendment of the U.S. Constitution. The pre-filing screening order is also meant to have a chilling effect on my speech, also a violation of my First Amendment rights.

By denying my petition for writ of certiorari, the Supreme Court undermined its legitimacy, as well as the Court's integrity and honor.

SECTION 3

There is a lack of oversight over Judges in the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose that's necessary for accountability and to protect our Constitutional Republic

I. Introduction

Article III, Section 1 of the Constitution vests the judicial power of the United States in the Supreme Court, and in such inferior Courts as Congress may from time to time establish. Congress passed the Judiciary Act of 1789 establishing the federal court system consisting of federal district courts and circuit courts that operated differently than the federal judiciary today. In 1891, the federal judicial system was changed to its current structure with a separate tier of district courts with original jurisdiction, and intermediate appellate circuit courts. The Supreme Court, the highest court in the land, has both original and appellate jurisdiction.

The judiciary is an independent co-equal branch of government based on the separation of powers doctrine. An independent judiciary is necessary for a proper functioning government in a free society. With that being said, an independent judiciary does not mean judges and court officials are exempt from oversight and accountability. Oversight of the Ninth Circuit Court of Appeals, the U.S. District Court in San Jose, and other federal courts should certainly start with the U.S. Supreme Court. However, the Supreme Court missed a great opportunity to exercise its oversight responsibility over the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose by denying my petition for writ of certiorari discussed in Section 2. But the branch of government, other than the judicial branch itself, that is best positioned to provide oversight of the judiciary is Congress. As just stated, Congress created the district courts and circuit courts of appeals based on its authority under Article III, Section 1 of the Constitution. Therefore, Congress has the power of oversight over these courts. The House of Representatives and Senate each have judiciary committees and oversight committees that can carry out this responsibility.

It should be sufficiently clear from what has been presented in the previous sections that there is corruption, dysfunction, and bias in the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose because of a lack of oversight and accountability. The Ninth Circuit Court of Appeals and the U.S. District Court in San Jose have been allowed to operate with total disregard for the truth, the Constitution, statutory law, and precedent.

II. The goal of oversight must be accountability and transparency

A. Impeachment considerations

Impeachment is a means of oversight by Congress authorized by the Constitution. There is a direct connection between several judges in the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals to the City of San Jose's conspiracy to obstruct justice in my lawsuit discussed in this report. Conspiracy to obstruct justice and obstruction of justice by a judge are crimes that are impeachable offenses. The constitutional requirements for impeachment of a federal judge are the same as for a President. The requirement for impeachment is treason, bribery,

or other high crimes and misdemeanors. It appears that bribery or quid pro quo played a role in this conspiracy to obstruct justice. The following judges by their actions and/or rulings implicate them in the City of San Jose efforts to obstruct justice:

U.S. District Court Judge Ronald M. Whyte: Judge Whyte was the presiding judge in my original lawsuit that was filed in 2006. He was a willing participant in the City of San Jose's scheme to perpetrate fraud-on-the-court with their motion for summary judgment filed in August 2007. Judge Whyte granted the City's its motion for summary judgment in July 2008 knowing fully that it was based on false claims as to the facts and law and was facilitated by a fraudulent stipulation of dismissal of a defendant without my consent or a settlement agreement in order to prevent Judge Whyte from ruling on that defendant's actions that violated my constitutional rights. After I filed a Rule 60 motion in February 2013, seeking relief from that judgment, Judge Whyte and court officials engaged in a campaign to subvert justice by deliberately falsifying the grounds for my Rule 60 motion for relief in docket entries in order to hold a sham hearing on my motion without my knowledge. The civil minutes and transcript provide contradictory accounts of what occurred in the hearing. My Rule 60 motion was denied by Judge Whyte with a summary disposition in April 2013. Judge Whyte's judgments that are based on fraud, a willful and wanton disregard for the rule of law, are evidence of unconstitutional bias. Judge Whyte's participation in the City of San Jose's fraudulent scheme to obstruct justice is an impeachable offense. However, it should be noted that Judge Whyte has retired and no longer hear cases. My Rule 60 motion is discussed in Section 2.

U.S. District Court Judge Beth Labson Freeman: Judge Freeman' conduct during litigation of the independent action in equity I filed is egregious. She made no attempt to hide her bias against me and her favoritism for the City of San Jose. Her bias against me was shown in the hearing on the City's motion to dismiss and declare me a vexatious litigant, and in her rulings in favor of the City. Judge Freeman showed a flagrant disregard for the facts, the evidence, and the law with her clearly erroneous rulings. She acted as more of an advocate for the City than an impartial judge. Judge Freeman's finding that I was a vexatious litigant and subjecting me to a pre-filing screening order is particularly revolting and corrupt, since the claims in my independent action in equity are not "wholly fanciful" or "patently without merit," a requirement for a vexatious litigant declaration. Judge Freeman's vexatious litigant declaration is in essence calling me a liar. Yet, it is the City of San Jose, the City Attorney's Office, and police officials that told several lies in concocting their completely fabricated motion for summary judgment in my lawsuit filed in 2006. As stated in Section 2, Judge Freeman's conduct towards me was malicious, retaliatory, and meant to silence my speech. It is clear that she is a willing participant in the cover-up and obstruction of justice in this corruption scandal. It is also clear that her negative personal feelings about me influenced her judgment. Impeachment considerations for Judge Freeman should be a given.

U.S. Magistrate Judge Nathanael Cousins: Judge Cousins, presided over a separate federal discrimination lawsuit (U.S. District Court Case # 15-cv-5729-EJD) that I filed against the City of San Jose, its mayor Sam Liccardo, and its councilmembers in December 2015. The basis of my lawsuit was that City leaders refused to open an investigation into a misconduct and discrimination complaint I filed against high-ranking employees of the City Attorney's Office and police

department. Judge Cousins dismissed my lawsuit on a motion to dismiss by the City based on the meritless argument that the City had no duty to investigate by complaint as is mandatory under the City's discrimination and harassment policy and Code of Ethics. Judge Cousins relied on the same non-precedential case cited by the City in making his ruling. What is so troubling about Judge Cousins ruling is that the case that he and the City relied on actually holds that a City official can be sued under Section 1983 for not investigating a misconduct complaint if they are the direct supervisor of the employee complained against. The case is Carlson v. County of Los Angeles. Judge Cousins erroneous ruling was made with the intent to cover up the City's misconduct. Therefore, he is also guilty of an impeachable offense.

Ninth Circuit Court of Appeals Judge William Fletcher: Judge Fletcher sat on the panel hearing my appeal of the District Court's judgment that grants the City of San Jose its motion for summary judgment in my lawsuit filed in 2006. The hearing was held in November 2009. As discussed in Section 1, Judge Fletcher discredited the judgment of the District Court on the basis of collateral estoppel during the hearing. He also discredited the City's claim that there was not sufficient evidence in the record to support my Monell Claim. Even though his findings undermine the judgment of the District Court, Judge Fletcher made comments at the end of the hearing that were blatantly biased against me. He asked why I made this a federal case; and why I didn't just drop the darn thing [my lawsuit]. His comments left no doubt that he was not impartial, and that he was predisposed to rule in favor of the City, even though he made findings implying that the District Court's judgment was clearly erroneous. Judge Fletcher and the Ninth Circuit Court of Appeals did, in fact, affirm the clearly erroneous judgment of the District Court in its memorandum disposition. Judge Fletcher's unconstitutional bias and misconduct implicates him in the City's conspiracy to cover up their misconduct and to obstruct justice. Judge Fletcher's misconduct is impeachable under the Constitution.

Ninth Circuit Court of Appeals Judge Sidney R. Thomas: I made a complaint with Judge Thomas regarding the misconduct of court officials and San Jose city officials. Judge Thomas refused to open an investigation into my complaint despite my allegations of fraud on the part of San Jose city officials and officials with the U.S. District Court in San Jose and Ninth Circuit Court of Appeals. My complaint alleged that these officials engaged in a conspiracy to obstruct justice by committing several criminal acts relating to public corruption. Judge Thomas's refusal to open an investigation into my complaint is part of a cover-up, an impeachable offense. My complaint letter and Judge Thomas's response letter are discussed in the next section, Section 4.

Chief Justice John Roberts and the Justices of the U.S. Supreme Court: There has been no direct link established between any of the Supreme Court Justices and the City of San Jose's conspiracy to obstruct justice as have been established between the above judges and the City. Even though I made complaints with Chief Justice Roberts by letter, I have not been able to verify if, in fact, he personally received the letters. There is no evidence uncovered, so far, that any of the Supreme Court Justices reviewed my petition for a writ of certiorari which documents serious misconduct by San Jose city officials and court officials. For these reasons, impeachment considerations are inappropriate against Chief Justice Roberts and the other Justices of the Supreme Court without compelling evidence of their direct involvement in this scandal to obstruct

justice. My complaint letters sent to Chief Justice Roberts are discussed in the next section, Section 4.

B. The Supreme Court and Congress must address corruption in our judiciary

Both Congress and the Supreme Court have been given great opportunities to address the blatant corruption and conspiracy to obstruct justice by San Jose city officials and officials with the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals. Congress was given the opportunity to take action based on complaint letters I submitted to members of Congress, but failed to do so. The Supreme Court was given the opportunity to take action with my complaint letters to Chief Justice John Roberts and with my petition for a writ of certiorari that was filed in July 2023. My petition was denied on October 2, 2023. Complaint letters I submitted to Congress and Chief Justice Roberts are discussed in the following section (Section 4) of this report. My petition for writ of certiorari is discussed in the previous section (Section 2).

Public corruption has already undermined the public's trust in all three branches of our government. Perhaps, the most egregious and dangerous form of public corruption is the corruption that appears to be widespread in our judicial system. It can be credibly argued that courts have a constitutional and moral obligation to safeguard the rights of citizens higher than that of the Executive and Legislative branches of government. In the case discussed in this report, the Ninth Circuit Court of Appeals and the U.S. District did not safeguard my rights, rather they became participants in the unconscionable scheme of San Jose city officials to cover-up their malicious, retaliatory, and blatantly discriminatory conduct against me, a black/African American citizen. In societies where courts do not settle disputes between the government and citizens in a fair manner consistent with the rule of law, it oftentimes results in civil unrest that can lead to violence. We've been down this road before, and appears to be headed in that direction again. However, I want to make it clear that I'm not advocating for violence against the courts.

C. Discrimination against pro se litigants and the misuse of memorandum and summary dispositions can be eliminated with oversight and transparency

Discrimination against pro se litigants, as noted in the overview, appears to be widespread in the Ninth Circuit Court of Appeals, the U.S. District Court in San Jose, and other federal courts as well. However, the discussion here is focused primarily on the conduct of the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose during litigation of my lawsuit against the City of San of Jose and its police officials filed in 2006. Discrimination against pro se litigants must end immediately if we are to have a credible judicial system that is required for a stable democratic society. Otherwise, we have a totalitarian state.

Also noted in the overview is that the overuse or misuse of summary dispositions and memorandum dispositions by the Ninth Circuit Court of Appeals and the U.S. District Court in San Jose are inherently unconstitutional and biased because of their tendency to violate a litigant's due process rights. They are nothing more than a means by the courts to either fix the decision in a case because of bias against a litigant, or to kill off cases for the sake of reducing the courts' caseloads. Memorandum dispositions and summary dispositions are quite often inconsistent with the facts, the evidence, published opinions, as well as the Constitution and federal statutory law.

They appear to be, in many cases, written by non-judges, perhaps staff attorneys or other court personnel. Some type of oversight or accountability to ensure that litigants' rights are not violated because of the overuse of memorandum dispositions and summary dispositions is essential in the interest of justice.

III. Conclusion

The egregious conduct of the judges named above undermines our Constitutional Republic, our Judiciary and the Rule of Law. Their disdain for civil rights, even those of black litigants like myself, offends decency by taking us backward to a period prior to the passing of the 1964 Civil Rights Act.

It is clear that the judges named for impeachment considerations violated the Oath of Office for federal judges under 28 U.S.C. Section 453 which states:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, __ __, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as __ under the Constitution and laws of the United States. So help me God."

It is also clear that these judges violated Canons of the Code of Conduct for United States Judges. The relevant Canons are:

> Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
>
> Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
>
> Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Dilligently

These judges must be held accountable if our federal judiciary is to have any credibility. In the case being discussed here, accountability must start with a reversal of the illegitimate and unconstitutional judgment in my lawsuit filed in August 2006.

SECTION 4

Complaints made to government officials and the media failed to produce an investigation into the misconduct of the City of San Jose and the Courts

I. Introduction

In Section 1, indisputable evidence is presented proving that the judgment in the lawsuit I filed against the City of San Jose and three police officials in 2006 is based on fraud, bias, and the Courts' violation of 28 U.S.C. Section 1738 (the full faith and credit act). Section 2 discusses my attempt to obtain relief from the judgment in that lawsuit, all to no avail. In this part, Section 4, I will present evidence of my complaints to local, state, federal officials, and the media regarding misconduct by San Jose city officials, the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals relative to litigation of the lawsuit. My complaints are mostly in the form of letters. Even though I filed complaints with several government and media entities, all of them will not be discussed in this report.

II. Complaints with local officials

My first complaints of misconduct were made with San Jose city officials and local authorities. No substantive actions on my complaints were ever taken by City officials or local authorities. The complaints are as follows:

A. San Jose city officials

Mayor Chuck Reed

Mayor Reed was sent an email on October 26, 2010, inquiring about an investigation into an allegation of misconduct I made against San Jose City Attorney Richard Doyle, San Jose Chief of Police Rob Davis, and members of their staffs. Mayor Reed failed to initiate an investigation. (See Appendix C, page C-1 for a copy of the email I sent to Mayor Reed)

City of San Jose Office of Employee Relations

I sent a letter to Employee Relations dated August 3, 2010, detailing my allegations of misconduct against officials with the City Attorney's Office and the Police Department. I received two response letters from Employee Relations dated August 20, 2010, and November 5, 2010. Employee Relations stated that there would be no investigation made into my allegations of misconduct by police officials because they had separated from City service. Employee Relations stated that any action against the City Attorney's Office would be based on my allegations being substantiated by the State Bar of California. (See Appendix C, page C-2 for a copy of my complaint letter to Employee Relations dated August 3, 2010) (See Appendix C, page C-6 for a copy of the response letter dated August 20, 2010 from Employee Relations) (See Appendix C, page C-7 for a copy of the response letter from Employee Relations dated November 5, 2010)

The City of San Jose Elections Commission

My complaint to the Elections Commission was against San Jose police officials and the City Attorney's Office. The Elections Commission conducted a hearing on my complaint and closed it without taking any action. Since my complaint had nothing to do with elections, the Elections Commission had no authority to conduct a hearing or close my complaint. City policy required that the Commission forward my complaint to the City Council for investigation and action relative to my complaints against the City Attorney's Office, because the City Council is the appointing authority for attorneys of the City. City policy required the Commission to forward my complaint against the police officials named to the City Manager's Office for investigation and action, because the City Manager's Office is the appointing authority for police officers. (See Appendix C, page C-8 for a copy of my complaint with the Elections Commission dated May 16, 2012) (See Appendix C, page C-10 for a copy of a letter from the Elections Commission dated January 13, 2013 detailing the findings of the Commission on my complaint) (See Appendix C, page C-15 for a copy of a letter I sent to the Elections Commission)

Mayor Sam Liccardo

I sent a letter to Liccardo when he was a councilmember advising him of the complaint that I made against the Police Department and City Attorney's Office. After Liccardo became Mayor, I emailed him and also posted on his facebook page requesting an investigation into my allegations of misconduct against City officials. No response was ever received from Liccardo in his position as councilmember or as Mayor. (See Appendix C, page C-18 for a copy of a letter I sent to Liccardo dated August 4, 2010) (See Appendix C, page C-19 for notice of an open letter I sent to Mayor Liccardo) (See Appendix C, page C-20 for a comment I posted to Mayor Liccardo's facebook page) (See Appendix C, page C-21 for a copy of an email I sent to Mayor Liccardo and the San Jose City Council)

B. Santa Clara County officials

Santa Clara County Civil Grand Jury

I made a request for the Civil Grand Jury to open an investigation into the misconduct of San Jose city officials and the courts relative to criminal misconduct that occurred during litigation of my lawsuit. The officials were named and the crimes alleged against them were documented. The Civil Grand Jury refused to open an investigation. (See Appendix C, page C-22 for a copy of my complaint letter to the Civil Grand Jury) (See Appendix C, page C-28 for a copy of a letter I received from the Civil Grand Jury advising that no action was warranted on my complaint) (See Appendix C, page C-29 for a copy of a letter I sent to the Civil Grand Jury)

Santa Clara County District Attorney's Office

The District Attorney's Office was made aware of my public corruption allegation against San Jose city officials and federal court officials in a letter addressed to District Attorney Jeff Rosen. The District Attorney's Office was also advised of my complaint with the Civil Grand Jury. The District Attorney's Office refused to open an investigation into my complaints. (See Appendix

C, page C-30 for a copy of a letter I sent to D.A. Jeff Rosen) (See Appendix C, page C-31 for a copy of a letter I sent to the Santa Clara County Criminal Grand Jury) (See Appendix C, page C-33 for a copy of a letter I received from the Santa Clara County D.A.'s Office)

III. Complaint with California state officials

Commission on Judicial Performance

In a letter dated March 31, 2006, I made a complaint against Commissioner Gregory Saldivar of the Superior Court of California, County of Santa Clara, Small Claims Division with the Commission on Judicial Performance. Commissioner Saldivar presided over the proceedings in my small claims case that is addressed in Section 1 of this report. Among my allegations of misconduct against Commissioner Saldivar is that he did not allow me to present my case, and he made no good faith attempt to ascertain the facts in my case. He made an implied finding without any actual litigation that he had no authority to grant the compensation I was seeking against the City of San Jose. I also alleged that Commissioner Saldivar failed to take any action against witnesses I subpoenaed from the City that failed to appear in court. It is clear that Commissioner Saldivar was biased against me. It should also be noted that I also made a complaint against Commissioner Saldivar with the presiding judge of the Santa Clara County Superior Court. (See Appendix A, page A-290 for a copy of the complaint with the presiding judge) The complaint is also addressed in Section 1. (See Appendix C, page C-36 for a copy of my complaint against Commissioner Saldivar with the Commission on Judicial Performance) (See Appendix C, page C-34 for a copy of a letter from the Commission acknowledging receipt of my complaint) The Commission on Judicial Performance failed to take any action on my complaint. (See Appendix C, page C-35 for a copy of a letter from the Commission advising that no action would be taken on my complaint)

The State Bar of California

In July 2010, I filed a complaint with The State Bar of California against attorneys Michael Dodson and Stuart Kirchick. Dodson represented the City of San Jose and Kirchick represented me during my lawsuit against the City that is the focus of this report. The basis of my complaint against Dodson is that he made false claims to the courts about the date the decision to deny me a CCW permit was reversed; and he misrepresented that the judgment the City won against me in small claims court precluded me from litigating by Section 1983 claim against the City. The basis of my complaint against Kirchick is that he failed to counter claims of Dodson that he knew to be false, and he entered a stipulation with Dodson to dismiss defendant Tuck Younis from my lawsuit without my consent. The stipulation of dismissal caused irreparable harm to my case. The misconduct of Dodson and Kirchick are discussed in Section 1. The State Bar of California refused to take any action on my compliant. (See Appendix C, pages C-40 through C-43 for relevant documents)

Supreme Court of California

After the State Bar of California refused to take action on my complaint against attorneys Michael Dodson and Stuart Kirchick, I filed a verified accusation against them with the Supreme Court of California in November 2010. My verified accusation was based on essentially the same claims in my complaint against Dodson and Kirchick that I made with the State Bar. My petition was denied by the Supreme Court of California. (See Appendix C, pages C-44 through C-58 for relevant documents)

California Attorney General's Office

I filed a complaint with the Attorney General's Office in a letter dated May 24, 2014, addressed to former Attorney General Kamala Harris. No action on my complaint was taken by the Attorney General's Office. (See Appendix C, page C-59 for a copy of the complaint letter)

IV. Complaints with federal officials

A. Courts

Ninth Circuit Court of Appeals Chief Judge Alex Kozinski

In a letter dated April 25, 2010, I filed a complaint with then Chief Judge Alex Kozinski alleging that Deputy San Jose City Attorney Michael Dodson violated California State Bar rules by making false and misleading statements in court during my appeal of the judgment in the lawsuit I filed against the City and police officials in 2006. Also discussed in the letter was the issue of collateral estoppel and the fact that there was no litigation in the small claims case at issue. Judge Kozinski responded with a letter stating that he had no authority to consider complaints against state officials, even though Circuit Rule 46-2(b) authorizes the Chief Judge or a panel of judges to initiate disciplinary proceedings based on conduct before the Court. (See Appendix C, pages C-62 through C-67 for copies of the relevant documents)

Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas

I made a request for an investigation into the misconduct of San Jose city officials and officials with the U.S. District Court for the Northern District of California - San Jose Division by letter sent to then Chief Judge Sidney R. Thomas dated March 19, 2018. I received a response letter from Judge Thomas dated August 8, 2018 stating that no further action would be taken in this matter. I also sent Judge Thomas a letter dated August 30, 2018, further addressing issues I raised in my first letter. Enclosed with my second letter was a copy of a letter I sent to Chief Justice John Roberts dated August 13, 2018. The letter to Chief Justice Roberts will be addressed later. (See Appendix C, pages C-68 through C-73 for copies of the documents related to my complaint with Chief Judge Thomas)

United States Supreme Court Chief Justice John Roberts

In a letter dated August 13, 2018, mailed to the Administrative Office of the United States Courts directed to Chief Justice Roberts, I requested an inquiry into my allegations of misconduct by San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals. Enclosed with the letter was a copy of my complaint letter and other documents sent to Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas. After receiving no response, I sent a second letter to Chief Justice Roberts dated September 17, 2018, also seeking an inquiry into my allegations. I never received a response to my two letters to Chief Justice Roberts. (See Appendix C, pages C-74 and C-76 for copies of my letters to Chief Justice Roberts)

B. F.B.I. and Department of Justice

F.B.I. Special Agent in Charge John F. Bennett

Special Agent in Charge Bennett of the F.B.I. field office in San Francisco was made aware of my complaint against San Jose city officials and officials with the U.S. District Court for the Northern District of California - San Jose Division. Copies of letters and documents sent to F.B.I. Headquarters, the Department of Justice, and the House Judiciary Committee requesting an investigation were included. No response was received from Agent Bennett. (See Appendix C, page C-78 for a copy of the letter sent to Agent Bennett)

F.B.I. Director Christopher Wray

I appealed directly to Director Wray to open an in investigation into my allegations of public corruption against San Jose city officials and federal court officials in a letter dated October 30, 2017, and in a letter dated April 16, 2018. I received no response from Director Wray. (See Appendix C, pages C-79 and C-80 for copies of the complaint letters sent to the Director)

Inspector General Michael Horowitz

I requested that the Inspector General open an investigation into the F.B.I. and the Department of Justice based on their failure to open an investigation into public corruption complaints I filed against San Jose city officials and officials with the U.S. District Court - San Jose Division and the Ninth Circuit Court of Appeals. No response was received from the Inspector General. (See Appendix C, page C-81 for a copy of my complaint letter sent to the Inspector General)

Attorney General William P. Barr

Attorney General William Barr was asked to address my allegation of a cover-up by F.B.I. Director Christopher Wray and former Attorney General Jeff Sessions that I made with Inspector General Michael Horowitz. I alleged that Director Wray and AG Sessions was covering up the criminal misconduct by San Jose city officials and federal court officials by their refusals to initiate an investigation. In my letter, I make a compelling case against San Jose city officials and federal court officials for obstruction of justice based on guidelines stated by AG Barr relative to the

Mueller Investigation of former President Donald Trump. I received no response from AG Barr. (See Appendix C, page C-83 for a copy of the letter sent to AG Barr)

C. Members of Congress

1. United States House of Representatives

Speaker of the House Nancy Pelosi

I first sought help from Congresswoman Pelosi in opening an investigation into my complaint of public corruption against San Jose city officials and federal court officials in a letter dated June 18, 2018. After receiving no response, I contacted her again by letter dated May 6, 2019 requesting an investigation after she became Speaker of the House. No response was ever received from Speaker Pelosi. (See Appendix C, page C-85 for a copy of the May 2019 letter)

House Judiciary Committee Chairman Jerrold Nadler

I sought an investigation into the misconduct of San Jose city officials and federal court officials in a letter dated April 19, 2019, addressed to Chairman Nadler and members of the House Judiciary Committee. With that letter were copies of complaint letters and documents I sent to Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas, Inspector General Michael Horowitz, and Attorney General William Barr. No response was received from Chairman Nadler or the House Judiciary Committee. (See Appendix C, page C-87 for a copy of the letter sent to Chairman Nadler and the Judiciary Committee)

Congressman Adam Schiff

In letter dated April 27. 2018, I requested help from Congressman Schiff in finding a fair resolution to this dispute between me, San Jose city officials and U.S. District Court officials based on comments Congressman Schiff made during the impeachment proceeding of Judge Thomas Porteous Jr. Congressman Schiff stated that litigants have the right to expect a judge hearing their case will be fair and impartial, and avoid even the appearance of impropriety. No response was received from Congressman Schiff. (See Appendix C, page C-89 for a copy of the letter sent to Congressman Schiff)

Ethics complaint against Pelosi, Nadler, and Schiff

In a letter dated August 12, 2019, I filed an ethics complaint against Speaker Pelosi, Chairman Nadler, and Chairman Schiff with the Office of Congressional Ethics for the House of Representatives. My complaint alleges that Pelosi, Nadler, and Schiff engaged in a cover-up of the racist and criminal misconduct of San Jose city officials and officials with the U.S. District Court for the Northern District of California - San Jose Division and the Ninth Circuit Court of Appeals. I received no response from the Office of Congressional Ethics for the House of Representatives regarding my complaint. (See Appendix C, page C-91 for a copy of my complaint)

House of Representatives Judiciary Committee

In a letter dated July 24, 2017, I requested the Judiciary Committee open an investigation into the misconduct of San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals during litigation of two lawsuits I filed against the City of San Jose. My letter documented criminal misconduct by the City and courts. I noted that the Judiciary Committee has jurisdiction over the lower federal courts. No response was received from the Judiciary Committee. (See Appendix C, page C-93 for a copy of the complaint letter I sent to the Committee)

Congressman Paul Ryan – Speaker of the U.S. House of Representatives

I requested that the former Speaker open an investigation into my allegations of misconduct against San Jose city officials and federal court officials in a letter dated September 1, 2017. Copies of letters and documents I sent to the House Judiciary Committee, the F.B.I., and Department of Justice were enclosed. No response was received from Speaker Ryan. (See Appendix C, page C-96 for a copy of the letter sent to Speaker Ryan)

2. United States Senate

Senator Lindsey Graham – Chairman of the Senate Judiciary Committee

In a letter dated May 13, 2019, I reminded Senator Graham, then Chairman of the Senate Judiciary Committee, of a letter I sent to him dated September 1, 2017, informing him of a complaint I made with the F.B.I. and Department of Justice against San Jose city officials and federal court officials for public corruption. In the May 2019 letter, I advised Senator Graham of the complaint I made with Inspector General Horowitz alleging that the F.B.I. and Department of Justice were engaged in a cover-up of the criminal misconduct of San Jose city officials and federal court officials. Enclosed with the letter to Senator Graham was a flash drive containing letters and documents I sent to Inspector General Horowitz and Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals detailing the criminal acts of San Jose city officials and federal court officials. No response was received from Senator Graham. (See Appendix C, pages C-97 and C-98 for copies of the letters I sent to Senator Graham)

Senator Chuck Grassley

In a letter dated October 23, 2018, I informed Senator Grassley, then Chairman of the Senate Judiciary Committee, of the public corruption crimes by San Jose city officials and federal court officials during litigation of two lawsuits I filed against the City of San Jose. Included were copies of complaint letters and attachments I sent to Chief Justice John Roberts and Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas. No response was ever received from Senator Grassley. (See Appendix C, page C-99 for a copy of the letter I sent to Senator Grassley)

Senator Dianne Feinstein

I notified Senator Feinstein of my public corruption complaints in a letter dated August 11, 2017, because I am a resident of California. Enclosed with the letter were copies of letters and documents I sent to the Senate Judiciary Committee, the Department of Justice, and the F.B.I. Senator Feinstein responded by letter dated August 15, 2017, that she could not intervene in, or comment on, a matter that is within the jurisdiction of the courts. (See Appendix C, page C-101 for a copy of my letter to Senator Feinstein) (See Appendix C, page C-102 for Senator Feinstein's response letter)

Senator Kamala Harris

I notified former Senator and current Vice President Kamala Harris of my public corruption complaints against San Jose city officials and federal court officials in a letter dated August 7, 2017. Senator Harris was notified because she represented me in the Senate since I am a resident of California. I received no response from Senator Harris. (See Appendix C, page C-103 for a copy of the letter I sent to then Senator Harris)

Ethics complaint against Graham, Grassley, Feinstein, and Harris

In a letter to the Senate Select Committee on Ethics dated July 10, 2019, I made an ethics complaint against the above Senators for failing to take action on my criminal misconduct complaint against San Jose city officials and officials with the U.S. District Court and Ninth Circuit Court of Appeals. I received a response from the Select Committee stating that it is up to the individual Senators as to how they respond to complaints, and that the Committee would be taking no action on my ethics complaint. (See Appendix C, page C-104 for a copy of my ethics complaint against Graham, Grassley, Feinstein, and Harris)

V. Media organizations notified about the misconduct of the City and Courts

KGO ABC 7 San Francisco

I sent a letter to KGO news reporter David Louie dated October 24, 2014, stating that San Jose city officials had ignored my requests for an investigation into criminal misconduct by the City Attorney's Office and the courts. Enclosed with the letter were copies of complaint letters I filed with the Santa Clara County Civil Grand Jury, the F.B.I., and the District Attorney's Office alleging public corruption crimes by San Jose Mayor Chuck Reed, the City Council, and several other City officials. After not receiving a response, I emailed David Louie and made arrangements for him to get a copy of the packet that I mailed to him. My allegations were never reported on by David Louie. (See Appendix C, page C-107 for a copy of my letter to David Louie) (See Appendix C, pages C-108 through C-110 for the email exchange with David Louie)

NBC Bay Area – KNTV 11

I sent a letter to NBC Bay Area – KNTV 11 dated October 21, 2014, condemning the Santa Clara County District Attorney's Office for not opening an investigation into a complaint I filed on May 24, 2014, against San Jose city officials for public corruption. The letter alleged City officials had engaged in criminal misconduct, violated its Code of Ethics and other policies. No response was received from KNTV, and there was no reporting on my allegations. (See Appendix C, page C-111 for a copy of my letter to KNTV 11)

Mercury News

Mercury News is the most prominent daily newspaper in the City of San Jose. I sent a letter to one of its reporters, Scott Herhold, dated October 17, 2014. Enclosed was a copy of a complaint I filed with the Santa Clara County Civil Grand Jury against San Jose city officials for public corruption. I wrote to Scott Herhold because he had written an article asking City Attorney Richard Doyle to resign because of questionable conduct by Doyle during litigation of cases involving the City of San Jose. After receiving no response from Herhold, I emailed him seeking an answer for his lack of a response to my letter. Herhold also did not respond to my email. Shortly thereafter, I contacted Herhold by phone and he stated he would take a look at the documents that I had mailed to him. Yet, he never wrote an article regarding my complaints against San Jose city officials. (See Appendix C, page C-113 for a copy of the letter I sent to Herhold) (See Appendix C, page 114 for a copy of the email sent to Scott Herhold)

San Jose Inside – The Fly

I contacted the Jose Inside on October 28, 2014 and requested they report on the allegation I was making that Mayor Reed, Sam Liccardo, and other City officials were covering up criminal misconduct by the City Attorney's Office and the U.S. District Court. No response was received from the San Jose Inside, and no article was written about my allegation. (See Appendix C, page C-115 for a copy of the communication I sent to the San Jose Inside)

VI. Comprehensive list of officials and entities contacted

As noted earlier, I contacted several officials, entities of the government, and media seeking to open an investigation into the criminal misconduct of San Jose city officials and officials with the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals, all to no avail. Not all of my contacts are mentioned above. However, a complete list of the officials and entities of the government that I contacted in my efforts to open an investigation has been compiled. (See Appendix C, pages C-116, C-117, and C-118)

VII. Summary and Conclusion

There has been no interest by authorities in opening an investigation into the very serious criminal misconduct of San Jose city officials and officials with the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals at any level, whether local, state, or federal. Most of my complaints with these authorities elicited no response. Their failure to open an investigation means

that there is a widespread cover-up occurring. Section 1 and Section 2 of this report proves clearly that my allegations of misconduct against San Jose city officials and court officials are not just credible, but are based on indisputable facts and evidence. It is clear from Section 1 and Section 2 that the judgment in the lawsuit (Frederick Bates vs. City of San Jose, et al., Case #06-05302 RMW) that is the subject of this report, is unconstitutional and void. It is as equally clear that San Jose city officials and officials with the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals committed several public corruption crimes with the intent to obstruct justice. Their misconduct is an affront to democracy, the Constitution, and our system of justice.

SECTION 5

Findings

This report finds the allegation that the City of San Jose, the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals obstructed justice during litigation of the case Bates v. City of San Jose et. al. in order to cover up discrimination and racism of San Jose city officials is true. This report also uncovers evidence that the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals discriminate against pro se litigants, and that there is misuse of memorandum and summary dispositions by both courts.

This report presents clear and convincing evidence that San Jose police officials, Deputy Chief Adonna Amoroso, Captain Tuck Younis, and Chief of Police Rob Davis knowingly and intentionally violated my constitutional rights. All three officials denied me a CCW permit, without a due process hearing required by California Penal Code Section 12027.1, upon my medical disability retirement from the San Jose Police Department in April 2004. The clear intent of these officials was to punish me based on their subjective feelings about my medical disability retirement, because I'm black, and to cause me extreme emotional distress.

It is sufficiently clear from this report that the attorney for the City of San Jose (Michael Dodson) obstructed justice by perpetrating fraud on the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals during litigation of my lawsuit filed in August 2006. My attorney, Stuart Kirchick, was complicit in Dodson's and the City's fraudulent scheme that was concocted in order to facilitate the filing of the City's motion for summary judgment. Dodson and Kirchick filed a stipulation of dismissal of defendant Tuck Younis from my lawsuit without a settlement agreement or my consent prior to the City filing its summary judgment motion. The stipulation of dismissal prevented the courts from ruling on the decision of Younis to deny me a CCW permit, without a hearing, in violation of my constitutional rights. It is also clear from this report that Younis committed perjury by filing a declaration in support of the City's motion for summary judgment falsely stating that Chief of Police Rob Davis played no role in the denial and later granting of my CCW permit. Younis also committed perjury during his deposition.

It is detailed sufficiently in this report that the City filed its motion for summary judgment based on several false claims. And that my attorney, Stuart Kirchick, never countered the City's false claims in court proceedings, further implicating himself in the City's scheme to perpetrate fraud on the court.

This report finds that the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals knowingly participated in the City of San Jose's scheme to obstruct justice by making clearly erroneous rulings in my lawsuit filed in August 2006. It is clear from this report that the rulings of the courts are intended to cover up the City of San Jose's discriminatory and racist decision to deny me a CCW permit after I retired from the City's police department on a medical disability in April 2004. The report finds that the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals exhibited unconstitutional bias against me throughout litigation of my lawsuit. Of particular concern is the criminal misconduct of Judge Ronald M. Whyte and the U.S. District Court in San Jose during litigation of my Rule 60 motion for relief filed in February 2013, and Judge Beth Labson Freeman malicious and retaliatory pre-filing screening order entered against me during her ruling on my independent action in equity for relief filed in October 2020.

Judge Whyte and Judge Freeman's actions were taken with the specific intent to obstruct justice by depriving me of a favorable judgment in my lawsuit, wholly inconsistent with the clearly established facts and laws.

It is clear from this report that the following judges violated the Code of Conduct for United States Judges: U.S. District Court judges Ronald M. Whyte, Beth Labson Freeman, and Magistrate Judge Nathanael Cousins; and Ninth Circuit Court of Appeals judges William Fletcher, and Sidney R. Thomas.

Another finding of this report that is deeply troublesome is the failure of the U.S. Supreme Court to grant my petition for a writ of certiorari that seeks a reversal of the clearly erroneous judgment in my case that is based on fraud, a misapplication of the law, and bias. It is clear from this report that the Supreme Court, through the actions of the Supreme Court Clerk's Office, made a conscious decision to join the conspiracy of the lower courts to cover up the egregious and criminal misconduct that occurred in this case.

This report also exposes an apparent misuse of summary dispositions and memorandum dispositions by the courts that are inherently biased, mostly against pro se litigants. This apparent misuse of summary dispositions and memorandum dispositions appears to be part of the Ninth Circuit Court of Appeals and other federal courts' efficient system of killing off cases that is driven by the courts' corruption and dysfunction. Also troublesome is the malicious and retaliatory manner in which some district court judges enter pre-filing screening orders against litigants, quite often pro se litigants. A reasonable conclusion from this report is that the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals lack sufficient oversight and accountability. It is sufficiently clear from this report that the U.S. District Court in San Jose and the Ninth Circuit Court of Appeals are corrupt and dysfunctional, and they are rigged and weaponized.

Lastly, this report finds that government officials at every level lack the courage and integrity to hold San Jose city officials, my attorney, the Ninth Circuit Court of Appeals, and the U.S. District Court in San Jose accountable for their egregious misconduct during the litigation of my lawsuit against the City of San Jose filed in August 2006.

SECTION 6

Recommendations

The Supreme Court should reverse its decision to deny my petition for writ of certiorari and grant it. It is undisputed that the judgement of the Ninth Circuit Court of Appeals affirming the judgment of the U.S. District Court on my independent action in equity, that my petition for writ of certiorari seeks to vacate, is unconstitutional and is legally null and void. My independent action in equity seeks to set aside the judgment of the District Court in my lawsuit filed in August 2006 because the judgment is based on fraud, it violates the full faith and credit clause of the Constitution implemented by 28 U.S.C Section 1738, and it violates the impartiality requirement of the Fifth Amendment Due Process Clause. There are no legal constraints that prevents the Supreme Court from reversing itself.

The Supreme Court and Congress should open investigations into my allegation that the City of San Jose, the U.S. District Court in San Jose, and the Ninth Circuit Court of Appeals obstructed justice during litigation of my lawsuit filed in August 2006. The impeachments of judges Ronald M. Whyte, Beth Labson Freeman, Nathaniel Cousins, William Fletcher, and Sidney R. Thomas should be given priority in any actions taken by Congress, because it is clear from this report that they made a conscious decision to participate in the criminal scheme of the City of San Jose to obstruct justice in this case. The actions of these Judges are repulsive and violate the oaths they took and the Code of Conduct for United States Judges. Clearly, they lack the temperament to be judges; because they failed to uphold the integrity and independence of the judiciary; they failed to avoid impropriety and the appearance of impropriety; and they failed to perform their duties fairly, impartially, and diligently.

There should also be investigations into the misconduct of San Jose city officials and my attorney by the appropriate state and local authorities in the State of California.

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REPORTED BY: Anne Edelmann

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MR. STUART KIRCHICK: May it please the Court, good morning, counsel. I'm Stuart Kirchick for Fred Bates. Penal Code section 12027.1 of California law does set forth a constitutional right to due process; it's clear. Um, the district court said so, the legislative history says so, and there's case law to support that after the amendment that clearly, in fact, it is a due process right. The Sommerfield v. Helmick case specifically talks about the legislative history and uh, states that there's a due process right to a hearing. And interestingly, that um, legislative amendment uh, to set forth a due process requirement followed a city of San Jose case, where the Peace Officer Association actually sued the city of San Jose, which actually led to the amendment allowing the due process provisions. Further, the Unland v. Block case um, also set forth a discussion of the legislative history, uh, and again, discussed where the police chief's stated

policy was to review each CCW endorsement application on a case-by-case basis and review it, and then just make a decision one way or another. That led to the legislative amendment allowing the fair notice and the hearing on situations of physical disability. The language is clear that there is a due process right, and the court found so. The issue seems to be, uh, is it a clearly established right? Well, the city actually argues in their brief, actually concedes in their brief that subsection E, relative to a psychological disability, is clear. They state that in their brief. So surely the other subsections are clear as well. They actually disagree with Judge Whyte in that regard. If the, if the, if subsection E is clear, that if someone has a psychological disability and they're not entitled to a good cause hearing, then why wouldn't the remainder of the statute be clear that if there's not a psychological disability, that someone is entitled, upon denial of a CCW permit, to have fair notice and a hearing before a three-member board? When you're

talking about clearly established right in this context, we often come across many cases where officers are in the field of battle making split-second decisions on whether or not there's a clearly established right. There are many cases out of this Court that discuss it, and the U.S. Supreme Court. For instance, the recent case of Callahan, which talked about the, the standard, the two-step pronged standard, was a case that's hugely different.

THE COURT VOICE 1: Let me ask you this. How does the Unland case affect your analysis? That is to say, it seems to me possible that the police chief could have said, listen, this qualifies under Section E, therefore, I don't need to do an actual hearing, end of story.

MR. KIRCHICK: The--thank you for asking that. The Unland case actually involved a physical and a psychological injury. The officer in that case had a diagnosis of depression and post-traumatic stress disorder, as well as a physical disability. There is nothing in the record

of the disability application for retired Sergeant Bates that says anything about a psychological disability, need for psychological medicine, a psychological diagnosis. There's absolutely nothing. Deputy Chief Amoroso wrote a memorandum to the retirement board attaching a disability application that said heart illness. There's nothing other than cardiovascular disease and hypertension and enlarged aorta and enlarged heart of retired Sergeant Bates in the record. Now, she testified that she didn't even review the record. The city of San Jose case dating back to 1988 talked specifically about how the chief and police have authority to look at the entire record to make this decision. They have weeks behind a desk to review the medical records, to review if there was even a psychiatric evaluation. There wasn't even a psychiatric evaluation in the record. There was no psychiatrist rendering an opinion. It was simply one statement that Sergeant Amoroso wrote herself in a memorandum acknowledging that Mr., Sergeant Bates has to avoid

psycho-emotional stress. Why? Because it will add to his physical hypertension. It will add to his medical disability. That's not a psychological diagnosis, and that's why it's much different than the Unland case.

THE COURT VOICE 2: Can we switch from psychological diagnosis to a question of law?

MR. KIRCHICK: Yes.

THE COURT VOICE 2: Weren't these same issues already dealt with in the, in the small claims court or whatever they call it down there? And isn't this collaterally estopped? The decision was made down there on exactly the issues which brings this case here.

MR. KIRCHICK: I disagree uh, for the following reasons, Your Honor. Uh, only the city was sued, first place. Deputy Chief Amoroso was not sued.

THE COURT VOICE 2: Doesn't matter. Not for collateral estoppel.

MR. KIRCHICK: Well, then my next secondary argument, Judge, is that Rule 8 of the Federal Rules of Civil Procedure

requires the city to affirmatively allege that in the answer so that I'm on notice to do discovery in that regard.

THE COURT VOICE 2: Wasn't that brought up in the motion for summary judgment?

MR. KIRCHICK: That's the only place it was brought up, and Judge Whyte did not address whatsoever any authority as to why it--

THE COURT VOICE 2: [Interposing] But it's there.

MR. KIRCHICK: It's there in the summary judgment motion, at which point I was…

THE COURT VOICE 2: And isn't that sufficient to carry it through?

MR. KIRCHICK: No, it's not, Judge, with all due respect, because I was unable at that point to do any discovery to really show that, in fact…

THE COURT VOICE 2: What, what discovery is there? You have the record of the, of the case in the other court, and you have your own allegations and stuff. That's it. You don't need discovery for collateral

estoppel.

MR. KIRCHICK: Well, I think it's to, to try and show it was not fully and fairly litigated and to explore more completely what uh, Sergeant Bates, uh…

THE COURT VOICE 2: Well, if it wasn't fully and fairly litigated, why wasn't it appealed in the state system?

MR. KIRCHICK: I don't believe, from a small claims court case, a plaintiff loses, has a right to appeal.

THE COURT VOICE 1: He brings a, he brings a de novo appeal, is what happens, of course. Now, were you involved at the small claims…

MR. KIRCHICK: Lawyers are not permitted.

THE COURT VOICE 1: I understand that. I didn't ask that. I said, were you involved?

MR. KIRCHICK: No, I was not.

THE COURT VOICE 1: At what point did you become involved?

MR. KIRCHICK: I became involved, I became involved prior to the small claims

court case when I wrote a letter to the city requesting a, a hearing for Mr. Bates and requesting the return of the CCW permit. Uh, Mr. Bates filed a small claims court case on his own after that.

THE COURT VOICE 1: And in what respect did you have anything to do with the small claims court?

MR. KIRCHICK: None.

THE COURT VOICE 1: Were you aware of what happened in the small claims court?

MR. KIRCHICK: After the fact.

THE COURT VOICE 1: After the fact?

MR. KIRCHICK: Yes.

THE COURT VOICE 1: And did you have in hand any records coming out of that small claims court when you, when you began this suit?

MR. KIRCHICK: Only his complaint.

THE COURT VOICE 1: Were there other records that, in, in the case?

MR. KIRCHICK: No.

THE COURT VOICE 1: So what could you have discovered?

MR. KIRCHICK: I don't know if there's

a transcript in the, in the courtroom to see.

THE COURT VOICE 1: Oh, yes, you do. There is none.

MR. KIRCHICK: I didn't think there, but I, I would have explored that, um, anything to see whether it was fully and fairly litigated. And I would submit, Judge, that based upon the language of his small claims complaint, that it does not fully and fairly litigate a Monell claim. It does not fully and fairly litigate what Deputy Chief Amoroso did and the causes of action against her and the chief of police. I don't believe a pro per plaintiff in small claims can fully and fairly litigate a Monell claim. And I don't think a judge pro tem understands the complexities of a Monell claim in 1983 litigation unless it's really raised by the pro per plaintiff. And I'm sorry, I meant to mention I'd like to reserve two minutes, and I see the…

THE COURT VOICE 1: You're, you're, you're just about there. Why don't we hear from the other side?

MR. KIRCHICK: Thank you.

THE COURT VOICE 1: Sure.

MR. MICHAEL JAMES DODSON: May it please the Court. My name is Michael Dodson from the San Jose City Attorney's Office representing uh, the city and the individual defendants. What I've heard counsel argue to the Court this morning, Your Honors, is that Deputy Chief Amoroso, who acted upon the application for a concealed weapon permit, simply made a mistake. And if in fact she did make a mistake in denying uh, Sergeant Bates his permit to carry a concealed weapon, we argue, and the district court so found that it was a reasonable mistake entitling her to qualified immunity. Uh, the, the obvious nature of the statute, the reason that exists in denying someone who has a psychological disability uh, the, the ability or the right to carry a concealed weapon, I believe is quite obvious. We don't want people who have psychological disabilities to be carrying concealed weapons. Now, when Deputy Chief Amoroso acted upon this application, uh, there was uh, some material available to her which

counsel argues she should have gone through the entire record. But the, the material she did go through was quite clear that Sergeant Bates suffered from what was called psycho-emotional stress. And psychological disability is not defined anywhere in the underlying California Penal Code statute at issue. So she was presented with a record that said that Sergeant Bates suffered from psycho-emotional stress, and counsel seems to want a deputy chief in the police department, as, as intelligent as she may be, to actually be a medical doctor and, and determine that psycho-emotional distress is not in fact, a psychological disability. And it's important to keep in mind that uh, Sergeant Bates ultimately was given his right to carry a concealed weapon. He was without it for approximately a four-month period between the decision uh, determination made by Deputy Chief Amoroso uh, and the decision made four months later by a different deputy chief who had, who had taken her position over when presented with clarifying information from the doctor that

in fact, it was not a psychological disability. At that point, the city reversed its earlier decision and granted him his right to carry a concealed weapon. Um, so my point is that any mistake that was made by Deputy Chief Amoroso was clearly a reasonable mistake under the circumstances, and we agree with the district court that that entitled her to qualified immunity uh, and that this court should uphold that decision. As to the other issue, we agree that collateral estoppel, based upon the earlier uh, decision of the small claims court, prevents re-litigation of the issues as to the city of San Jose. Uh, it's important to point out, and there were some questions directed to counsel as to whether or not uh, counsel was involved at the small claims uh, point in time. And it's true that lawyers are not allowed to specifically represent clients in small claims proceedings in the State of California. However, it's in the record at ER00194 that, in fact, what Sergeant Bates was suing for was to recover a $1,500 retainer he had paid

to this very counsel, Stuart Kirchick. That's the nature of his claim in the underlying small claims court. So it's clear that uh, whether or not Mr. Kirchick was representing him, per se, in the small claims action, he was involved.

THE COURT VOICE 1: Well, that's pretty much what he said already. I mean, that's consistent with what we already heard. Sure.

MR. DODSON: So in any event, we believe collateral estoppel prevents re-litigation of that issue. We believe that Deputy Chief Amoroso was reasonable.

THE COURT VOICE 1: I have to say I'm a little dubious on the collateral estoppel because it has to be, quote, actually litigated and decided. And further, it has to be actually litigated and decided in a proceeding in which the consequences of collateral estoppel are sufficiently foreseeable that uh, the parties know they're going to have to live with it later. So maybe there's collateral estoppel and maybe not.

MR. DODSON: In any event, uh, even if

it's not, Your Honor, we have, we have argued in our brief that there is not sufficient uh, evidence in the record to support a Monell claim against the City of San Jose. There's absolutely no evidence of any policy, custom, practice, procedure.

THE COURT VOICE 1: Well, you know, for a Monell claim, all you need is a decision by a policymaker. You don't need a policy. You need a decision by a policymaker.

MR. DODSON: But the case law, not only Monell, but cases following Monell, set forth a, a four-part test that basically set forth that it has to be a pattern practice so ingrained in the, in the policy and custom of the city as, as to make that finding, as we've argued sufficiently, I believe, in our brief. And I don't think that finding is any evidence whatsoever. What we have, Your Honor, with all due respect, is at best a, a mistake by an employee of the city, and all that gives rise to is respondeat superior liability. And Monell and its progeny specifically say that that is not sufficient to support

municipal liability if it's simply based on the mistake of an underlying city employee. So we would argue that that's all that's in the record is respondeat superior liability, which is not sufficient. So in summary, I would ask that this Court uphold the finding of summary judgment in favor of uh, defendants, respondents in this case. Thank you.

THE COURT VOICE 1: Thank you. In response?

MR. KIRCHICK: Thank you, Your Honor. In response, it's interesting that the city claims that it would be improper to give someone with a psychiatric diagnosis a CCW and their gun, yet Chief Davis on the day of my client's retirement gives them a large-capacity ammunition magazine that's illegal for the general public to have. I'm sure they also wouldn't want people on a psychiatric disability to have a large ammunition…

THE COURT VOICE 2: Is that in the record?

MR. KIRCHICK: Pardon me?

THE COURT VOICE 2: Is that in the record?

MR. KIRCHICK: Yes, it is.

THE COURT VOICE 2: Okay.

MR. KIRCHICK: It's an exhibit. And uh, further um, he didn't suffer psycho-emotional stress. There's no diagnosis of psycho-emotional stress. It was to avoid, it was a work limitation. It said avoid psycho-emotional stress, and Deputy Amoroso said there's no position for you under those circumstances. Every officer is going to undergo psycho-emotional stress. So under her evaluation and interpretation, every officer really would be on a psychological disability.

THE COURT VOICE 1: You know, I'm going to cut to the chase a little bit. I understand all the legal arguments that we've been going through. I mean, it's a cliché to say, why did you make a Federal case out of this? Uh, he asked for the concealed weapons permit. He's denied. He, he requested again. He's granted. Why doesn't he just drop the darn thing?

MR. KIRCHICK: This is obviously outside the record and, and, but I'd love to answer. Uh, it's very important to Sergeant Bates to have uh, his gun.

THE COURT VOICE 1: Well, he has it.

MR. KIRCHICK: To protect himself.

THE COURT VOICE 1: He has it.

MR. KIRCHICK: It was--

THE COURT VOICE 1: [Interposing] And he got it very quickly.

MR. KIRCHICK: It was very upsetting for him not to have it for five or six months. And quite frankly, it was still a due process violation in our opinion, and he chose to make a federal case out of it…

THE COURT VOICE 1: Yeah, - -.

MR. KIRCHICK: Because his civil rights are important to him.

THE COURT VOICE 1: Okay, fair enough. Fair answer.

MR. KIRCHICK: Thank you.

THE COURT VOICE 1: Yeah, sure. Okay, the case of Bates v. City of San Jose is now submitted for decision.

[END Audio-Recording-08-16757-(5).wma]

C E R T I F I C A T E

I, Anne Edelmann, certify that the foregoing transcript is a true record of said proceedings, that I am not connected by blood or marriage with any of the parties herein nor interested directly or indirectly in the matter in controversy, nor am I in the employ of the counsel.

Signature: Anne Edelmann

Date: September 26, 2024

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Deputy Chief of Police, TUCK YOUNIS, individually and in his official capacity as City of San Jose Police Captain,

Defendants.

Case Number: C-06-05302 RMW

DEFENDANTS' NOTICE OF MOTION; MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: November 9, 2007
Time: 9:00 a.m.
Room: 6, 4th Floor
Judge: Hon. Ronald M. Whyte

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NOTICE OF MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 9, 2007 at 9:00 a.m. or soon thereafter as counsel may be heard by the above-entitled Court, located at 280 South First Street, San Jose, California, Defendants will move, and hereby move, pursuant to Federal Rule of Civil Procedure ("FRCP") 56 for summary judgment or in the alternative, partial summary judgment on all claims for relief alleged in the Complaint on the grounds that Plaintiff's allegations fail to state claims for relief and the Defendants are entitled to judgment as a matter of law, and/or immunity. This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, Declarations, and all other pleadings and papers on file, as well as whatever oral arguments may be made at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Frederick Bates ("Bates"), a retired Sergeant with the San Jose Police Department, has sued the City of San Jose ("City"), its Chief of Police, Robert Davis ("Davis"), former Deputy Chief, Adonna Amoroso ("Amoroso"), and its current Assistant Chief of Police, Tuck Younis ("Younis"). Younis was subsequently dismissed by stipulation.

Bates' Complaint alleges a violation of his civil rights by the individual Defendants, and municipal liability on the part of the City arising out of the initial denial to Bates upon his disability retirement of a permit to carry a concealed weapon. It is undisputed that the City initially denied Bates this permit, but after receiving additional clarifying medical information, the City reversed its decision and granted Bates this privilege.

As discussed below, summary judgment should be granted in favor of all individual Defendants due to the fact that the undisputed evidence is that at all times they were acting in good faith and, even assuming that some or all of the actions on the part of one

/ / / / /

or more of the individual Defendants amounted to a constitutional violation, they are entitled to qualified immunity.

In addition, the undisputed facts are that the City does not maintain a policy of systematically denying retiring Police Officers due process of law, as alleged by Plaintiff and the City cannot be liable for any constitutional violations under a *respondeat superior theory*. In addition, Bates previously sued the City in Small Claims Court and a Judgment in favor of the City was entered against him. Therefore, the principals of *res judicata* bar any action by Bates against the City.

II. FACTUAL BACKGROUND

The factual background of this matter is relatively simple and undisputed. Plaintiff Frederick Bates is a former Sergeant with the San Jose Police Department. He was granted a disability retirement from the department in April 2004. He received a disability retirement due to the fact that the City could not accommodate the work restrictions placed upon him by his physician, to "avoid psychologically or physically stressful work."

Upon receipt of this information, Defendant and then Deputy Chief Adonna Amoroso denied Bates the right to carry a concealed weapon due to the provisions of California Penal Code section 12027.1(e) which prohibits the issuance of a permit to carry a concealed weapon to any Officer who has retired because of a "psychological disability."

Several months after the initial denial, the San Jose Police Department received clarifying information from Bates' physician which essentially stated that Bates did not have a psychological disability and was an appropriate candidate to carry a concealed weapon. It is undisputed that upon receipt of this clarifying information from Bates' physician the Police Department reversed its earlier decision and granted Bates the right to carry a concealed weapon.

Bates then sued the City only in Small Claims Court seeking to recoup the $1,500 retainer he had paid to his attorney to assist him in this matter. It is undisputed that the Court rendered judgment in favor of the City in that Small Claims action. Bates thereupon filed this action against the City of San Jose, Police Chief Robert Davis, Amoroso, and

Younis. However, on August 3, 2007, the parties filed a Stipulation of Dismissal as to Defendant Younis.

III. LEGAL ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT.

FRCP 56(b) states in relevant part as follows:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law (FRCP 56(c)). The moving party bears the initial burden of establishing that there is no genuine issue of material fact (*Celotex Corp., v. Catrett*, 477 US 317, 322 (1986)). After the moving party meets its burden, the burden shifts to the responding party who must then present specific facts showing that a triable issue of fact exists (*British Airways Board v. Boeing Co.*, 585 F2d 946, 950-52 (9th Cir.1978), cert. denied 440 US 981 (1979)).

It is not enough for the responding party to point to mere allegations or denials contained in the pleadings. Instead, the responding party must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial (FRCP 56(e)). The evidence is supposed to be more than a mere "scintilla"; the responding party must show that the trier of fact could reasonably find in its favor (*Anderson v. Liberty Lobby, Inc.*, 477 US 242, 252 (1986)).

To preclude the entry of summary judgment the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law... factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 US 242-247-248. The opposing party "must do more than simply show that there is some metaphysical doubt as to the material fact" (*Matshushita*

Elec. Indus. Co. v. Zenith Radio, 475 US 574, 586 (1986)). "When the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" (*Matshushita*, *supra*, 475 US at 587).

B. PLAINTIFF WILL BE UNABLE TO ESTABLISH A CONSTITUTIONAL VIOLATION BY THE INDIVIDUAL DEFEDANTS.

Plaintiff's First Cause of Action alleges a violation of 42 USC section 1983 against the individual Defendants, Davis and Amoroso. Specifically, Plaintiff alleges that he was initially wrongfully denied a permit to carry a concealed weapon following his disability retirement in April 2004. However, Plaintiff also alleges that "toward the end of December 2004" Defendant Younis advised Plaintiff that the Department Head reversed his decision and decided to grant Bates his permit to carry a concealed weapon.

As a result of these actions, Bates alleges that his rights under the United States Constitution were violated, specifically his rights to freedom from deprivation of due process of law, freedoms from summary punishment, and freedom from the deprivation of the right to bear arms.

Plaintiff asserts a violation of 42 USC section 1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Section 1983 does not create or establish any substantive rights, it is merely a procedural vehicle used to redress violations of the Bill of Rights and of certain Federal statutes. In other words, in order to establish a valid claim under section 1983, Plaintiff must establish an independent substantive basis, such as a violation of the Federal Constitution or a Federal statute. In this case, the alleged Constitutional violations are that Bates was initially denied the right to carry a concealed weapon following his disability retirement in April 2004, but that approximately eight months later, that decision was

reversed such that Bates was thereupon granted that privilege. Defendants assert that this conduct does not amount to a constitutional violation.

C. THE CITY INITIALLY DENIED PLAINITIFF HIS PERMIT DUE TO THE GOOD FAITH BELIEF THAT HE HAD A PSYCHOLOGICAL DISABILITY

Plaintiff's claims relating to an alleged violation of his due process rights relate to the alleged violation of California Penal Code sections 12027 and 12027.1. These sections deal with the authorization of a retired Peace Officer, such as Bates, to carry a concealed weapon. Of particular note is California Penal Code section 12027.1(e) which provides: "No peace officer who is retired after January 1, 1989, because of a psychological disability shall be issued an endorsement to carry a concealed and loaded firearm pursuant to this section."

As discussed below, this is the section that Defendant Amoroso relied upon in initially denying Bates the right to carry a concealed weapon due to her belief that his retirement was based upon a psychological disability. Amoroso retired from the San Jose Police Department in July 2004. At the time of her retirement she was the Deputy Chief of Police, for the Bureau of Administration (Deposition of Adonna Amoroso at 5:25; 6:1-6; relevant portions attached to the Declaration of Michael J. Dodson). Part of Amoroso's duties in that position included determining whether or not to accept an Officer's Application for Disability Retirement (Amoroso depo at 9:16-25; 10:1-18).

During the process leading up to Plaintiff's disability retirement, Amoroso reviewed certain documentation relating to that. Specifically, she signed a memorandum to Ed Overton of the Police Retirement Board on March 16, 2004. In that memorandum she quoted from the City's doctor regarding the nature of Plaintiff's disability: "If Mr. Bates is continued to work in the workplace, that the following restrictions need to be followed." And it states – the only restriction he states is he should, "avoid **psychologically** or physically stressful work," end quote (Amoroso depo at 18:10-25; 19:1-5; emphasis added).

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As a result of this recommendation from the City's doctor, Amoroso testified that she would find it "extremely burdensome" to accommodate someone in a position who needed to avoid psychological stress (Amoroso depo at 19:24-25; 20:1-15). Amoroso testified that she was not privy to Bates' medical or psychological records and that she did not review any other documentation relative to Bates' Application for Disability Retirement other than [the City doctor's] medical restrictions which noted that Bates should "avoid psychologically or physically stressful work" (Amoroso depo at 25:1-24). Amoroso was ultimately the one who made the decision to initially deny Bates a Concealed Weapons Permit (Amoroso depo at 26:24-25; 27:1-4).

In making the decision to deny Bates a Concealed Weapons Permit following his disability retirement, Amoroso testified that she discussed Bates' case with Sergeant Toney, who was the acting Lieutenant of Personnel, and based upon the disability retirement including psychological stress, she made the decision to deny the request for a Concealed Weapons Permit.

Amoroso did not look at medical records nor any disability file, testifying that she was "not privy to those" (Amoroso depo at 27:19-25; 28:1-21). Amoroso also testified that she has made "about 300" decisions whether to approve or disapprove Concealed Weapon Permit applications for retired Police Officers in her career, and that she has previously denied about 6 of them (Amoroso depo at 31:16-25; 32:1-8). At the time that she made the initial decision to deny Bates' Concealed Weapons Permit, she believed that his retirement was based upon a psychological disability (Amoroso depo at 34:7-25; 35:1-7).

Amoroso also testified as to her familiarity with California Penal Code section 12027.1. She understood that under certain circumstances an Officer could appeal the denial of a Concealed Weapons Permit. However it was her understanding that such appeal rights were not available for "psychological stress" (Amoroso depo at 36:1-20).

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After Amoroso denied Bates his permit, she called him on the telephone and told him about California Penal Code section 12027.1, specifically the section that prohibits the issuance of Concealed Weapons Permit to a peace officer who retires because of a psychological disability (Amoroso depo 37:4-15). Moreover, Defendant Chief Robert Davis played no role whatsoever in either denying Bates a permit or in later reversing that decision and granting it to him. (See Declaration of Tuck Younis).

D. CALIFORNIA PENAL CODE SECTION 12027.1 AUTHORIZES DENIAL OF A CONCEALED WEAPONS PERMIT DUE TO PSYCHOLOGICAL DISABILITY WITHOUT A HEARING.

Bates contends that he was denied due process of law due to the City's denial to him of a permit to carry a concealed weapon following his retirement from the City Police Department in April 2004. However, California Penal Code section 12027.1 specifically **prohibits** the issuance of such a permit to an individual who retires "because of a psychological disability" (California Penal Code section 12027.1(e)). In addition, when such a denial is based upon this section, the individual has **no right to a hearing** on this issue. See *Unland v. Block* (1997) 59 Cal.App.4th 1537.

In *Unland*, *supra*, an officer filed for a disability retirement for various reasons including "anxiety conditions sustained through the course of employment." The County Retirement Board granted the disability retirement, and the law enforcement agency thereupon denied him a permit to carry a concealed weapon because of a "psychological disability" under Penal Code section 12027.1(e).

In reviewing the history of Penal Code section 12027.1, the *Unland* court noted that several amendments were made to the statute in 1988. The court noted that the statute does not state that only retirement boards may decide whether or not a peace officer retired because of a psychological disability and noted that subsection (e) of the statute says nothing regarding that the law enforcement agency's power to decide that preliminary question (*Id.* at 1543).

The *Unland* court noted that the amended statute also created an **automatic denial** rule for officers who retired because of psychological disabilities and that such officers had no statutory right to a noticed hearing under the statute if they retire because of a psychological disability (*Id.* at 1544-1545). Finally, the *Unland* court noted that the legislature, in amending the statute in 1988 "...did not choose to define 'psychological disability' in section 12027.1, ...if the legislature had wished to define 'psychological disability'... it would have done so in the 1988 legislation" (*Id.* at 1547). Therefore, based upon the *Unland* decision, automatic denial of the right to carry a concealed weapon is appropriate where the retirement is based upon a psychological disability, and such an officer has no right to a hearing regarding that denial.

E. EVEN ASSUMING A CONSTITUTIONAL VIOLATION, THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Individual liability of government officials under 42 U.S.C. section 1983 has long been subject to principles of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) the United States Supreme Court stated that "government officials ... generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In oft-quoted language, the Court stated: "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law" (*Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Furthermore, qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation" (*Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The privilege is "an immunity from suit rather than a mere defense to liability" (*Ibid).* As a result, the Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (*Hunter v. Bryant,* 502 U.S. 224, 227 (1991)).

Because of the nature of police work, qualified immunity has been applied frequently. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court stated:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts.... If the officer's mistake as to what the law requires is reasonable, ...the officer is entitled to the immunity defense. (*Id.*, at 205; emphasis added.)

The *Saucier* Court added: "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, [this principle] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions" (*Id.)* This accommodation for reasonable error or mistaken judgment exists in part because **officials should not always err on the side of caution due to a fear of being sued**. See *Hunter v. Bryant*, 502 U.S. 224 (1991); *Harlow, supra,* at 806.

In *Saucier*, *supra*, the Supreme Court set forth a sequential approach that must be followed in the qualified immunity context. On a motion for summary judgment, a court must first consider whether the facts, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right. If no violation is established, there is no necessity for further inquiry concerning qualified immunity. On the other hand,

> If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; .... The relevant, dispositive inquiry in determining whether a right is clearly established is whether if would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. (*Id.*, at 201-202.)

The Court's explanation of this analysis emphasizes the broad discretion that is afforded to police officers who face tense and unique situations. Because the law does not always prescribe a clear course of action under a particular set of circumstances, qualified immunity operates to protect officers from the "sometimes hazy border" between excessive

and acceptable force (*Id.*, at 2158; *Jeffers v. Gomez*, 267 F.3d 895, 909 (9th Cir. 2001)). Thus, the second inquiry in a qualified immunity analysis asks whether the officer could have "reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right" (*Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001)).

Of particular note, the Supreme Court in *Saucier* held that the two-part analysis applies. Therefore, in a summary judgment motion, there are **two layers of reasonableness** that a court must assess. The first layer requires a court to assess the "objective reasonableness" of the action under all the circumstances (*Graham v. Conner*, 490 U.S. 386, 397). Under *Saucier*, even if the court determines that the circumstances, seen most favorably to the plaintiff, show the lack of reasonableness on the part of the officer, the court must further determine whether the officer, either by mistake of law or fact, could reasonably have believed that his or her conduct did not violate a clearly established right. See also *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001); *Marquez v. Gutierrez*, 322 F.3d 689, 692-693. (9th Cir. 2003); *Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002); *Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir. 2002).

F. AMOROSO'S ACTIONS WERE OBJECTIVELY REASONABLE.

Under *Saucier, supra,* the first level of analysis requires a determination of whether Defendants' actions establish the deprivation a constitutional right. Defendants in no way concede this point and assert that even looking at the facts most favorable to the Plaintiff in this case, no constitutional violation could be established. Even assuming Plaintiff could establish a constitutional violation, the second inquiry in the qualified immunity analysis, as noted above, is whether an officer could have "reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right" (*Jackson v. City of Bremerton, supra*).

In this case, Amoroso testified to her good faith belief that Plaintiff's disability retirement was for psychological reasons. Even assuming she was mistaken in that belief,

any mistake she made was reasonable given the information she had at the time she made the decision. "If the officer's mistake as to what the law requires is reasonable... the officer is entitled to the immunity defense" (*Saucier v. Katz, supra*, 533 U.S. 194, 205). As noted above, defendant Chie Davis played no role in the decision to deny and to later grant Bates' a permit. (See Declaration of Tuck Younis).

G. PLAINTIFF'S ACTION AGAINST THE CITY IS BARRED BY THE DOCTRINE OF RES JUDICATA

"'The doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.' [citation.]" (*Mata v. City of Los Angeles* (1993) 20 Cal. App. 4th 141, 149; quoting *Nakash v. Superior Court* (1987) 196 Cal. App. 3d 59, 67). The doctrine of *res judicata* is well established in common law and civil law jurisdictions, and is frequently declared by statute. *See* generally California Code of Civil Procedure sections 1908, 1908.5, 1911; 7 Witkin, *Procedure* Ch. IX, § 280.

When a former judgment is properly pled in a complaint, such judgment may be considered by the trial court in determining whether it is *res judicata* of a plaintiff's alleged cause of action. (*Rideaux v. Torgrimson*, 12 Cal.2d 633, 638; *Spitzer v. Superior Court,* 74 Cal.App. 494, 498; *Weil v. Barthel* (1956) 45 Cal.2d 835, 837).

Res judicata, also known as claim preclusion, prohibits the litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. (*Cabrera v. City of Huntington Park,* 159 F.3d 374, 381 (9th Cir.1998)). For *res judicata* to apply there must be: (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties. (*Ibid.*)*Res judicata* gives conclusive effect to a former judgment only when the former judgment was in a different action; an earlier ruling in the same action cannot be *res judicata*, although it may be "law of the case" if an appellate court has determined the issue. (*Lennane v. Franchise Tax Bd.* (1996) 51 Cal. App. 4th 1180, 1185, 1186).

In a new action on the *same cause of action,* a prior judgment for the defendant is a complete *bar.* (7 Witkin, *Procedure*, Ch. IX, § 348). A prior judgment for the plaintiff likewise precludes the new action because it results in a *merger,* superseding the plaintiff's claim by a right of action on the judgment. (*Id.* at §342). In a new action on a *different cause of action,* the former judgment is not a complete merger or bar, but is effective as a *collateral estoppel,* i.e., it is conclusive on issues actually litigated between the parties in the former action. (*Id.* at §354).

Here, summary judgment should be granted as to the City because it is clear from the face of the pleadings that Plaintiff's complaint is barred by the doctrine of *res judicata*. Prior to filing this action, Plaintiff filed a small claims action against the City of San Jose seeking to recover $1,500 in attorney's fees which Plaintiff alleged he paid his attorney in an effort to obtain a reversal of the City's decision to deny him a concealed weapons permit.

On January 30, 2006 the Small Claims Court entered a judgment for the City and against Plaintiff. (See Declaration of James Brennan). Now, Plaintiff attempts to re-litigate this same issue although there has already been final judgment on the merits. The doctrine of *res judicata* should be applied to give conclusive effect to the Small Claims Court proceedings in which the court ruled in favor of the City and against the Plaintiff.

H. ON THE MERITS, PLAINTIFF CANNOT PREVAIL ON HIS CLAIMS AGAINST THE CITY OF SAN JOSE.

Should the Court not find this action barred from the principals of *res judicata*, as discussed above, there are no triable issues of fact as to the claim against the City of San Jose and, therefore, summary judgment should be granted.

1. Under *Monell*, Plaintiff's Civil Rights Claim Against The City Should Be Dismissed.

In his second cause of action, Plaintiff attempts to assert a Civil Rights Claim against the City (otherwise known as a "*Monell*" claim) pursuant to 42 USC section 1983. However, as discussed below, there is no evidence to support any *Monell* claim against

the City in this case. In his Complaint, Plaintiff generally alleges that the City, through the individually named Defendants, undertook various actions which are alleged in his Complaint and which some how "represented official municipal policy and practice."

The requirements for municipal liability under section 1983 were originally set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and subsequent cases. There is no evidence in this case to meet that standard. At best, the allegations of Plaintiff's Complaint, and the undisputed facts, attempt to assert liability against the City solely under a *respondeat superior theory* as a result of the actions of the individual Defendants.

a. Liability Cannot Be Predicated On *Respondeat Superior*

In *Monell v. Department of Social Services*, *supra,* the United States Supreme Court held that *respondeat superior* liability may not serve as the basis for imposing 42 U.S.C. section 1983 liability against a municipal entity. That is, a public entity cannot be liable under such a theory solely because it employs a tortfeasor. Later cases have consistently refused to hold municipalities liable under a theory of *respondeat superior*. See *Oklahoma v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

"Instead, in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under §1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Board of County Commissioners v. Brown,* 520 U.S. 397, 403 (1997). "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably." *Id.,* at 406. Moreover, "an isolated incident caused by simple negligence" does not give rise to liability under section 1983. *Erdman v. Cochise County,* 926 F. 2d. 877,882 (9th Cir. 1991).

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b. There Is No Custom or Policy Upon Which To Ground A *Monell* Claim

"It is only when the execution of the government's policy or custom ...inflicts the injury that the municipality may be held liable under section 1983." *Monell, supra,* 436 U.S. 658, 694; *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987). In order to constitute a governmental "custom," the practice of unconstitutional misconduct must be "so common and well settled as to constitute a custom that fairly represents municipal policy" and "actual or constructive knowledge of such custom must be attributable to the governing body or to an official to whom the body had delegated policy making authority." *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. *en banc*), reh'g denied, 735 F.2d 861 (5th Cir. 1984), cert. denied 472 U.S. 1016 (1985).

Plaintiff cannot establish a direct causal link between some municipal policy or custom and the alleged constitutional deprivations. Assuming, *arguendo*, that a constitutional violation had occurred, absolutely no evidence even suggests any constitutional injury occurred because of some City policy or custom amounting to misconduct intending to deprive its citizens of their constitutional rights. "Nor, without more, would a city automatically be liable under section 1983 if one of its employees happened to apply the policy in an unconstitutional manner, for liability would then rest on *respondeat superior." City of Canton v. Harris,* 489 U.S. 378, 387 (1989).

The City cannot possibly be liable under 42 U.S.C. section 1983 in this action because there is no evidence, that: (1) the City had a policy or custom which allows for the existence of any unconstitutional misconduct by its police officers; (2) the City's policy making officials were intentionally indifferent to any alleged unconstitutional misconduct or that they tacitly authorized any allegedly unconstitutional misconduct; or (3) that the City had some "policy" or "custom" that actually caused the alleged constitutional deprivation of which plaintiff now complains. See *Monell v. Department of Social Services*, *supra*. See also, Declaration of Tuck Younis.

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c. There Is No Evidence of Deliberate Indifference

In addition to the other factors discussed above, in order to prevail on a *Monell* claim, plaintiff must produce evidence which amounted to a "deliberate indifference" to the rights of persons with whom the police come into contact. City of Canton, supra, 489 U.S. 378, 389. In this case, there is no such evidence. Only where the municipality's alleged failure to instruct, supervise, control or discipline reflects a "deliberate" or "conscious" choice by the City and therefore constitutes a policy, can the City be held liable under section 1983. (*Id.)*

The deliberate indifference standard was specifically adopted by the Supreme Court to ensure that Civil Rights claims against municipalities, such as the one presented by plaintiff, attain a certain level of gravity before a municipality can be compelled to defend itself at trial. *City of Canton*, *supra.* Stated simply, the plaintiff will be unable to establish that the City had some kind of policy or custom that encourages its officers to unlawfully deny individuals their due process rights or to commit any other unlawful acts.

Plaintiff's Civil Rights Cause of Action against the City is clearly grounded upon a *respondeat superior* theory based upon the actions of its police officers, which is not permissible. It cannot be established that the City's policies and procedures are inconsistent with applicable laws or in any way promote, sanction or otherwise condone any conduct on the part of its police officers that would serve to deprive law abiding citizens of their constitutional rights. To the contrary, the evidence is completely opposite such an assertion.

d. There Is No Requisite Causal Relationship

Assuming, *arguendo*, that plaintiff could prove allegations of a custom, policy or deliberate indifference, he would then have to establish that the City's conduct was (1) the cause in fact and (2) the proximate cause of the constitutional deprivation. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). The appropriate inquiry is therefore whether the injury would have been avoided "had the employee been trained under a program that was

not deficient the identified respect." *City of Canton, supra*, 489 U.S. 378, 391. But-for causation is not enough; "[r]ather, the policy must be the proximate cause of the section 1983 injury." *Van Ort v. Estate of Stanewich*, 92 F. 3d 831, 837 (9th Cir. 1996). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of County Commissioners v. Brown, supra*, 520 U.S. 397, 405.

Since Plaintiff will be unable to offer any evidence whatsoever to support a finding that the City has a policy or custom which allows its police officers to violate people's constitutional rights, Plaintiff will be unable to prevail on his *Monell* claim against the City. Summary judgment should therefore be granted as to the Plaintiff's second cause of action.

IV. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Summary Judgment, or alternatively, Partial Summary Judgment.

Respectfully submitted,

Dated: October 12, 2007

RICHARD DOYLE, City Attorney

By: /S/
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Attorneys for Defendants, CITY OF SAN JOSE, ROBERT DAVIS and ADONNA AMOROSO

NO. 08-16757

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK BATES, Plaintiff-Appellant, v. CITY OF SAN JOSE, et al., Defendants – Appellees.	NOS. 08-16757 (Northern District of California, San Jose Division: C06-05302 RMW)

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I. CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Defendants/Appellees are not a corporate entity and have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

II. STATEMENT OF JURISDICTION

The District Court had Federal Question Jurisdiction in this case pursuant to 28 U.S.C. § 1331, as the case purportedly arises under the laws of the United States, specifically 42 U.S.C. § 1983. This Court has jurisdiction to entertain this Appeal pursuant to 28 U.S.C. § 1291.

The final judgment in the underlying case was filed on July 7, 2008. Appellant's Excerpts of Record ("ER") 000174 (docket no. 31). Appellant filed a timely Notice of Appeal on July 29, 2008.

III. STATEMENT OF ISSUES

A. Whether the District Court erred in granting Defendants' Motion for Summary Judgment on the basis of qualified immunity.

B. Whether the District Court erred in granting summary judgment in favor of Defendant City of San Jose ("City") on the basis of collateral estoppel.

IV. STATEMENT OF THE CASE

Appellant Frederick Bates ("Bates") alleges that his civil rights were violated by virtue of the fact that he was initially denied a permit to carry a concealed weapon by the City following his disability retirement from the City's Police Department. In the underlying lawsuit Bates asserted that his civil rights were violated despite the fact that, upon receipt of additional clarifying medical information from Bates relating to the nature of his disability, the City reversed its earlier decision and granted Bates a permit to carry a concealed weapon.

Defendants filed a Motion for Summary Judgment asserting that there was no constitutional violation and, in addition, even assuming a constitutional violation, Defendants were simply mistaken in initially denying Bates a permit to carry a concealed weapon, that mistake was made in good faith and, therefore qualified immunity protected them. In addition, the City asserted that Bates was collaterally estopped from pursuing his claims against the City by virtue of the fact that he had previously filed a Complaint against the City in the Small Claims division of the Superior Court of the State of

California based on the same set of facts, and judgment was entered in favor of the City and against Bates on that claim.

The District Court entered an Order Granting Defendants' Motion for Summary Judgment, which was filed on July 7, 2008 (ER 000165), and on that same date entered Judgment in favor of Defendants (ER 000174). Bates filed a timely Notice of Appeal on July 29, 2008. ER 000164.

V. STATEMENT OF FACTS

Bates retired as a Sergeant from the City's Police Department upon being granted a disability retirement in April 2004. ER 000166. The disability retirement was granted, in part, because the City could not accommodate work restrictions placed upon Bates by his physician to "avoid **psychologically** or physically stressful work." *Id.* (Emphasis added).

Upon receipt of this information, Defendant/Appellee Adonna Amoroso ("Amoroso"), then a Deputy Chief of Police of the City's Police Department, denied Bates a permit to carry a concealed weapon. The basis of the denial was California Penal Code § 12027.1(e) which prohibits the issuance of a permit to carry a

concealed weapon to any officer who has retired "because of a psychological disability."[1] *Id.*

Following the recommendation from Bates' physician that he was required to avoid "psychologically or physically stressful work," Amoroso made the determination that Bates fell within the provisions of this Penal Code section and denied him a permit to carry a concealed weapon. *Id.*

Several months later, the City's Police Department received clarifying information from Bates' physician stating that Bates did not in fact have a psychological disability and that he was an appropriate candidate to carry a concealed weapon. Upon receipt of this additional clarifying information, the Police Department reversed its earlier decision and granted Bates a permit to carry a concealed weapon in August 2004.

Thus, approximately four months elapsed between the time of Bates' disability retirement, in April 2004, and his obtaining a permit to carry a concealed weapon in August 2004. As a result of this, Bates asserts that his civil rights were violated.

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[1] California Penal Code § 12027.1(e) reads: "No peace officer who is retired after January 1, 1989, because of a **psychological** disability shall be issued an endorsement to carry a concealed and loaded firearm pursuant to this section." (Emphasis added.)

Thereafter Bates sued the City, only, in the Superior Court of California, County of Santa Clara Small Claims division, seeking to recover the $1,500 retainer he had paid to his attorney for purposes of helping him secure his Concealed Weapon Permit. *Id.* The State Court Small Claims division entered Judgment in favor of the City on this claim. *Id.*

On July 7, 2008, the District Court filed its Order granting Defendants Motion for Summary Judgment, ruling that the individual Defendants were entitled to qualified immunity and that Bates was collaterally estopped from pursuing his claim against the City. ER 000165 – ER 000172.

VI. SUMMARY OF ARGUMENT

Despite the ruling by the District Court that the denial of a Concealed Weapons Permit under California Penal Code § 12027.1 implicates a constitutionally protected interest, which is disputed by Appellees, the District Court nevertheless correctly ruled that on the undisputed facts presented to it the individual Defendants, Amoroso and the City's Police Chief Robert Davis ("Davis") were entitled to qualified immunity.

First, there was no evidence presented to the Court as to any role played by Davis in making the decision regarding the permit which Bates complains of. Moreover, as to Amoroso, any mistake she may have made was made in good faith and thus she is entitled to the protection of qualified immunity.

Additionally, the District Court correctly ruled that Bates' action against the City was barred by the doctrine of collateral estoppel due to the fact that he had previously sued the City in the Small Claims Division of the Santa Clara County Superior Court on the same set of facts, and had a judgment entered against him. Finally, although not separately stated as an issue presented for review, Bates has not set forth any evidence sufficient to allow him to pursue a civil rights claim against the City.

VII. ARGUMENT

A. STANDARD OF REVIEW

The Order of the District Court Granting Defendants' Motion for Summary Judgment is subject to *de novo* review. *Aguilera v. Baca,* 510 F.3d 1161, 1167 (9th Cir. 2007).

B. CALIFORNIA PENAL CODE § 12027.1 AUTHORIZES DENIAL OF A CONCEALED WEAPONS PERMIT WITHOUT A HEARING DUE TO PSYCHOLOGICAL DISABILITY

Bates contends that he was denied due process of law due to the City's denial to him of a permit to carry a concealed weapon following his retirement from the City's Police Department in April 2004. However, California Penal Code § 12027.1 specifically **prohibits** the issuance of such a permit to an individual who retires "because of a psychological disability." California Penal Code § 12027.1(e); emphasis added. In addition, when such a denial is based upon this section, the individual has **no right to a hearing** on this issue. See *Unland v. Block,* (1997) 59 Cal.App.4th 1537; emphasis added.

In *Unland,* an officer filed for a disability retirement for various reasons including "anxiety conditions sustained through the course of employment." The County Retirement Board granted the disability retirement, and the law enforcement agency thereupon denied him a permit to carry a concealed weapon because of a "psychological disability" under Penal Code § 12027.1(e).

In reviewing the history of Penal Code § 12027.1, the *Unland* Court noted that several amendments were made to the statute in 1988. According to the *Unland* Court, the amended statute created an **automatic denial** rule for officers who retired because of psychological disabilities and that such officers had no statutory right to a noticed hearing under the statute if they retire because of a psychological disability. *Id.* at 1544-1545; emphasis added.

Finally, the *Unland* Court noted that the legislature, in amending the statute in 1988 "...did not choose to define 'psychological disability' in section 12027.1, ...if the legislature had wished to define 'psychological disability'... it would have done so in the 1988 legislation." *Id.* at 1547. Therefore, based upon the *Unland* decision, automatic denial of the right to carry a concealed weapon is appropriate where the retirement is based upon a psychological disability, and such an officer has no right to a hearing regarding that denial.

C. EVEN ASSUMING, *ARGUENDO,* A CONSTITUTIONAL VIOLATION, THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

The District Court rejected Defendants' argument in their Motion for Summary Judgment that denial of a Concealed Weapons

permit is not a constitutional violation. In making that argument, Defendants cited *Association of Orange County Deputy Sheriffs v. Gates,* 716 F.2d 733 (9th Cir. 1983) where the Court, in reviewing and earlier version of California Penal Code § 12027.1, held that the requirement of "good cause" prior to the denial of a weapons permit does not create a constitutionally protected interest. *Id.* at 734.

Defendants contend that the District Court incorrectly held that the 1988 Amendment to California Penal Code § 12027.1, which added a hearing requirement when, no psychological disability was involved, created a constitutionally protected interest. ER 000169. The District Court also noted correctly that "Plaintiff has now received his concealed weapons permit under section 12027.1 without a good cause hearing… it would certainly appear that no further process is due at this point." ER 000170.

In *Association of Orange County Deputy Sheriffs v. Gates, supra,* this Court held, in deciding a case under a prior version of the Penal Code section at issue in this case, that "…the requirement of 'good cause' prior to the denial of a weapons certificate **does not create a constitutionally protected interest**, …" 716 F.2d at 734; emphasis added. The Court also rejected appellants' argument in that

case that the denial causes a loss of liberty without due process of law. *Id.*

Despite finding that the denial of a concealed weapons permit implicated a constitutionally protected interest, the District Court nevertheless correctly ruled that Defendants Amoroso and Davis were entitled to qualified immunity.

"The Doctrine of Qualified Immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 815 (2009) (quoting, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). "Qualified Immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.

The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id.*

citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (J. Kennedy, dissenting).

To determine whether a Defendant is entitled to qualified immunity, the Court must first consider whether the facts, taken in a light most favorable to Plaintiff, show that the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As previously noted, the District Court found that the Defendants conduct herein implicated a constitutional right.

The second step in the qualified immunity analysis is to determine whether the right the official is alleged to have violated was clearly established such that it would be clear to a reasonable officer that his or her conduct was unlawful in the situation confronted. *Id.* at 202.

It is not necessary that a prior decision rule "the very action in question" unlawful for a right to be clearly established. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, "the contours of the right must be sufficiently clear so that a reasonable official would know that his conduct violates that right." *Browning v. Vernon*, 44 F.3d 818, 823 (9th Cir. 1995). An alternative expression of the "clearly established" law standard is that the law gave the official "fair

warning." See *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003).

As noted by the Court in *Saucier v. Katz, supra,* "officers can have reasonable, but mistaken beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations Court will not hold that they have violated the constitution." *Saucier v. Katz, supra*, 533 U.S. 194, 205. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine… will apply to factual situation the officer confronts… If the officer's mistake as to what the law requires is reasonable, …the officer is entitle to the immunity defense." *Id.* at 205. "This accommodation for reasonable error or mistaken judgment exists in part because officials should not always err on the side of caution due to a fear of being sued." See *Hunter v. Bryant*, 502 U.S. 224 (1991).

Under *Saucier*, even if the Court determines that the circumstances, seen in a light most favorable to the Plaintiff, show the lack of reasonableness on the part of the officer, the Court must

further determine whether the officer, either by mistake of law or fact, could reasonably have believed that his or her conduct did not violate a clearly established right. See also *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001); *Marquez v. Gutierrez*, 322 F.3d 689, 692-693 (9th Cir. 2003).

In the present case, even when looking at the facts in a light most favorable to Bates, it is clear that any mistake made on the part of Amoroso and/or Davis was reasonable under the circumstances. As Bates notes in his Brief, at page 16, "...the *Saucier* analysis is not about the information Amoroso had at the time she made her decision. Rather it is about the analysis of whether a reasonable officer could have believed his conduct was lawful." The undisputed facts of this case are that the medical information reviewed by Amoroso in making her determination that Bates had a "psychological" disability and was therefore not entitled to a Concealed Weapons Permit was ambiguous, at best.

As Bates himself notes in his Brief, at page 8, after review of a portion of the medical information regarding Bates' disability retirement application Amoroso could not accommodate his work restrictions to avoid "**psychologically** or physically stressful work."

(Emphasis added.) The law which Amoroso relied upon in making her determination was quite clear. California Penal Code § 12027.1(e) provides that "no peace officer who is retired after January 1, 1989, because of a **psychological disability** shall be issued an endorsement to carry a concealed and loaded firearm pursuant to this section." (Emphasis added.)

Moreover, as discussed, *supra*, the law at the time that Amoroso made her decision to deny Bates a Concealed Weapons Permit was also clear regarding the fact that no hearing was required pursuant to California Penal Code § 12027.1, the section Amoroso relied upon in her determination. See *Unland v. Block*, *supra*.

What former Defendant Tuck Younis ("Younis") did several months later when supplied with additional clarifying medical information is not relevant to the determination of whether Amoroso is entitled to qualified immunity. As previously noted, after the initial denial, Bates submitted additional clarifying information pertaining to the nature of his disability to Younis, Amoroso's successor. Based upon review of this additional information, Younis reversed the earlier decision made by Amoroso and granted Bates his Concealed Weapons Permit.

The District Court correctly concluded that "...a reasonable official under the same circumstances [as Amoroso] would not know that her conduct violated Bates' right to a good cause hearing, particularly in light of *Unland*, which held that subsection (e) created an automatic denial rule for officers who retired because of a psychological disability." ER 000171.

For these reasons, this Court should uphold the granting of Summary Judgment on the basis of qualified immunity in favor of Defendants Amoroso. In addition, as there was no evidence presented to the District Court regarding Chief Davis' role in this matter, this Court should also uphold the granting of Summary Judgment in his favor.

D. THE DISTRICT COURT CORRECTLY RULED THAT BATES' ACTION AGAINST THE CITY WAS BARRED BY COLLATERAL ESTOPPEL

Bates' second issue presented to the Court is that the District Court was incorrect in granting Defendants' Motion for Summary Judgment as to the City on the basis of collateral estoppel.

"Issue preclusion by collateral estoppel prevents re-litigation of issues argued and decided in prior proceedings." *Rodgers v. Sergeant Controls and Aerospace*, 136 Cal.App.4th 82, 89 (2006) (citing

Castillo v. City of Los Angeles, 92 Cal.App.4th 477, 481. Moreover, as the District Court noted, "Collateral estoppel as a defense need not be alleged in an answer or other responsive pleading, *Rodgers*, 136 Cal.App.4th at 89, and that it is sufficient that Defendants raised the issue of collateral estoppel in their Motion for Summary Judgment." ER 000171.

In finding in favor of Defendant City on the basis of collateral estoppel, the Court cited the undisputed facts that Bates' sued the City in the Small Claims division of the Santa Clara County Superior Court alleging that "he was deprived of his civil rights because of the denial of a Concealed Weapons Permit upon his retirement." ER 000172. The Court also noted that the Small Claims Court issued a Notice of Entry of Judgment in favor of Defendants, denying Bates' claim on January 30, 2006 and that this constituted a "final judgment against Bates and in favor of the City on the merits of his claim that his rights were violated." ER 000172.

In making this finding the Court noted that "…collateral estoppel has been found to bar re-litigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be re-

litigations; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].' Based upon this test, the District Court was correct in holding that the collateral estoppel test was satisfied and that Bates' was precluded from re-litigating his claim on the merits against the City in the District Court.

E. EVEN THOUGH NOT RAISED AS A SEPARATE ISSUE FOR REVIEW, BATES NEVERTHELESS ARGUES THAT HE MAY PURSUE A *MONELL* CLAIM AGAINST THE CITY

As previously noted, despite the fact that Bates sued the City in Small Claims Court alleging that his civil rights were violated, and that a final judgment was entered against him, he nevertheless now argues that he may pursue a claim against the City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

In the second cause of action in the underlying lawsuit, Bates attempted to assert a Civil Rights Claim against the City (otherwise known as a "*Monell*" claim) pursuant to 42 U.S.C. § 1983. However, as discussed below, there was no evidence presented to support any *Monell* claim against the City in this case.

In his Complaint, Bates generally alleged that the City, through the individually named Defendants, undertook various actions which he asserted "represented official municipal policy and practice."

The requirements for municipal liability under § 1983 were originally set forth in *Monell v. Department of Social Services,* 436 U.S. 658 (1978) and subsequent cases. There is no evidence in this case to meet that standard. At best, the allegations of Bates' Complaint, and the undisputed facts, attempt to assert liability against the City solely under a *respondeat superior theory* as a result of the actions of the individual Defendants, Amoroso and/or Davis.

1. Liability Cannot Be Predicated On *Respondeat Superior*

In *Monell v. Department of Social Services, supra*, the United States Supreme Court held that *respondeat superior* liability may not serve as the basis for imposing 42 U.S.C. § 1983 liability against a municipal entity. That is, a public entity cannot be liable under such a theory solely because it employs a tortfeasor. Later cases have consistently refused to hold municipalities liable under a theory of *respondeat superior*. See *Oklahoma v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

"Instead, in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997). "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the employee acted culpably." *Id.* at 406. Moreover, "an isolated incident caused by simple negligence" does not give rise to liability under § 1983. *Erdman v. Cochise County*, 926 F. 2d. 877, 882 (9th Cir. 1991).

2. There Is No Custom or Policy Upon Which To Base A *Monell* Claim

"It is only when the execution of the government's policy or custom ...inflicts the injury that the municipality may be held liable under § 1983." *Monell, supra*, 436 U.S. 658, 694; *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987). In order to constitute a governmental "custom," the practice of unconstitutional misconduct must be "so common and well settled as to constitute a custom that fairly represents municipal policy" and "actual or constructive

knowledge of such custom must be attributable to the governing body or to an official to whom the body had delegated policy making authority." *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. en banc), reh'g denied, 735 F.2d 861 (5th Cir. 1984), cert. denied 472 U.S. 1016 (1985).

Bates cannot establish a direct causal link between some municipal policy or custom and the alleged constitutional deprivations. Even assuming that a constitutional violation had occurred, absolutely no evidence even suggests any constitutional injury occurred *because of* some City policy or custom amounting to misconduct intending to deprive its citizens of their constitutional rights. "Nor, without more, would a city automatically be liable under § 1983 if one of its employees happened to apply the policy in an unconstitutional manner, for liability would then rest on *respondeat superior*." *City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

The City cannot possibly be liable under 42 U.S.C. § 1983 in this action because there is no evidence, that: (1) the City had a policy or custom which allows for the existence of any unconstitutional misconduct by its police officers; (2) the City's policy making officials were intentionally indifferent to any alleged unconstitutional

misconduct or that they tacitly authorized any allegedly unconstitutional misconduct; or (3) that the City had some "policy" or "custom" that actually caused the alleged constitutional deprivation of which Bates now complains. See *Monell v. Department of Social Services, supra.*

3. There Is No Evidence of Deliberate Indifference

In addition to the other factors discussed above, in order to prevail on a *Monell* claim, Bates must produce evidence which amounted to a "deliberate indifference" to the rights of persons with whom the police come into contact. *City of Canton, supra*, 489 U.S. 378, 389. In this case, there is no such evidence. Only where the municipality's alleged failure to instruct, supervise, control or discipline reflects a "deliberate" or "conscious" choice by the City and therefore constitutes a policy, can the City be held liable under § 1983. *Id.*

The deliberate indifference standard was specifically adopted by the Supreme Court to ensure that Civil Rights claims against municipalities, such as the one presented by Bates, attain a certain level of gravity before a municipality can be compelled to defend

itself at trial. *City of Canton, supra.* Stated simply, Bates has not presented any facts that could establish that his alleged injury was the result of a policy or custom that encourages its officers to unlawfully deny individuals their due process rights or to commit any other unlawful acts.

Bates' Civil Rights Cause of Action against the City is clearly grounded upon a *respondeat superior theory* based upon the actions of its police officers, which is not permissible. It cannot be established that the City's policies and procedures are inconsistent with applicable laws or in any way promote, sanction or otherwise condone any conduct on the part of its police officers that would serve to deprive law abiding citizens of their constitutional rights. To the contrary, the evidence is completely opposite such an assertion.

4. There Is No Requisite Causal Relationship

Assuming, *arguendo*, that Bates could prove allegations of a custom, policy or deliberate indifference, he would then have to establish that the City's conduct was (1) the cause in fact and (2) the proximate cause of the constitutional deprivation. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). The appropriate inquiry is therefore whether the injury would have been avoided "...had the employee

been trained under a program that was not deficient in the identified respect?" *City of Canton, supra*, 489 U.S. 378, 391. But-for causation is not enough; "[r]ather, the policy must be the proximate cause of the § 1983 injury." *Van Ort v. Estate of Stanewich*, 92 F. 3d 831, 837 (9th Cir. 1996). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of County Commissioners v. Brown, supra*, 520 U.S. 397, 405.

Bates has offered no evidence whatsoever to support a finding that the City has a policy or custom which allows its police officers to violate people's constitutional rights, or that any such policy or custom proximately caused the alleged constitutional deprivation. He has therefore not met the test for a *Monell* claim against the City. Therefore, the District Court's ruling in favor of the City on Summary Judgment should be upheld.

VIII. CONCLUSION

For all the foregoing reasons Defendants/Appellees respectfully request that this Court uphold the District Court's decision granting summary judgment in their favor.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: April 29, 2009

By: s/Michael J. Dodson
MICHAEL J. DODSON
Sr. Deputy City Attorney

Attorneys for Appellees,
CITY OF SAN JOSE, ROBERT DAVIS, ADONNA AMOROSO and TUCK YOUNIS

detective bureau. But, in any case, his job duties are not any different from what's usual and customary for his job as -- I believe, he was a police sergeant at the time. So he is not on any restrictions at all, according to November the 20th, 2003.

Q. And why would that memorandum have been generated to Ed Overton, whether it's from you or someone in your department? In other words, was it done in response to something or --

A. Sure. Because Ed Overton let us know that Fred put in an application for a service-connected disability retirement. And Ed wanted to know, "So what duties is he performing right now? What's happening with this guy?" Because he put in an application.

So we are just responding to him saying not doing anything different than any other police sergeant would do. That is all it says.

Q. Thanks. And do you have an independent recollection, without looking at documents, as to what the nature of Fred Bates' disability was?

A. Yeah.

Q. What was that?

A. Yes.

Q. What's your recollection?

A. That he had a situation with his heart that was

affected by psychological stress, heart condition of some type.

Q. Do you remember ever reviewing his application for service-connected disability retirement?

A. Not the application, no.

Q. Do you recall ever reviewing medical reports that were either generated by the city or another doctor relative to his condition?

A. The report itself, no. I wasn't privy to that information.

Q. In this particular memo, page 60, I think you indicated that someone else did sign it for you.

A. Yes, Captain David Kenneller.

Q. And it's your belief because --

As you sit here today, you don't remember this actual memorandum, do you?

A. No.

Q. Would it be common practice for a captain who, I take it, is someone under your supervision --

A. Yes.

Q. -- in the same department, to generate this form memorandum and sign it for you?

A. That is the captain who actually works for me who oversees the personnel unit. So yes. The answer is yes.

"required" is the operative word. It's voluntary. We do ask them to show up for a group session to just air out some things. But they don't have to say anything. They don't have to participate. They just have to be there. That is the only requirement we have.

That is unfortunate. That is just the way it is when you're dealing with unions and individuals that are concerned about what other people think of them.

So the only time we do a fitness-for-duty, which is what you're describing, which is a mandatory situation, is when we suspect that somebody has had -- is having psychological stress, and there is evidence of it, as evidenced by behavior and/or they tell us they are. And that is when they are sent mandatorily to fitness-for-duty.

Q. Thank you. Are you aware of Fred Bates, from the year 2000 to the time he was retired out, being required to have a fitness, mental fitness examination?

A. No, I'm not.

Q. Now, is it your understanding that based on the memorandum we discussed on page 10 that this would trigger the city's acceptance of Mr. Bates -- Sergeant Bates' application for disability retirement?

A. It would be a very big part of their decision-making process.

Q. And did you understand at the time you wrote this that this was a medical condition that Fred Bates was suffering, causing the work restriction?
A. No, because it says "psychological stress." So I wasn't sure, you know, what --
Psychological stress is psychological stress. So I didn't know there was something else to this.
Q. Again, you didn't look into his medical records, right?
A. I'm not privy to those.
Q. And you weren't aware of any information that he had a psychiatric diagnosis of any certain psychiatric condition, right?
A. I wasn't aware of one. I just know what the doctor said his restrictions were.
Q. To avoid psychologically or physically-stressful work, right?
A. Yes.
Q. Did you understand that to be a psychological diagnosis of a condition?
A. I'm trying to think what I thought then.
Q. Sure.
A. Yes.
Q. Really? Have you had training in psychology?
A. I just know that it says "psychological stress."

It wasn't a diagnosis per se. Like no one is going to tell me the guy is bipolar. They are not going to say that. They are not going to say this guy is suffering from depression. They are not going to say that. The doctor is not going to come out with that. He is just going to say "psychological stress."

Q. And it's not your job to interpret whether that is a psychological or medical condition that the officer is suffering from, right?

A. No.

Q. Am I right?

A. I'm not a doctor. So I just know what the restrictions were.

Q. And my question is: Isn't it true that you're not to interpret those limitations as to whether someone has a psychological condition or a medical condition, correct?

MR. DODSON: Are you speaking in terms of the application for disability retirement when you ask that?

MR. KIRCHICK: It is in conjunction with his application for disability retirement, which is why this memorandum was written.

MR. DODSON: That is all I wanted to clarify.

THE WITNESS: Right. You are correct.

BY MR. KIRCHICK:

Q. Okay. And you don't have privy to medical records or psychological records to help your understanding, right? We have covered that.

A. Correct.

Q. Okay. Did you understand that his disability retirement was a medical disability as opposed to a psychological disability?

A. No.

Q. Was that something that would be important for you to know, or did it even matter to you in terms of your job function?

A. It wouldn't matter in terms of my job function.

(Discussion off the record.)

BY MR. KIRCHICK:

Q. I'm going to try and summarize your knowledge of documentation regarding the disability of Frederick Bates. Okay?

A. Okay.

Q. Other than the two memorandums that you signed, is it fair to say that up to his retirement actually occurring, you did not review any other documentation relative to Frederick Bates' application for disability retirement?

A. Other than Dr. Das' medical restrictions.

Q. Would you receive that in the form of a medical

permit?
A. Yes.
Q. And how did you participate in that decision?
A. I ultimately made that decision.
Q. It's signed by someone else. Let me just get that, and we can --
There we go. I'm going to show you page 68, and it looks like it's a copy of a retired ID card.
A. Okay.
Q. Show you that. Could you explain what that is when you've had a chance to look at it.
A. This is the normal application for a retired ID card.
Q. Can I just stop you there for one sec? I'm sorry to interrupt.
Does that card get completed by the retired officer after he has been granted the retirement?
A. Yes.
Q. All right. Thanks go. Ahead and continue.
A. And the officer -- and the sergeant, in this case, is assisted in completing this. And then there is a CCW approval section which is to be completed by investigating personnel only. And it has to be signed by the personnel commander. And in this particular -- in this particular case it was disapproved, no CCWs

authorized, and it's signed by Sergeant Bruce Toney, number 1985. And Sergeant Toney was the acting lieutenant of personnel. Lieutenant Savage, who was in charge of personnel at the time, was back in Washington DC. He was working for Homeland Security, on loan there for six months.

And Sergeant Toney and I discussed Fred's case, the reason for his disability retirement being granted. That included psychological stress. And under that circumstance, based upon that medical restriction and approval, basis of approval, I had Bruce Toney deny his request for a CCW.

Q. What did you consider -- tell me everything you considered other than what -- if there is anything in addition to what you've said, anything else you considered in deciding to deny his CCW permit.

A. Nothing else.

Q. Did you look at his medical records?

A. No. I'm not privy to those.

Q. Did you look at all at his disability file?

A. I'm not privy to that either.

Q. Did you know that he retired on a medical disability as opposed to a psychological disability?

MR. DODSON: Assumes facts not in evidence. You can answer.

A. I believe the answer would be no.
Q. There is no --
A. There is no one else that I would talk to about it.
Q. So this decision is solely your decision for all officers that retire?
A. Yes.
Q. Is this your job duty?
A. Yes.
Q. And it's your independent sole decision?
A. Yes.
Q. Is it subject to any review?
A. Chief of Police.
Q. And then what?
A. That is it.
Q. How many decisions to approve or disapprove CCW permits did you make for retired police officers in your career?
A. About 300.
Q. You ever deny them?
A. Yes.
Q. About what would you say the breakdown is?
A. I denied four for psychological stress, two for physical limitations, maybe three. One of those I was going to hold a hearing, and I think we were about to

hold a hearing, in fact, and the officer presented additional information that enabled us to come to the conclusion that I should go ahead and grant it. There was additional information coming forward.

Q. So out of about 300 you've denied about seven or eight. Is that fair?

A. No. Probably about six, because one I overturned.

Q. And in all those was it done similarly to your decision regarding Fred Bates' CCW, in that you didn't look at any medical records, you didn't look at the disability application itself, you didn't look at the personnel file of the officer, and you made the sole decision?

A. Right, based on what happened at the -- usually at the Retirement Board.

Now, remember, I did say that this was after discussion with the lieutenant, who would go to the disability retirement board meeting and listen to the discussion there and also a review of the medical restrictions that were placed on the individual.

Q. So is it your understanding that Sergeant Toney went -- or is it Toney or Toman?

A. Toney, T-o-n-e-y.

Q. Was it your understanding that Sergeant Toney

went to the disability hearing for Fred Bates?
A. Yes.
Q. And he came back and reported to you about what that was?
A. Yes.
Q. Did he explain to you that what he learned was that Mr. Bates had a longstanding history of hypertension?
A. I don't recall.
Q. Did he go back to you and make it clear to you that the disability was a medical disability and not a psychological disability retirement?
A. No.
Q. Did he go back -- did Sergeant Toney explain to you that he learned that as a result of the hypertension that Mr. Bates suffered from he actually had a heart enlargement as well?
A. No.
Q. Did he come back and tell you that his disability retirement application was approved?
A. Yes.
Q. So what I'm hearing is you don't know -- again, even after being told that information, you didn't know whether it was a psychological disability or a medical disability retirement, correct?

A. I had heard that was -- go ahead.

MR. DODSON: I'm just going to object. It misstates her testimony and assumes facts not in evidence. But you can answer.

THE WITNESS: Could you ask the question.

BY MR. KIRCHICK:

Q. I was about to ask it again anyway.

Prior to making your decision about the CCW permit, did you have knowledge that Sergeant Bates was retired on a medical disability?

A. No.

Q. Did you believe that he was retired on psychological disability?

A. Yes.

Q. You did? What was the basis of that belief?

A. Psychological stress.

Q. That is not what I asked.

A. Okay.

Q. Are you familiar that there are psychological disabilities and that there are medical disabilities?

A. Yes.

Q. That's your understanding, there are two types of disabilities?

A. Yes. But this one was based on psychological stress.

answer his questions, and that is what I really remember for sure.

Q. So when he said, "Well, I wasn't retired on a psychological disability," did you say, well, anything like, "Can you show me anything that would justify what you're telling me," or was it just --

A. I can't remember everything in the conversation.

Q. So you were telling him essentially, "You don't have a hearing, right, Fred, because you're on a psychological disability." Right?

A. Right.

Q. And he was saying, "Well, I wasn't on a psychological disability," so there is essentially a conflict right there, right?

A. Well, I was saying that, "Hey, one of your restrictions was for psychological stress. And that is part of what you used to get a disability retirement. And now you're saying you're not suffering from psychological stress. So which" -- "what is it? You know, if you're suffering from psychological stress, I can't give you a CCW. But you did get a retirement."

Q. The Penal Code section doesn't say that if you're suffering from psychological stress that you don't get a CCW, right?

A. Well, you're seeing it differently from what I'm

seeing it. It says "psychological disability."
Q. My question is: The Penal Code doesn't say if someone -- if an officer has a work restriction to avoid psychological stress, that they don't get a CCW, correct?
A. They don't use the term "stress." They use the term "disability." So he got a disability retirement based on psychological stress.
Q. That's your understanding?
A. Yes.
Q. Now, when Fred said that wasn't true, that your understanding was mistaken, did you do anything to look into that?
A. Other than maybe check with the lieutenant. But other than that, I don't recall.
Q. Did you offer Mr. Bates to provide you with his own medical records to show you that he did not -- medical records or application for a disability retirement to show you that, in fact, it was a medical disability and not a psychological disability?
A. I don't remember.
Q. Any time thereafter did you ever offer him the three-member hearing to allow him to appeal the denial of your decision?
A. No. It wouldn't be applicable based on what I based the decision on.

Q. That is true. That is true.

MR. DODSON: Is that a judicial admission you just made, agreeing with her statement?

MR. KIRCHICK: Jury instruction. Comments of counsel are not evidence. I love that.

MR. DODSON: Just asking.

MR. KIRCHICK: I love that instruction. I can ask any question at all and make any statements. It is not evidence.

BY MR. KIRCHICK:

Q. So just to sum up, after Fred Bates told you that you were wrong, that it was not a psychological disability in his opinion, you did nothing other than maybe talk to a lieutenant to see whether or not he was correct or you were correct?

A. Correct.

Q. And you don't recall anything about the conversation with the lieutenant in that regard?

A. It has just been too long. Sorry.

Q. And what lieutenant is that? That's okay..

A. That would have been the acting lieutenant, Bruce Toney.

Q. And your decision is the final decision, correct?

A. Yes.

CITY OF SAN JOSE CAPITAL OF SILICON VALLEY DEPARTMENT OF RETIREMENT SERVICES	Title APPLICATION FOR RETIREMENT	Do. ent No. Form RP-2	Rev. 7/25/2002	Page 2 of 2

RECEIVED
NOV 12 2003
by RETIREMENT

RECIPROCITY:

COMPLETE THE FOLLOWING IF YOU ARE A MEMBER OF ANOTHER CALIFORNIA PUBLIC RETIREMENT SYSTEM AND YOU HAVE/ARE CLAIMING RECIPROCITY. NOTE: YOU MUST RETIRE CONCURRENTLY TO QUALIFY FOR RECIPROCAL BENEFITS.

Name of System	[redacted]	[redacted]
CalPERS	5-26-01 To 3-9-84	7-1-04

DISABILITY RETIREMENT APPLICANT ONLY

CONSENT TO RELEASE INFORMATION

I request that the Retirement Plan make such investigation as it may deem necessary to establish the facts in my case. My personal physician, your Medical Director, and all other persons having knowledge of pertinent facts are hereby authorized to disclose them to you or to your agents for the purpose of establishing the kind and degree of my disability. I hereby also specifically consent to the release of any and all alcohol, drug abuse, or psychiatric treatment records under the same conditions as outlined above.

I understand my responsibility to the Retirement Plan in regard to engaging in a gainful occupation and the need to report all income from such occupation until I attain age 55 (Federated Retirement Plan) or until service plus retirement equal 20 years (Police and Fire Retirement Plan).

(PLEASE ATTACH ALL INDEPENDENT MEDICAL REPORTS)

MY DISABILITY IS: INJURY TO HEART AND CARDIOVASCULAR SYSTEM
OCCURRED ON: 5-30-01

ATTORNEY'S NAME REPRESENTING YOU FOR RETIREMENT *: [redacted]

ADDRESS: [redacted], CA. 95030

PHONE NUMBER: (408) [redacted]

*DISABILITY INFORMATIONAL PACKET WILL BE SENT TO THE ATTORNEY LISTED ABOVE.

RETIREE'S SIGNATURE: Edward Bates DATE: 11/10/03

Bates, Frederick-Retirement Tape

U: Unknown person.
J: Jim Jeffers
FB: Frederick Bates
DD: Dr. Dos

U: … retirements, we have a no-service retirements this morning under item two under disabilities uh, item 2-A, Frederick Bates….

[silence for approximately 1 min]

U: … of age with 20 years of service. Medical reports from Dr. Ngdated 2-7-04, 8-24 and 8-36-01. From Dr. Smith dated 12-18, 9-30, 7-37-12903-10-30-6-12 and 1-24-02. From Dr. Berail dated 8-13-01, Dr. Dos who wrote the report for the retirement board is dated 3-17-04 and he concludes that the sergeant should avoid psychological, physical and stressful work His current status is that he is on uh, disability leave, and has been since the time of his application. You should… excuse me… you should have a, there was a conflicting statement made by hmm, Dr. Ng, and you should have a clarifying memo in front of you.

U: That's correct and for the record, Mr. Bates is being represented by Jim Jeffers, Good Morning.
J: Good Morning.
U: Dr. Dos, you wanna take this, take this packet?
DD: Yes. Mr. Bates has had a long standing hyper-tension which has progressively been more difficult to control in spite of medications and lifestyle changes so in his best interest, his physician felt that he should have a relatively less demanding lifestyle including occupation and other activities in order to prevent the bad outcomes that could happen with poorly controlled blood pressure, being primarily strokes, hmm, and/or heart problems, or mild cardial infarcion.

U: Thank you doctor. Mr. Jeffers, you want to give us a brief statement please?
J: Uh, I have nothing further to add except that the hyper-tension has been long standing and it is currently not in control. Uh, both Dr. Smith, his treating doctor, and Dr. Ng, his evaluating doctor believe that he can only work at a job that has minimal amount stresses with disability retirements requested.
U: Thank you One question, uh, guess it would be Dr. Ng's report dated September 2001, it's page two, it's probably the first third of the packet. He goes on to state, uh, in terms of his qualified injured worker status, I do think he can continue to work in his current capacity. I therefore do not think he is a Q.I.W. Can you share with me what's changed from that date to currently because Dr. Ng also now states that uh, that he is qualified for… he doesn't believe that anymore….

J: Hmm... Mr. Bates was seen by Dr. Ng for a medical evaluation, it was a forensic evaluation. He was not being treated for his hyper-tension at that point. It was after, that he started treatment with uh, Dr. Smith. At... as I understand Mr. Bates' situation, maybe he can fill us in, he was working in internal affairs at that time and hmm, the stress was difficult for him and he transferred over to school safety which is considered to be a less stressful position. And uh, even at that position he taking off work by his treating physician. He believe he went to, he left internal affairs sometime in the year 2002.

U: Thank you. Ken?

K: You know I'm trying to read all this and I got pretty confused I just, but I just, if someone can simply draw a line for me and show me how the raised blood pressure is related to our job then I'm okay but I can't, I don't see that you know? Hmm...

J: Hmm, I thought Dr. Ng addressed that ...

K: He said that hmm, something about a left atrial enlargement and at least part of his poorly controlled stage two or stage three hyper-tensions presumed due to his work. I don't know what that means.

J: Which page are you reading?

K: Oh gosh, there's no page. It's the hmm, February 7th, let's see, wait a minute... page... page 12 of the February 7th, 2004 hmm... the fourth, the last, the very last paragraph down, the fourth line down...

J: Oh I see, he hmm... remember there is a different standard of proof required in a worker's compensation claim...

K: Right.

J: And in a retirement claim, and I think the first sentence is that this man does have heart trouble according to the labor code for worker's compensation purposes, and then hmm, that the presumption would be applicable, and I think that's what that sentence means.

K: So this doctor is saying that the high blood pressure is related to heart disease?

J: Yes.

K: Doctor?

U: Well hmm, I think if you look on page 13 of the February hmm, 7th, 2004, for Dr. Ng, I asked Dr. Ng to list the contributing factors to the blood pressure, and hmm, high, a lot of is genetic. And he also considers the primary factor to be stress factors from work, and so the issue is to decide what level of stress is contributing, and... because he appeared, Dr. Ng opines that that's the major factor contributing to his hyper-tension, and he doesn't seem to have, Mr. Bates doesn't appear to have any significant lifestyle factors hmm, particularly with diet, exercise, and smoking, he doesn't seem to have any of those. The only real issues are personal stress in his life, as well as possibly ethnicity, and then age of course is a more important one.

K: So out of one, two, three... seven possible causes of hyper-tension, Dr. Ng has removed all but his age and his job as being hmm, the...

U: Hmm, yeah essentially he did talk about possibly recent stress in his personal life so there's one personal, work stress, hmm, weak history so small contribution from family history or...

K: Okay.

U: ... genetics and then ...

K: Thank you.

U: Any further comments to the board?... Move for approval.
[everyone in the background replies in unison, however what word they say is inaudible]
U: Motion on a second, any further comments? Saying none, all those in favor, opposed, the motion carries.

J: Thank you.
U: Freddy take care of yourself, best of health to you.
F: Thank you.

[End of Discussion regarding Frederick Bates]

the long-term assumption is not something to be changed regularly or frequently. We need to see if the fundamental long-term outlook for the market changes between now and the next valuation – not if we will be able to get 8% between now and the next valuation. She also discussed the actuarial smoothing method, the actuarial practice of not necessarily having "100% invested" as a goal, salary and investment assumptions and keeping the Plan funded appropriately.

The Chair asked about lowering the expected investment return to 7.5% and the costs to the employee and to the City.

Ms. Chapman stated she did the numbers for the pension only. It would also have an impact on the medical costs. For the current valuation for the pension only, the contribution rate is 21.77% of pay. To change the rate to 7.5%, it would jump to 30.83% of pay. It would be about an 8.5% of pay increase to go to 7.5%. The employee rate would go from 8.21% of pay to 9.4% of pay.

The Chair recommended the item be deferred to next month. He requested the item be e-mailed to all the Board members.

Ms. Chapman stated she would also include the numbers for the medical part.

M.S.C. Muncy/Brill) to approve deferring the item. Motion carried 7-0-0.

(*Dr. Das* arrived at 9:42 a.m.)

RETIREMENTS (Out of order)

Service – None.

Disabilities

Frederick Bates, Sergeant, Police Department. Request for Service-Connected Disability Retirement effective April 1, 2004; 20.05 years of service. He is 49 years of age and makes application based on injury to heart and cardiovascular system. His medical restrictions include the following: should avoid psychologically and physically stressful work. The current status is that he is on disability leave and has been since the time of his application.

The Secretary stated the necessary documents for Police Sergeant Bates have been submitted and verified.

For the record, the following medical reports have been received:

Doctor's Name	Report Date
[redacted]	8/26/01; 8/31/01; 2/7/04 & 3/29/04 (memo) 1/24/02; 6/12/02; 10/30/02; 1/29/03; 3/7/03; 9/30/03 & 12/18/03
William Brall	8/13/01
Retirement Medical Director	Report Date
Rajiv Das	3/17/04

Exhibit Z

Police Sergeant Bates was present and was represented by [redacted]

Dr. Das summarized the medical reports.

The Board discussed the medical condition and reports with [redacted]

(M.S.C. Muncy/Dando) to approve item. Motion carried 7-0-0.

CITY OF SAN JOSÉ, CALIFORNIA

201 W. MISSION STREET
P.O. BOX 270
SAN JOSE, CALIFORNIA 95103-0270

August 26, 1999

[redacted]

Dear Mr. [redacted]

I received your letter postmarked August 24, 1999 regarding the matter of a CCW endorsement. You are not entitled to a hearing on this matter on two grounds.

First, your request was not timely. Penal Code Section 12027.1(3) states in part that a retired police officer has 15 days following the denial to request a hearing. You were notified of the denial on August 5, 1999 by Personnel and, therefore, had only until August 20th to make the request. You failed to do so, thereby forfeiting your right to a hearing.

Secondly, Section 12027.1(3)(e) forbids the issuance of a CCW endorsement for peace officers who retire with a psychological disability, and is not subject to a hearing. You and your doctor made assertions and submitted medical evidence of industrially-caused psychological disabilities to the Retirement Board. This fact was read into the record at your retirement hearing, was discussed during previous hearings, appears on your application for retirement, and is public information. Also on the record is the fact that the Workman's Compensation Appeals Board approved your claim of a psychiatric disability and you are currently undergoing treatment.

Your request for a hearing on this matter is DENIED.

ADONNA J. AMOROSO
Deputy Chief
Bureau of Administration

[redacted], M.D.
A PROFESSIONAL CORPORATION
[redacted]
[redacted] CA 95032

(408) [redacted]

DEA # [redacted]

LIC. # _____

NAME fred bates 12/18/03 AGE _____

ADDRESS re:retirement DATE _____

℞ work related stress
city san jose police;
doi: ct 5/30/01; CLAIM 01945jp50
dob 2 28 55; ss 524 02 2613
TO WHOM IT MAY CONCERN:
MR FRED BATES is a 48 yr old police officer. He has significant high blood pressure and it is difficult to control even on limited work dut and on medications; It would benefi him to consider early retirement.
If there are any questions, please feel free to contact me.
sincerely yours,
[redacted] MD.

RECEIVED
DEC 22 2003
by RETIREMENT

Refill _____ times

DO NOT SUBSTITUTE ☐ [redacted] MD

To ensure brand name ... box.

EXHIBIT V

CITY OF SAN JOSE - MEMORANDUM

INTERDEPARTMENTAL MEMO

TO: Police and Fire Retirement Board
FROM: Rajiv Das, MD

RE: Frederick Bates
Police Sergeant
DATE: 3/17/04

Identification

Mr. Frederick Bates is a 48 year old male employed as a police sergeant by the City of San Jose who is applying for a service connected disability retirement for injuries suffered to his heart.

History of Present Illness

Mr. Bates was originally diagnosed with hypertension approximately 10 years ago and was placed on medications. He filed a claim for his hypertension in 2001. He has been on medication ever since and treated by [redacted] MD. His blood pressure was controlled by medications until 2003 when his blood pressure became more difficult to control even with adding and modifying his medication schedule. His diastolic blood pressures have been consistently averaging 100 mm Hg with the upper limit of normal being 90 mm Hg.

At this time, he complains of dizziness associated with moderate physical exertion. He suffers from headaches that he attributes to his elevated blood pressure. He also describes chest pain, which is inconsistently related physical exertion. He denies any sensation of irregular heart beats, fatigue with exertion or swelling in his legs.

Past Medical History:

1. History of lower back pain
2. Carpal tunnel syndrome symptoms diagnosed at Kaiser.

Medications:

1. Cozaar
2. Toprol
3. Cardura

Allergies: No known drug allergies.

Habits: He denies smoking cigarettes and rarely consumes alcoholic beverages.

Exhibit R

Social: He is single without children.

Leisure Time Activities: He currently walks for exercise.

Occupational History: Sergeant Bates has worked for the City of San Jose Police Department for 20 years. He began as a patrol officer and switched to the field training office for 2 years. He switched to the detective bureau from March 2000 to March 2001. He then transferred to Internal Affairs until August 2002 when he went back to patrol work. He has been taken off of work recently due to his medical condition. He was previously on modified duty that precluded him from physical confrontation. He was managing the crossing guard program that entailed disciplining employees, supervising and coordinating the guards as well as hiring and performing background checks.

Medical Reports

1. Evaluation by William Breall, MD dated August 13, 2001. He found left ventricular hypertrophy with some evidence of coronary artery disease. He opined that Mr. Bates had a physical and emotional cardiac disability precluding heavy work. He also recommended a lifting restriction for 50 pounds. He felt that Mr. Bates could continue to work as a police sergeant.

2. Evaluation by [redacted] MD dated August 26, 2001. He attributed Mr. Bates hypertension to psychoemotional stress due to a specific incident in his police work. He also found that working in Internal Affairs was stressful for Mr. Bates. In general, he attributes Mr. Bates' hypertension to psychoemotional stress from work as a police officer.

3. Evaluation by [redacted] MD dated August 31, 2001. He continues to believe that psychoemotional stress caused Mr. Bates' hypertension.

4. Progress note by [redacted] MD datpd 1/24/02. His blood pressure is 138/90. He describes Mr. Bates' stress at work in Internal Affairs. He desires to return to patrol duty to decrease his stress. Dr. [redacted] feels that Mr. Bates either needs to change his job or medications need to be changed.

5. Echocardiography report dated 6/12/02 and interpreted by [redacted] MD. The findings are unremarkable.

Exhibit R

6. Progress note by [redacted], MD dated 10/30/02. He describes the stress in patrol duties as less than internal affairs. His blood pressure is under better control. Blood pressure is 112/80.

7. Progress note by [redacted], MD dated 1/29/03. He reports that Mr. Bates' diet has worsened since resuming patrol duties. The blood pressure is 140/100.

8. Progress note by [redacted], MD dated 3/07/03. The blood pressure is 138/90.

9. Progress note by [redacted], MD dated 9/30/03. The blood pressure is 130/90. He reports that there are no significant ekg changes indicated progression of disease. Mr. Bates is working desk job.

10. Note by [redacted], MD dated 12/18/03. He states that Mr. Bates has significant high blood pressure which is difficult to control even on limited work.

11. Evaluation by [redacted], MD dated February 7th, 2004. He feels that work-related stress has been the primary contributor to Mr. Bates hypertension. He opines that Mr. Bates should avoid psychoemotional stress. He does not feel that Mr. Bates could continue working in the police department since a low stress job is not available within the department.

Diagnostic Impression:

1. Hypertension
2. History of Left ventricular and atrial enlargement

Discussion

Mr. Bates has been diagnosed with high blood pressure for over 10 years. His blood pressure appears to correspond to his perceived stress in the job that he is performing at the time. He has transitioned from internal affairs (which he perceived as stressful) to patrol duties (which he perceived as less stressful) with a decrease in his blood pressure readings. Most recently he transferred to desk duties but his treating physician, [redacted] MD felt that even this type of work was not compatible with controlling Mr. Bates' blood pressure.

Furthermore, [redacted] feels that Mr. Bates' hypertension is due to work-related psychoemotional stress. He does not feel that Mr. Bates could only control his blood pressure while working in a low stress environment. Mr. Bates has associated heart findings indicating chronic hypertension such as left ventricular and atrial hypertrophy.

Exhibit R

Mr. Bates is currently on multiple medications and his blood pressure at the last evaluation was 160/110. This indicates that his blood pressure is not well controlled.

The following restriction is provided in order to decrease Mr. Bates' perceived stress that may help control his blood pressure. Hypertension is a risk factor for strokes.

1. He should avoid psychologically or physically stressful work.

Rajiv Das, MD

Exhibit R

San José Police Department

Date: APRIL 6, 2004

Officer: FRED BATES Badge: 2416

Retirement Date: 4-1-04

The San Jose Police Department, in accordance with Title 18, United States Code, Chapter 44, Section 992(w)(3)(C), transfers to your control the large capacity pistol magazine used in the performance of your official duties while employed by this agency.

It is understood that these large capacity magazines described in the above United States Code as "large capacity ammunition feeding devices" are for your exclusive use only. Ownership of these magazines shall not be transferred in any manner except as provided by law.

Should you no longer wish to retain custody and control of these magazines, you must return them to the San Jose Police Department or transfer them to a federal firearm licensee or to another qualified officer.

This letter of authorization must be retained by you as proof of compliance with federal law. The possession of restricted large capacity magazines without proper authorization may subject you to criminal penalties.

Officer: F d Bates 2416 Date: 4-6-04
Signature & Badge

ROBERT L. DAVIS
Chief of Police

Exhibit I

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Ed Overton
Police Retirement Board

FROM: Adonna Amoroso
Deputy Chief of Police

SUBJECT: APPLICATION FOR RETIREMENT DATE: February 20, 2004

Approved Date

REVISED

RE: Frederick Bates #2416
Police Sergeant

Sergeant Frederick Bates has submitted an application for a Service Connected Disability Retirement. Attached are copies of the State of California's Report of Occupational Injury or Illness relating to his disability.

In answer to your inquiry of November 14, 2003, Sgt. Frederick Bates has been working modified duty in School Liaison since 8-18-03. On 2-11-04 he was placed on disability. Until he returns, we will not know if his duties will be usual and customary for his specified class title.

Adonna Amoroso
Deputy Chief of Police

AA:BT:mcv

c: Mike Pribula, Analyst
Cathy Poletti, Analyst

RECEIVED
MAR - 1 2004
by RETIREMENT

EXHIBIT U

State of California EMPLOYER'S REPORT F OCCUPATIONAL INJURY OR ILLNESS	CITY OF SAN JOSE ITEMS NO. 6 THRU 26 OF THIS REPORT ARE TO BE COMPLETED BY THE IMMEDIATE SUPERVISOR OF EMPLOYEES WHO HAVE SUSTAINED (OR ARE CLAIMING) AN OCCUPATIONAL INJURY OR ILLNESS. SEND THE ORIGINAL AND TWO COPIES TO THE CITY WORKERS' COMPENSATION OFFICE AT 152 NORTH 3RD STREET, SUITE 904, SAN JOSE, CA 95112-5509. RETAIN GOLDENROD COPY FOR YOUR RECORDS.	OSHA Case No. ☐ Fatality

Any person who makes or causes to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony.

NOTICE: California law requires employers to report within five days of knowledge every occupational injury or illness which results in lost time beyond the date of the incident OR requires medical treatment beyond first aid. If an employee subsequently dies as a result of a previously reported injury or illness, the employer must file within five days of knowledge an amended report indicating death. In addition, every serious injury/illness, or death must be reported immediately by telephone or telegraph to the nearest office of the California Division of Occupation Safety and Health.

DO NOT USE THIS COLUMN

EMPLOYER

City of San Jose

152 North 3rd Street, Suite 904, San Jose, CA 95112-5509 (408) 277-4151

Local Government 944-0382-1

X

FEKO RATES 2416 F FO

EMPLOYEE

CT - 5-30-01

INJURY OR ILLNESS

CUMULATIVE - HEART/CARDIOVASCULAR

POLICE

POLICE

CUMULATIVE

CUMULATIVE

EXHIBIT U

CITY OF SAN JOSE PERFORMANCE APPRAISAL FORM

(For Instructions Refer to Section 7.01 of the Personnel Administrative Manual)

Last Name, First Name, Initial		CSJ Emp. ID:	Action: (check one)
Bates, Frederick 2416		084129	Retention on permanent Status XX
Department:	Class Title/Number:	Type of Appraisal: (check one)	Rejection during Probation
POLICE/B.F.O.	POLICE SERGEANT 2216	Second Probationary Final Probationary	Withhold Step Increase
Beginning/Ending Period		Annual XX Special Step	Step Increase Merit Increase to Step ____
1/26/2003 1/25/2004			

KEY ELEMENTS OF JOB PERFORMANCE:	Exceptional	Above Standard	Meets Standard	Improvement Needed	Unsatis-factory
COMMUNICATIONS		X			
RELATIONSHIPS WITH OTHERS	X				
JOB EXPERTISE	X				
JUDGMENT		X			
INITIATIVE AND RELIABILITY		X			
JOB RELATED PERSONAL HABITS			X		
PLANNING AND ORGANIZING		X			
SUPERVISION	X				
EQUALITY ASSURANCE		X			
OVERALL RATING: The overall rating should be discussed with and acceptable to the intermediate supervisor and Department Head before discussing with employee.		X			

PERFORMANCE TARGETS FOR THIS PERIOD:

See Attached Addendum

COMMENTS ON KEY ELEMENTS AND PERFORMANCE TARGETS:

See Attached Addendum

FUTURE PERFORMANCE TARGETS:

See Attached Addendum

EMPLOYEE

☒ I accept the evaluation.

☐ I do not concur. To appeal, see information on back. There is no appeal for Probationary Appraisals.

☒ I have read and understand my responsibilities regarding Outside Work Permits, the Code of Ethics, the Conflict of Interest Code, and the Gift Ordinance.

SIGNATURE Lt Bates #2416 DATE 3-2-04

RATER

☒ I acknowledge responsibility for ensuring that this employee understands Outside Work Permits, the Code of Ethics, the Conflict of Interest Code and the Gift Ordinance.

NAME (Print) Lt. [redacted] SIGNATURE: [redacted] DATE: 3/2/04

1ST INTER SUPV

I concur with the rater's Recommendation.

SIGNATURE Mike [illegible] 3-4-04 DATE

2ND INTER SUPV

I concur with the rater's Recommendation.

SIGNATURE DATE

DEPARTMENT HEAD

SIGNATURE Capt. David Kwiller for RED MAR 15 2004 DATE

DIRECTOR OF HUMAN RESOURCES

SIGNATURE DATE

PROBATIONARY PERIOD

MAR 11 2004

CITY OF SAN JOSE PERFORMANCE APPRAISAL FORM (attachment)

Last Name, First Name, Initial:	Beginning/Ending Period:	**Police Department:**
BATES, FREDERICK 2416	**1/26/03 to 1/25/04**	***BFO/CSD***
SSN:	Class Title/Number **POLICE SERGEANT 2216**	

The first probationary report should be completed within the first month of the probationary period. It should include only a listing of the key elements of the position and the performance targets for the next probationary review. For employees with a six-month probationary period, the second probationary report should be completed by the end of the fourth month. For employees with a twelve-month probationary period, the second probationary report should be completed by the end of the eighth month. The third or final probationary report covers the entire probationary period and is the only probationary report sent to the Human Resources Department. The first and second probationary reports are kept by the department for use in preparing the final probationary report.

If the final probationary report is not received by the Human Resources Department on or before the date on which an employee's probationary period ends, the service of that employee **shall be deemed to have been unsatisfactory and his or her employment shall be terminated** (Sec.3.04.990 San Jose Municipal Code). The probationary period shall be regarded as a part of the testing process (Sec. 3.04.1000 SJMC) and the employee may be rejected at any time by the Appointing Authority without the right of appeal to the Civil Service Commission (Sec. 3.04.1010 SJMC). However, a test such as the probationary period shall not be designed, or used to discriminate because of race, color, religion, sex or national origin (1964 Civil Rights Act, Title VII, Section 703(h). The Civil Rights Act decrees that any part of a test must measure the person for the job and not the person in the abstract. Therefore, the performance assessment must be supported by job related factors.

PERFORMANCE TARGETS

During the review period the supervisor, jointly with the individual, should define results to be achieved in various phases of the job. The process should be a dynamic and changing one, where the manager evaluates progress on a continual basis. Targets or objectives should be clearly understood by the supervisor and the employee. For the evaluation to be effective, the employee must have an active and integral role in both its initial establishment and the methods used to reach the targets. These targets should be consistent with and in support of the adopted city goals and departmental objectives.

REVIEW AND APPEAL

A permanent non-management employee not on probation may have the right to appeal performance ratings. Such appeal shall be made first to the Department Head. If the employee is dissatisfied with the decision of the Department Head, he or she may appeal further.

The process for further appeal may be defined in the Memorandum of Agreement of the employee's bargaining unit. There are generally two avenues of further appeal, one directed to the City Manager and the other to the Civil Service Commission. Consult the appropriate Memorandum of Agreement to determine the specific appeal process that applies.

NOTE: AFTER OBTAINING SIGNATURES, MAKE 3 COPIES. FORWARD ORIGINAL TO HUMAN RESOURCES. RETAIN 1 COPY IN THE EMPLOYEE'S DEPARTMENT PERSONNEL FILE. SEND/GIVE THE EMPLOYEE AND THE SUPERVISOR COPIES IN SEALED ENVELOPES MARKED "CONFIDENTIAL."

CITY OF SAN JOSE PERFORMANCE APPRAISAL FORM (attachment)

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BATES, FREDERICK 2416 SSN:	1/26/03 to 1/25/04 Class Title/Number POLICE SERGEANT 2216	BFO/CSD

Performance Targets for this Period:

1. Prepare for the next lieutenant's exam. – Not Accomplished.
2. Maintain ongoing fitness program – Accomplished.
3. Take a variety of city-offered computer classes – Not Accomplished.

Comments on Key Elements and Performance Targets:

This appraisal covers the period from Jan. 26, 2003 to Jan. 25, 2004. During this time, you were assigned to BFO as a patrol team supervisor from January to August. Lts. [redacted] and [redacted] were your supervisors. Then, you transferred to the Community Services Division (CSD) on modified duty and took over the School Safety (crossing guards) Unit under my supervision.

This appraisal is based on my personal observations, comments from your prior supervisors and employees, and a review of your personnel files. During the period, you had no complaints or accidents. Your leave balances are appropriate.

In this position, you are a program manager. You supervise four civilian supervisors, one office specialists and about 180 part time guards. The guards are assigned to locations all over the city. You manage program goals, measurments, budget, reports and administrative duties. You hire, train, and establish discipline for all of these important public service employees. In addition, you are asked to work with other City departments such as the Dept of Transportation, the City Attorney, City Manager, and Council members staff.

Future Performance Targets:

1. Maintain a fitness program.
2. Control blood pressure.
3. Assist officers who want to take the Sergeant's exam.

Communications – Above Standard

You communicate clearly, completely and accurately both verbally, and in writing. I have seen you interview guards and your easy-going manner allows you establish rapport with them. I have also reviewed your written communications and you are just as effective on paper. You put a lot of effort into your reports and memos, and the result is effective communications. Your vocabulary is appropriate for you audience.

Relationships with Others - Exceptional

You get along well with your employees, citizens, city staff members and supervisors. You are fair, courteous, empathetic and confident. Your actions are interpreted accurately and are appreciated. Your civilian supervisors told me you were the nicest sergeant they have had. Lt. [redacted] said you have great people skills. You motivate your employees to perform their best

Last Name, First Name, Initial:	Beginning/Ending Period:	**Police Department:**
BATES, FREDERICK 2416 SSN:	**1/26/03 to 1/25/04** Class Title/Number **POLICE SERGEANT 2216**	**BFO/CSD**

and put in extra effort. You treat confidences properly, which generates trust. You are open to suggestions, and seek them on a regular basis.

When you were on the District "R" patrol team, you helped a family deal with an unstable neighbor over a period of time. This kind of service builds confidence in the police department.

When you transferred to CSD in August, you inhereted a complex team of 5 employees. You handled their issues calmly and effectively. You and your team produced a holiday recognition ceremony that the guards greatly appreciated. You also had three guards injured while on-duty. You provided support and assistance to the employees so they could recover and return to work.

Job Expertise – Exceptional

You are a 20 year peace officer and a 6 year sergeant. You know all of the common policies, procedures, codes and orders to be effective as a police supervisor. Your experience in the Juvenile Unit, Internal Affairs, and patrol have provided you with a base of knowledge. You have a BA in History and a MS in Criminal Justice. Your combined education and experience make you a source of wisdom that other supervisors consult.

When you transferred to CSD, you had not been a program manager. However, your work ethic and commitment to excellence motivated you to learn the job very quickly. It usually takes a new supervisor a year to learn how to manage the School Safety Unit. The management and budget period alone is one year. You quickly learned how to manage your resources to meet your program goals. To complicate matters, the City Auditor did a review of our unit, and a City Councilmember initiated a new crossing guard program right after you first arrived. You were able to handle these tasks calmly and intelligently.

I don't usually rate a new supervisor exceptional in this area, but I'd like to recognize your accomplishments in getting to know a new unit, a new team, and a new job very quickly and effectively. Thanks for your efforts!

Judgment – Above Standard

You anticipate and handle routine and emergency issues quickly and effectively. Your decisions are logical and appropriate. You can sort through facts and details to prioritize important inputs so that your decisions are sound. Lt. [redacted] said you balance the needs of the citizens with those of the Department. You use descretion when handling confidential matters and addressing the concerns of the command staff. You always kept me informed of important developments with the unit and it's employees.

Last Name, First Name, Initial:	Beginning/Ending Period:	Police Department:
BATES, FREDERICK 2416 SSN:	1/26/03 to 1/25/04 Class Title/Number POLICE SERGEANT 2216	BFO/CSD

As an example, a city employee suggested that we give safety equipment to a school employee as a gesture of good will. You corrrectly identified the liability issues that could arise from that action, and consulted city attorneys so we can develop an appropriate protocal.

Initiative and Reliability – Above Standard

You are reliable and dependable; your presence and assignments are completed on-time. As I mentioned before, you took the initiative to learn all about the School Safety Unit very quickly. Your performance under pressure was above the expectations for this position. You are a very conscientious and productive supervisor. Your high standards are also applied to your subordinates.

Job Related Personal Habits – Meets Standard

Your height, weight and physical conditioning are appropriate for the job. You are on modified duty and I wish you the best in maintaining your health. You work-out on a regular basis by walking and doing resistance exercises. You are always neat and professional in your appearance. You maintain your work environment in an organized manner.

Planning and Organizing – Above Standard

You plan and organize your work in a neat manner. You went through all of the files in the School Safety office and sorted them. This includes sorting all of the files on the guards by employement status. I mentioned that you and your supervisors planned the guard recognition event which went very well. You also plan ahead by screening guard applicants in anticipation of hiring needs. You distribute the work load amonst your supervisors so that they are evenly balanced. You are aware of your program goals and measurements so you can meet or exceed your objectives. This includes working with Councilmembers and the media to promote student pedestrian safety.

Supervision – Exceptional

You supervise your employees in a professional manner. You inspect, evaluate, and guide their work to maximize productivity. You provide appropriate direction and correction as needed. You are never overbearing or timid. You delegate tasks properly.

For example, two of your supervisors had an unreliable crossing guards. You worked with them to bring the guard's performance up to standards. One guard resigned and the other guards was offered employee assistance. You treated the supervisors and the employees in a firm but compassionate way so that the safety of the students are assured, and the employees are cared for.

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BATES, FREDERICK 2416 SSN:	**1/26/03 to 1/25/04** Class Title/Number **POLICE SERGEANT 2216**	**BFO/CSD**

Equality Assurance – Above Standard

You conduct unit management consistent with the City's Equality Assurance policies. You are sensitive to the needs of all employees and citizens.

Overall Rating – Above Standard

You have been a member of this agency for 20 years. You have consistently performed at least above standard, if not exceptionally in all areas during your career, and especially while in the Community Services Division. I wanted to thank you for jumping in to manage the School Safety Unit. You did not request this assignment, but you have done a great job. It has been a pleasure working with you.

Frederick Bates #2416
Police Sergeant

Date: 3-2-04

[redacted]
Police Lieutenant

Date: 3/2/04

S 2612 **WORKERS' COMPENSATION RESPONSIBILITY**

RESPONSIBILITY:

City policy requires that before a disabled employee can be reassigned to duty, a medical report confirming the employee's medical restriction(s) must be forwarded to Workers' Compensation for on-duty injury/illness or the Police Personnel Unit for off-duty injury/illness. According to City policy, the Workers' Compensation Office is responsible for (1) receiving, reviewing, and evaluating written medical records obtained from the disabled employee's treating physician, and (2) ensuring the "Return to Work" form from the Police Personnel Unit is completed and processed for the Department in accordance with policy guidelines set forth in these provisions.

S 2613 **DEPARTMENT COMPLIANCE WITH WORK STATUS RESTRICTIONS:**

The information on the "Return to Work" form will be reviewed and used by the Department Head as a basis for the assignment of disabled employees to modified duty assignments. The form should contain adequate provisions for (1) recommending "modified duty" status and (2) describing the type of work restrictions required.

If any questions arise regarding the employees work restrictions, the Police Personnel Unit should be contacted to clarify work restrictions through Workers' Compensation (on-duty injuries) or Employee Health Services (off-duty injuries).

Until such time as any questions or confusion are resolved by the City Medical Director, all assignment decisions will be made consistent with the conditions stated by the employee.

- RECORD MAINTENANCE OF LIMITED DUTY ASSIGNMENTS: The Police Department Personnel Unit will ensure that accurate and up-to-date records of disabled employees on limited duty are maintained, and that such information is coordinated with Police Department subdivisions, Workers' Compensation, or Employee Health Services as appropriate.

- TRACKING OF EMPLOYEES ON DISABILITY LEAVE OR LIMITED DUTY STATUS: The Department Personnel Unit is responsible for tracking of all members who are on disability or modified duty, or on medical leave of absence.

- SUPPLYING OF INFORMATION TO DISABLED EMPLOYEES: The Police Personnel Unit has a responsibility to ensure that information received which pertains to an employee's disability status is forwarded to the affected employee and bureau representative.

If the information received indicates that the employee would suffer a loss of benefits, the employee will be notified and will be provided with information as to whom to contact to mitigate the loss of benefits.

In addition, disabled employees will be provided with information pertaining to the Disability Tracking System, Workers' Compensation benefits, salary continuation benefits, the Police and Fire Retirement System, and other information they may require.

Property Of San Jose Police Department
For Official Law Enforcement Use Only

Exhibit D

JONATHAN NG, M.D., J.D., F.C.L.M., F.A.C.P.

Internal Medicine Legal Medicine American Board Certified in Geriatric Medicine Critical Care Medicine Sports Medicine Nuclear Cardiology

Testamur
American Board of Echocardiography

August 25, 2004

Captain Tuck Younis
San Jose Police Department
201 West Mission Street
San Jose CA 95110

RE: FREDERICK BATES

Dear Captain Younis:

As you know, I have evaluated Officer Frederick Bates for the City of San Jose as well as for his attorney. In evaluating him, there was a term that we use in describing his disability status and that is "Preclusion from Psychoemotional Stress" This is a term of arts-frequently used in assessing work-related disability. I have assessed thousands of police officers and I have given restriction to many officers, the majority of whom actually continues to work as safety officers without restriction or any problem. I do not think Mr. Bates has any problem or difficulty in carrying a concealed weapon just because of the labeling of his disability using the term "Preclusion from Psychoemotional Stress."

Jonathan Ng, M.D., J.D., F.C.L.M., F.A.C.P.
American Board Certified in Internal Medicine,
Legal Medicine, Geriatric Medicine*, Nuclear Cardiology,
Critical Care Medicine* and Sports Medicine,
Testamur, American National Board of Echocardiography *(inactive)

cc: Frederick Bates
514 Fontanelle Court
San Jose, CA 95111

Exhibit A

1835 PARK AVENUE.SAN JOSE.CALIFORNIA 95126. (408) 295-8514. Fax (408) 295-9844

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K

Law Offices of Stuart D. Kirchick
2131 The Alameda, Suite C-1
San Jose, California 95126
(408) 291-0123
(408) 291-0418 facsimile
Email: SDKirchick@aol.com

RECEIVED
OCT 7 - 2004
CHIEF'S OFFICE

October 5, 2004

Rob Davis, San Jose Chief of Police
Ralph Torres, Deputy Chief
SAN JOSE POLICE DEPARTMENT
201 W. Mission Street
San Jose, California 95110

Re: Our Client: SJPD Sergeant Frederick Bates, Retired

Dear Chief Davis and Deputy Chief Torres:

Please be advised that our office has been retained to represent retired Sergeant Frederick Bates, relative to obtaining his authorization to carry a concealed and loaded firearm. As you know, Sergeant Frederick Bates was approved for a medical disability retirement on or about April 1, 2004. On or about April 6, 2004, Sergeant Bates received his retirement ID card which was not stamped for CCW privilege. A photocopy of his ID card is enclosed herewith. Sergeant Bates did not receive any written notification that authorization for him to carry a concealed and loaded firearm was denied.

On or about April 16, 2004, Sergeant Bates contacted Deputy Chief Amoroso requesting a hearing. Since she was unavailable, Sergeant Bates left a message. Approximately one week later, Deputy Chief Amoroso advised Sergeant Bates that the CCW authorization was denied based on a work restriction he had on his medical records which was for him to avoid psychological stress. She further informed Sergeant Bates that he had no right to appeal since "his disability was based on a psychological disability". Sergeant Bates never received anything in writing from Deputy Chief Amoroso or the department that he was denied CCW authorization due to a psychological disability, or otherwise.

Further, Sergeant Bates' disability was not psychological, but rather medical. Documentation verifying Sergeant Bates' disability being medically based is equally available to your department. You may look to records in your own department or contact the Workers Compensation claims adjuster for the City of San Jose in this regard. Alternatively enclosed herewith is a letter from Dr. Jonathon Ng to Captain Tuck Younis dated, August 25, 2004, further clarifying the issue.

Exhibit C SJ000086

To Sergeant Bates' knowledge, your department never forwarded anything in writing regarding the denial of his CCW privilege, or rights to a hearing or an appeal.

On or about August 25, 2004, Sergeant Bates contacted Captain Younis, at police personnel, requesting reconsideration of this issue. Captain Younis requested Dr. Ng submit the letter referred to above explaining the term "psychological or psycho-emotional stress." The letter sent to Captain Younis on the same date. On or about September 10, 2004, Captain Younis advised that there would be no appeal because "it was not made within 45 days." Captain Younis further indicated that his telephone conversation with Deputy Chief Amoroso was his appeal. Approximately two weeks later, Captain Younis also advised POA director Jeff Ricketts that Sergeant Bates did not have a right to an appeal.

The actions of your department, by and through the actions of Deputy Chief Amoroso and Captain Younis, are contrary to applicable law. First, Penal Code section 12027 defines "honorably retired" peace officers as including those who have accepted a service or disability retirement. (PC§ 12027 (a) (1) (A)). Penal Code section 12027.1 determines the only circumstances upon which a police department may deny or revoke the authorization of an honorably retired peace officer their CCW authorization. As set forth in PC§ 12027.1(B), the authorization may be "denied by the issuing agency only upon the showing of good cause. Good cause shall be determined at a hearing, as specified in subdivision (d)."

Subdivision (d) of PC section 12027.1 states the following:

Any hearing conducted under this section shall be held before a three member hearing board. One member of the hearing board shall be selected by the agency and one member shall be selected by the retired peace officer or his or her employee organization. The third member shall be selected jointly by the agency and the retired peace officer or his or her employee organization.

In the matter of authorizing Sergeant Bates to carry a concealed and loaded firearm, your department has not formally denied the authorization in writing or explained their good cause to do so. Further, a three member hearing board has not been convened to deny Sergeant Bates such authorization. The department and the City of San Jose are well aware that Sergeant Bates retired on a work related physical disability. The City of San Jose is in possession of the medical reports documenting the same. Sergeant Bates did not retire with a psychological disability nor was Sergeant Bates' psychological status ever in question as can be gleaned from all of his City of San Jose performance appraisal forms and medical reports.

Thus, we would respectfully request that the department immediately reissue Sergeant Bates' identification certificate indicating the approval for him to

carry a concealed and loaded firearm. Should you fail to do so within 10 days of the date of this letter or contact me for a short extension of time within that period, then I will assume that it is not your intention to do so and to continue to deprive Sergeant Bates of his due process rights. Should that be the case, Sergeant Bates will pursue any and all legal remedies he has available to him including but not limited to a law suit alleging civil rights violations and discriminatory actions by your department.

Thank you for your anticipated courtesy and cooperation in this regard. Feel free to contact me if you have any questions or comments.

Sincerely,

Stuart D. Kirchick

SDK/rc
enclosure
cc: Frederick Bates
Rick Doyle, San Jose City Attorney

No. 97-56525
United States Court of Appeals, Ninth Circuit

In re: Lavander v. Prober

Decided Apr 27, 1999

In re: ROGER LEVANDER; JOSIE LEVANDER, Debtors. ROGER LEVANDER; JOSIE LEVANDER, Appellants, v. EDWIN PROBER; ELIAS MILLER; PETER MILLER, Estate of; ALL CARR COMMUNICATIONS COMPANY; CALGRIND HOMES INC.; DALBY HOMES INC.; DENORMANDIA LAND CO.; DREAMLAND HOMES INC.; EFFINGTON HOMES INC.; ELDRIDGE CORPORATION; FLORADAY PARK INC.; GRANTON HOMES INC.; GREGORY KNOLLS INC.; LADDS HOMES INC.; LAUREL APARTMENTS; MILLER MORTGAGE CO.; MILLGEE INVESTMENT CO. INC.; PHALANX HOMES INC.; PRICHARD HOMES INC.; ROWENA HOMES INC.; SHEPARD HOMES INC.; SUFFOLK HOMES INC.; THRIFTY ESTATES INC., Appellees. No. 97-56525 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argued and Submitted April 27, 1999--Santa Ana, California

Filed July 7, 1999

Amended July 20, 1999

Appeal from the United States District Court for the Central District of California Kim McLane Wardlaw, District Judge, Presiding Before: Warren J. Ferguson, Diarmuid F. O'Scannlain, and A. Wallace Tashima, Circuit Judges. Opinion by Judge Tashima; Concurrence by Judge Ferguson Concurrence by Judge O'Scannlain

COUNSEL: Daniel J. McCarthy, Hill, Farrer, & Burrill, Los Angeles, Cal- ifornia, for the appellants. Irving M. Gross, Robinson, Diamant, Brill, & Klausner, Los Angeles, California, for the appellees.

ORDER

The opinion filed on July 7, 1999, is amended to include Judge Ferguson's concurring opinion attached hereto.

OPINION

TASHIMA, Circuit Judge:

In December, 1993, the bankruptcy court awarded attorneys' fees to Chapter 11 debtors Roger and Josie Levander against All-Carr Communications Company, Inc. ("Corporation"). In November, 1996, the bankruptcy court entered two orders that amended the December, 1993, order to add AllCarr Communications Company, a general partnership ("Partnership"), as an additional judgment-debtor. On appeal, the district court reversed the November, 1996, order for lack of jurisdiction. The Levanders appeal, contending that jurisdiction existed to amend the original order under the bankruptcy court's inherent equitable powers, Rule 60(a) and (b) of the Federal Rules of Civil Procedure, and S 187 of the California Code of Civil Procedure. We have jurisdiction under 28 U.S.C. S 158(d), and we reverse. We hold that the bankruptcy court had jurisdiction to amend its order underS 187 and its inherent power based on the fraud perpetrated upon it by the Corporation and the Partnership.

I.

casetext

The Levanders owned a cellular telephone service company. In 1991 and 1992, they filed separate bankruptcy petitions, which were consolidated in April, 1992, and thereafter jointly administered. On July 29, 1992, the Corporation filed a proof of claim against the Levanders' bankruptcy estate alleging a nonpriority general unsecured claim for $714,742.21 that the Levanders owed the Corporation on three promissory notes. At a hearing on July 30, 1993, the bankruptcy court disallowed this claim on the ground that the Corporation had previously accepted stock in satisfaction of the obligation. The bankruptcy court confirmed the Levanders' plan of reorganization on August 11, 1993.

On August 20, 1993, the Corporation appealed the confirmation order and the order disallowing its claim. The bankruptcy court, the bankruptcy appellate panel (BAP), and this court all refused to grant the Corporation's motion for a stay of the confirmation pending appeal. The Corporation subsequently abandoned its appeal and the BAP dismissed the Corporation's appeal with prejudice on September 30, 1994.

Meanwhile, on December 13, 1993, the bankruptcy court granted the Levanders' motion for attorneys' fees and costs totaling $44,170.00 against the Corporation for the time period of May 17, 1993, through August 31, 1993. The court did not know of the existence of the Partnership or that the Corporation had transferred its assets, so it awarded the attorneys' fees and costs only against the Corporation. The reason the court so believed was that when one of the Corporation's officers was asked during a May, 1993, deposition whether the Corporation's assets had been sold, he answered:"No. The assets haven't been sold." To the question of "as far as you know, All-Carr Communications [Corporation] is still an active company?" the same officer answered: "Yes. They still have the [cellular telephone] numbers and is active." The court ordered the Corporation to pay the awarded amount, but reserved final judgment on the total amount of fees and costs to be awarded until the Corporation's appeal was completed.

On July 20, 1995, after unsuccessfully seeking voluntary payment from the Corporation, the Levanders had the marshal levy a writ of execution against the Corporation's bank accounts. That same day, a former employee of the Corporation responded to the writ, stating that she owned what had been the Corporation's assets in the bank and produced a bill of sale to that effect. This bill of sale, dated December 7, 1993,(FN1) showed that the Partnership had transferred to her the ownership of what had formerly been the Corporation's assets, including the store, inventory, and all of the equipment, for one dollar.

On September 29, 1995, the Levanders requested documents and depositions from the Corporation's officers regarding the sale or transfer of the Corporation's assets. On the day that production was to commence, the Corporation filed a voluntary bankruptcy petition, which stayed discovery. The Corporation's bankruptcy filing also prevented the Levanders from proceeding with a motion they had filed for additional attorneys' fees against the Corporation. The Levanders then filed a motion under Rule 2004 of the Federal Rules of Bankruptcy Procedure, which was granted on November 14, 1995, for the same documents and depositions.

These documents and depositions revealed that the assets traveled in a circle. Beginning on February 4, 1993, months before the officer testified that the Corporation still had its assets, the Corporation transferred its assets to 19 corporate entities. These corporate entities later conveyed the Corporation's assets to the Partnership, which had been formed on February 25, 1993. Finally, in December, 1993, the Partnership sold the assets to the former employee for one dollar.

On June 14, 1996, the Levanders filed a motion to amend the attorneys' fees order to designate the Partnership as an additional judgment-debtor.

(FN2) On November 6, 1996, the bankruptcy court granted the motion to amend the order, stating that "equity screams for some remediation" (FN3) because the Partnership was the real party in interest in the Corporation's litigation against the Levanders' estate.(FN4) The Partnership appealed the order to the BAP on November 15, 1996, and, on December 30, 1996, the appeal was transferred to the district court.

On September 25, 1997, the district court entered an order reversing the decision of the bankruptcy court to add the Partnership as a judgment-debtor for lack of jurisdiction. Specifically, the district court concluded that the ten-day time limit of Federal Rule of Civil Procedure 59(e) had expired. The district court also held that S 187 of the California Code of Civil Procedure did not govern because the federal -- not state -rules of procedure control in bankruptcy court.

II.

"We stand in the same position as did the district court in reviewing the bankruptcy court's order." United States v. Wyle (In re Pacific Far E. Lines, Inc.), 889 F.2d 242, 244 (9th Cir. 1989). We therefore review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See Diamant v. Kasparian (In re Southern Cal. Plastics, Inc.), 165 F.3d 1243, 1245 (9th Cir. 1999).

III.

A.

[1] "The inherent powers of federal courts are those that `are necessary to the exercise of all others.' " Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (quoting Roadway Express, Inc. v. Piper , 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 11 U.S. 32, 34 (1812))). This inherent power, which is based on equity, see Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944), not only springs forth from courts' traditional power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)), but also "furthers the pursuit of achieving complete justice by enabling the court to suspend those judgments whose enforcement leads to inequitable results." Hadix v. Johnson, 144 F.3d 925, 937 (6th Cir. 1998). In Chambers, the Supreme Court observed that the inherent power of federal courts includes, inter alia, the power to vacate judgments on proof that a fraud upon the court has been committed. See Chambers, 501 U.S. at 44.

[2] The Court justified the "historic power of equity to set aside fraudulently begotten judgments" on the basis that "tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Id. (internal quotation marks and alterations omitted) (citation omitted); see also Hazel-Atlas Glass Co., 322 U.S. at 246 ("The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."); Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575 (1946) (bribery of judge).

[3] Just as a court may use its inherent power to protect its integrity by vacating a judgment obtained by fraud, it also may amend a judgment for the same purpose. When a court vacates a judgment obtained by fraud, it not only rids itself of the defilement caused by the fraud, but also restores balance and fairness between the parties by removing the benefit gained by the party that committed the fraud. Amending a judgment serves these same goals by removing the benefit -for example, the avoidance of a judgment against itself -- that the party gained by committing fraud on the court.

We therefore hold that a federal court may amend a judgment or order under its inherent power when the original judgment or order was obtained

through fraud on the court.(FN5) Cf. Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1133 (9th Cir. 1995) (non-disclosure of existence of videotape containing unfavorable results amounted to fraud on the court, thereby justifying new trial).

[4] Thus, the bankruptcy court had the inherent power to amend its judgment to add the Partnership as an additional judgment-debtor based on the fraud committed upon it.(FN6) We now turn to the question of whether the Corporation and the Partnership committed fraud upon the bankruptcy court.

B.

[5] A court must exercise its inherent powers with restraint and discretion in light of their potency. See Chambers, 501 U.S. at 44. Although the term "fraud on the court " remains a "nebulous concept," Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993), that phrase "should be read narrowly, in the interest of preserving the finality of judgments." Toscano v. Commissioner, 441 F.2d 930, 934 (9th Cir. 1971).

[6] Simply put, not all fraud is fraud on the court. To constitute fraud on the court, the alleged misconduct must "harm[ ] the integrity of the judicial process." Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989). To determine whether there has been fraud on the court, this circuit and others apply Professor Moore's definition:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Gumport v. China Int'l Trust and Inv. Corp. (In re Intermagnetics Am., Inc.), 926 F.2d 912, 916 (9th Cir. 1991) (quoting 7 James Wm. Moore et al., Moore's Federal Practice P 60.33, at 515 (2d ed. 1978)).

[7] Generally, non-disclosure by itself does not constitute fraud on the court. See England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960) (failure to produce evidence, without more, does not constitute fraud on the court). Similarly, perjury by a party or witness, by itself, is not normally fraud on the court. See, e.g., Gleason v. Jandrucko , 860 F.2d 556, 559-60 (2d Cir. 1988); 12 James Wm. Moore & Joseph T. McLaughlin, Moore's Federal Practice S 60.21[4][c], at 6056-57 (3d ed. 1998). The Gleason court reasoned that since perjury is an evil that could and should be exposed at trial, it should not qualify as fraud upon the court. See Gleason, 860 F.2d at 560.

[8] The reason why the courts in these cases did not treat perjury or non-disclosure alone as fraud on the court was that the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court. For example, in Gleason, Gleason could have deposed eyewitnesses and introduced evidence at trial to impeach the police officers' testimony, which he claimed was perjured, because the issues of lack of probable cause and bad faith on the part of the officers, and therefore their credibility, were already before the court. See id. at 559. The court concluded that Gleason could not, after the fact, claim fraud on the court based only on this alleged perjury, which he could have challenged during the trial. See id. at 559-60.

[9] In contrast, the perjury and non-disclosure in the instant case (that the Corporation had transferred its assets to shell entities months before the Corporation testified in depositions that the Corporation's "assets haven't been sold") was not -and could not have been -- an issue at the attorneys' fees hearing, as neither the court nor the Levanders knew that the Partnership existed. Therefore, neither the Levanders nor the court had any reason to question the veracity of the

Corporation with respect to whether the Corporation still possessed its assets. Further, not only did the Corporation and the Partnership deceive the Levanders, but they also deceived the court, because the court relied on the Corporation's depositions to impose attorneys' fees on the Corporation, rather than on the party with the assets -- the Partnership. See, e.g., Broyhill Furniture Indus., Inc., 12 F.3d at 1086-87 (although party knowingly withheld material and thereafter sought enforcement of a fraudulently obtained patent, there was no fraud on the court because fraudulent evidence used to obtain patent from patent office was not submitted to court, so court itself was not victim of fraud); In re Intermagnetics Am., Inc., 926 F.2d at 917 ("[T]he inquiry as to whether a judgment should be set aside for fraud upon the court . . . focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process."). Therefore, since the bankruptcy court itself was defiled by the perjury, the fraud was a fraud on the court.

IV.

In ruling that the bankruptcy court did not have jurisdiction to amend its order, the district court rejected the Levanders' argument that S 187 of the California Code of Civil Procedure(FN7) applied, concluding that "the federal, not state, rules of procedure . . . govern in bankruptcy court." We disagree.

A.

We have held that Federal Rule of Civil Procedure 69(a)(FN8) empowers federal courts to rely on state law to add judgmentdebtors under Rule 69(a), which "permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits." Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp. , 159 F.3d 412, 421 (9th Cir. 1998) (quoting Peacock v. Thomas, 516 U.S. 349, 359 n.7 (1996)) (internal quotation marks omitted).(FN9)

In Cigna, the appellant, much like the appellees in the instant case, argued that the motion to amend the judgment to add a judgment-debtor was untimely under Rule 59(e), and that the court therefore had no jurisdiction. See id. We rejected this argument, holding that Rule 69(a) allows judgment-creditors to use state law to collect on their debts. See id. Because California law allows amendment of a judgment to add a judgment-debtor, we held that the district court did not abuse its discretion in so doing. See id. at 421-22.

[10] The instant case is analogous since the Levanders also were judgment-creditors attempting to collect on a debt. As such, Rule 69(a) authorized the use of California law to collect on their debt, and the district court erred by holding that the bankruptcy court did not have the jurisdiction to allow them to do so.

Finally, we must determine whether the requirements of California law were met in order to add the Partnership as a judgment-debtor.

B.

[11] Under California Code of Civil Procedure S 187, a court "has the authority to amend a judgment to add additional judgment debtors." Issa v. Alzammar , 38 Cal.App.4th Supp. 1, 4 (1995); see also Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conference Ctr. Bd., 41 Cal.App.4th 1551, 1554-55 (1996). To amend a judgment under S 187, two requirements must usually be met: "(1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns. " Tripplet v. Farmers Ins. Exch., 24 Cal.App.4th 1415, 1421 (1994).(FN10)

1.

When the bankruptcy court evaluated whether it had authority under California law to amend its order to add the Partnership as a judgment-debtor, it relied primarily on Carr v. Barnabey's Hotel Corp., 23 Cal.App.4th 14 (1994). Carr involved a situation analogous to the instant case. Carr had sued and obtained a judgment against Barnabey's Hotel Corporation (the original judgment-debtor) for sex and pregnancy discrimination, wrongful termination, and fraud. See id. at 1617. Barnabey's Hotel Corporation answered the complaint and defended the case at trial, see id. at 20, as did the Corporation in the instant case. But, Barnabey's Hotel Corporation had ceased doing business before the trial, had no assets or source of income, and never held title to the hotel, see id., just as the Corporation in the instant case had transferred all of its assets prior to appearing before the bankruptcy court. Peppercorn (the added judgment-debtor in Carr) was a limited partnership with the same president and partners as the officers of Barnabey's Hotel Corporation, see id., just as the Partnership and Corporation in the instant case have many of the same officer/partners. Furthermore, Peppercorn had been doing business as Barnabey's Hotel and Restaurant. See id. The appellate court in Carr upheld the trial court's amendment of the judgment to add Peppercorn as a judgment-debtor and stated:

Under Code of Civil Procedure 187, the court had the authority to amend the judgment to add a judg ment debtor. Carr's error essentially amounted to no more than a variance between pleading and proof.

The decision to grant an amendment in such circum stances lies in the sound discretion of the trial court. "The greatest liberality is to be encouraged in the allowance of such amendments in order to see than justice is done." Justice was obviously served by the amendment.

It is not too much to say that Peppercorn's con duct approached a fraud on the court. Carr sued the right party under the wrong name, a fact which must have been clear to the defense from the inception of the litigation. Yet, nothing was said about the mis take in any deposition, motion, or other proceeding.

Id. at 20-21 (citations omitted).

The instant case is indistinguishable. The Levanders pursued the Corporation for attorneys' fees because they thought, as a result of the Corporation's officer's testimony and the fact that the Corporation continued to argue its claim against the Levanders' estate, that the Corporation was the proper party with the assets, when all along, the Corporation knew and did not disclose to the court, that the Partnership had control of the assets. Therefore, just as in Carr , the instant case involved conduct that amounted to fraud on the court.

The amended judgment-debtors in Carr argued, as the appellees do in this case, that they were not the alter egos of the original judgment-debtor and therefore could not be added as judgment-debtors pursuant to S 187. See id. at 21. The Carr court rejected this argument and affirmed the trial court's amendment of the judgment explicitly without a finding of alter ego, stating that "the equities overwhelmingly favor" it. Id. at 22-23.

[12] The Carr court looked to the "equitable principles regarding alter ego" and concluded that although the added judgment-debtor did not meet the formal requirements for alter ego liability, it nevertheless fit within the theory underlying amendment of a judgment based on alter ego liability. That is, "the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant." Id. at 21. The court then reasoned that by not allowing amendment due to the absence of a finding of alter ego would "work an injustice." Id. at 23.

[13] Therefore, under the authority of Carr, a finding that the Partnership was the alter ego of the Corporation was not required to add the Partnership as a judgment-debtor.(FN11)

2.

[14] The second requirement for amendment under S 187 is that the added party " `controlled' the litigation." Triplett, 24 Cal.App.4th at 1421. The bankruptcy court did not clearly err in finding that this requirement was met in the instant case. The Partnership in essence controlled the litigation because the same group of individuals comprised the Partnership and the Corporation, they were present during the litigation, and one of the partners even contributed deposition testimony. Thus, adding the Partnership as a judgment-debtor raises no due process concerns. See, e.g., Farenbaugh & Son v. Belmont Constr., Inc., 194 Cal.App.3d 1023, 1031 (Ct. App. 1987) (allowing amendment of judgment to add judgmentdebtor when new debtor "was not a passive participant by any manner of means in that original trial."); Alexander, 104 Cal.App.3d at 45-46 (approving amendment of judgment to add name of corporate judgment-debtor's sole stockholder).

[15] In sum, since Rule 69(a) authorizes judgment-creditors to use state law to collect on their debts and S 187 applies in the instant case, the bankruptcy court had jurisdiction to amend its order to add the Partnership as a judgment-debtor.

V.

The district court erred when it reversed the bankruptcy court's order, because the bankruptcy court had jurisdiction to add the Partnership as a judgment-debtor under both its inherent power and S 187 of the California Code of Civil Procedure. Accordingly, we REVERSE the decision of the district court and REMAND with directions that the bankruptcy court's order be affirmed.

(FN1). The Partnership sold everything one day after this court denied the Corporation's motion for a stay pending appeal, and only five days after the bankruptcy court ruled that the Levanders were entitled to recover their fees and costs from the Corporation.

(FN2). The Levanders also included Edwin Prober, Elias Miller, the Estate of Paul Miller, and the 19 corporations in their motion to amend the judgment. The bankruptcy court denied this part of the Levanders' motion, a decision the Levanders do not appeal.

(FN3). During its October, 1996, hearing to determine whether to add the Partnership as a judgment-debtor, the bankruptcy court characterized the Corporation's earlier deposition testimony as "plain not true."

(FN4). The bankruptcy court actually filed two separate orders on November 6, 1996, both of which granted the Levanders' motion to amend the judgment to add the Partnership as an additional judgment-debtor. In addition to granting the motion to amend, the first order awarded the Levanders an additional $37,051.85 in fees and costs against the Partnership for the time period September 1, 1993, through March 31, 1996. The second order specifically amended paragraphs 1-4 of the original order so that it included both the Partnership and Corporation as judgment-debtors. To facilitate discussion, we refer to the two orders as the "order."

(FN5). Although motions for relief from judgment may also be brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Rule 60(b)'s savings clause specifically provides that the rule "does not limit the power of a court . . . to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b); see also id. at advisory committee notes, 1946 amendment ("[T]he rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause.").

(FN6). The inherent power of Article III courts to amend a judgment extends to bankruptcy courts. Cf. Caldwell v. Unified Capital Corp. (In re

Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996) (noting that 11 U.S.C. S 105(a) provides bankruptcy courts with the authority to issue orders necessary "to prevent an abuse of process, " including the power to sanction) (quoting 11 U.S.C. S 105(a)).

(FN7). Section 187 provides:

When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Cal. Civ. Proc. Code S 187.

(FN8). Rule 69(a) provides:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execu tion, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment-debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held. Fed. R. Civ. P. 69(a).

(FN9). The district court did not have the benefit of Cigna at the time it made its ruling.

(FN10). A motion to amend a judgment under S187 must also be made within a reasonable time. See, e.g., Cigna , 159 F.3d at 421; Alexander v. Abbey of the Chimes, 104 Cal.App.3d 39, 48-49 (1980) (court abused its discretion in granting motion to amend judgment after an almost seven-year delay because movants had no reasonable explanation). The Levanders discovered the fraudulent conduct of the Corporation and Partnership in late 1995 and filed the motion to amend in June, 1996. We find this period of time to be reasonable. See Cigna, 159 F.3d at 421 (seven and one-half month delay was reasonable).

(FN11). We recognize that there is California case authority to the contrary. See Triplett, 24 Cal.App.4th at 1420-21 (not allowing amendment without finding of alter ego). We believe, however, that Carr is the better reasoned case and the path that the California Supreme Court would follow. See Elliott v. City of Union City, 25 F.3d 800, 802 n.3 (9th Cir. 1994).

FERGUSON, Circuit Judge, concurring:

When an appellate court has alternative bases for its holding, it cannot be claimed that all but one of the bases is unnecessary dicta. Part III of the Court's opinion here is not irrelevant to our disposition of the matter, as the special concurrence claims; rather, it is an alternative holding providing one of two independent bases for supporting our disposition. Cf. United States Steel Corp. v. United States Envtl. Protection Agency, 444 U.S. 1035, 1038 (1980) (Rehnquist, J., dissenting from denial of certiorari) (recognizing that alternative holdings are not dicta).

O'SCANNLAIN, Circuit Judge, specially concurring:

As the opinion makes plain, we have previously recognized that Federal Rule of Civil Procedure 69(a) allows recourse to state procedures for the execution of a federal judgment. See Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998). Because California law permits the amendment of the judgment to add judgment debtors like the

partnership here, see Carr v. Barnabey's Hotel Corp., 23 Cal.App. 4th. 14, 20-21 (1994), we need not reach nor resolve the novel question of whether a federal court's inherent equity powers permit such amendment. Rather than make new law unnecessarily, and in dicta, no less, I would leave the resolution of this question for another day.

While I concur in the result and in parts I, II, and IV, I cannot join part III of the opinion or that portion of part V which relies on the alternative "inherent powers" ground

casetext

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK BATES, Plaintiff, -vs- CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Police Deputy Chief of Police, TUCK YOUNIS, individual and in his official capacity as City of San Jose Police Captain, Defendants.	No. C 06-05302 RMW (PVT)

DEPOSITION OF CHARLES "TUCK" YOUNIS, II

BE IT REMEMBERED: That pursuant to Notice on Friday, June 8, 2007, 2:17 p.m., before me, Martha Ruble, CSR-5145, personally appeared CHARLES "TUCK" YOUNIS, II called as a witness herein, at 2131 The Alameda, Suite C-1, San Jose, California, and being by me first duly affirmed, was examined in said cause.

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BY: MICHAEL J. DODSON, Esq.
***

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CHARLES "TUCK" YOUNIS, II,
having been first duly affirmed to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION BY MR. KIRCHICK

Q. Good afternoon.
A. Good afternoon.
Q. Would you please state your full name and spell it for us.
A. It's Charles T. Younis, Y-o-u-n-i-s, the II. And I go by Tuck, T-u-c-k.
Q. How did you get Tuck?
A. Part of my middle name.
Q. Oh, really. Which is?
A. Tuckla. T-u-c-k-l-a.
Q. That is a unique one.
A. Yes.
MR. DODSON: I was always wondering that.
THE WITNESS: Believe it or not, I'm Middle Eastern. I'm Syrian. So it's a Syrian name, both the middle and the last name. I know I don't look it.
BY MR. KIRCHICK:
Q. A redhead Syrian.
A. Yes.
Q. We have learned two new things already.

MR. DODSON: There must be an Irishman --
THE WITNESS: It was the Christian Crusades, I think. Viking throwback.
BY MR. KIRCHICK:
Q. You handed me your business card, which indicates you're Assistant Chief of Police for the San Jose Police Department; is that correct?
A. Correct.
Q. How long have you worked in that capacity?
A. About a year -- it will be two years in September of this year.
Q. So two years in September. So since September 2005?
A. That's correct.
Q. And what -- in what capacity were you employed with the same police department, I take it, prior to that?
A. I come up on 28 and a half years with the police department. I started off as an officer, promoted to sergeant and lieutenant and promoted to captain in June of 2004, which I think is relative to my rank when this situation occurred.
Q. And what area were you captain of, what division?
A. At the time of my promotion in June of 2004 I

was assigned to be the captain of the bureau of administration.

Q. Now, you're aware we are here regarding the denial and reissuance of a CCW permit for retired Sergeant Frederick Bates?

A. Yes, I am.

Q. And did you have a particular role in that at some point?

A. Yes, I did.

Q. And what was the first thing that you did with regard to this issue?

A. In my position as the captain for the bureau of administration I received a phone call from retired Sergeant Bates, indicating that he had been denied his CCW privileges by the previous administration. And Sergeant Bates and I were friends in the department, and we had played baseball together, other sports and socialized.

And he asked if in light of the administration change, being Chief Davis, the new chief of administration, which was Pete Oliver at the time, if we would consider -- reconsider his denial of his CCW.

Q. And did you do that?

A. After -- basically what I told him, I would check with my boss, who is Deputy Chief Oliver, and get

back to him.

I checked with Deputy Chief Oliver. Basically said that what the inquiry was from Fred. And Chief Oliver said that we would not be reopening cases that were already decided by the previous administration.

At that point I went back and I called Fred and provided him with that information.

Q. I'm going to show you a letter that has been Bates stamped page 66 from Defendant City's responses to production of documents. It is stamped, signed by Chief Davis to Fred Bates, and it's dated April 6, 2004. Okay?

A. Okay.

Q. I'm going to ask you if you're familiar with that letter once you've had a chance to read it.

A. I have seen these types of letters before. It's a form letter. I had not seen this particular letter for Fred Bates.

Q. What does that form letter say basically?

A. Basically it's the department's transition of our large-capacity magazines, which law enforcement personnel are the only ones allowed to possess. A private citizen without the status of police officer cannot possess it. It's transferring that to Fred Bates and asking for his signature. And then in this case it's stamped by the Chief of Police.

Q. And is that something that happens after someone is retired, an officer is retired?

A. That is my understanding, yes. I'm not involved -- I'm not personally involved in the process of distribution of this document, so I don't know at what point it's turned over.

Q. Does it appear from reading it that it's after retirement? Because on the form it has "retirement date."

A. That absolutely does. It is -- retirement date is on there, and it does appear to be for that purpose, yes.

Q. Doesn't it make sense that that document, in terms of the substance of the document, transferring the large capacity ammunition-feeding device or magazine from the department to the retired officer, that, in fact, that document would be generated after retirement of an officer?

A. Yes, that does.

Q. So that document purportedly is from the Department of San Jose Police Department, telling Fred Bates after retirement that if he signs this document, this large-capacity ammunition magazine is now his as opposed to the department's?

A. That I don't know. But I believe what it does,

it gives the authorization for it. I don't know about the logistics of whether it was at one time the department's and then transfers to him or not or gives him the ability to have that magazine or not. I don't know the answer to that question.

Q. Did a private citizen own such a magazine?

A. It's my understanding, no, they cannot.

Q. Only a retired police officer, right, or a police officer?

A. Or a police officer. I believe there are federal statutes and other things that go along with that but correct.

Q. How would you square that letter with an officer at the same time being denied their right to carry a concealed weapon as a retired police officer?

MR. DODSON: Well, that calls for a legal conclusion. That is also possibly argument. You can answer it if you can.

THE WITNESS: As far as a possession of a handgun and a CCW, they are really two different things. Someone can possess a handgun but they can't carry a concealed weapon.

MR. KIRCHICK: I understand that. That wasn't the question, was it?

THE WITNESS: Well, as far as --

MR. DODSON: Argumentative.
BY MR. KIRCHICK:
Q. The question then, I will rephrase it or ask it again. The question is: How do you square the San Jose Police Department returning a large-feeding ammunition magazine to a retired officer that a private citizen is not allowed to own, yet feeling they are psychologically unfit to carry a concealed weapon?
A. Well, since I wasn't involved in the decision making of this particular situation, I don't have all of facts on that. So I -- I can't offer or render an opinion on that.
Q. Would it be fair to say that if someone were on a psychological disability, generally speaking, that you would not offer to return them a large ammunition magazine?
MR. DODSON: Calls for speculation.
BY MR. KIRCHICK:
Q. If you know.
MR. DODSON: Incomplete hypothetical. If you know.
THE WITNESS: I would say that I would not do that.
BY MR. KIRCHICK:
Q. Smart man.

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disability?
A. I don't know of that. I'm not involved in that part of this. I'm not aware of it.
Q. Thank you. And you're saying when you said that personally, you wouldn't transfer large-capacity magazines to a retired officer on a psychological disability, are you speaking personally, or are you speaking as Assistant Chief of the San Jose Police Department, that if it were a policy decision in your capacity that you wouldn't do it?
A. I'm saying as my position as Assistant Chief of the San Jose Police Department, I would not do that because the statute directs me not to do that.
Q. Well, the statute, though, doesn't really -- let me ask you this:
Is there a statute that pertains to the large-capacity magazine in that regard, or are you referring to the CCW statute?
A. I'm referring to the CCW statute.
Q. Are you aware of whether this United States Code referenced in page 66 discusses anything about releasing these two retired officers on a psychological disability?
A. I'm not.
Q. You've testified many times before, haven't you?
A. Yes, I have.

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Do you know if there is a policy or procedure within San Jose Police Department specifically relating to whether or not to transfer large-capacity magazines, such as this letter purports to do, to those retired under either a medical or psychological disability?
A. Under a medical or psychological disability I do know that someone retiring under a psychologic disability would not be given a CCW permit or authorization for that. And that is not only policy, it's also the statute that says that.
As far as a medical disability, I don't know of a situation where we have denied a CCW on a medical disability, where -- but we would evaluate that aspect of it. In reference to this (indicating), you know, I would have to believe that this is something that is done not at our level, at a chief officer level. It's probably done at a lower level in the organization, like a sergeant at the range doing a transfer of paperwork with a magazine capacity. So that is -- like I answered before, I don't know where this comes into play as far as the flow.
Q. But my question was: Are you aware of a specific departmental policy or procedure that dictates whether this is offered to a retired officer, depending on whether it's a psychological disability or a medical

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Q. Have you given depositions?
A. A few, not a whole lot.
Q. Well, you're doing great, so I'm not going to go through the whole instruction stuff.
A. Sure.
Q. But if you have any question about the process or need to talk to your lawyer in any way, you're allowed to.
A. Okay.
Q. Primarily the most important thing is you've been place under oath.
A. Absolutely.
Q. It is the same legal force and effect as if we were in court.
A. Absolutely.
Q. So when you -- going back to when you talked to Fred Bates and you said that it was based on your discussion with Lieutenant Pete Oliver at the time that no --
A. If I may correct. Chief Oliver, Deputy Chief Oliver.
Q. I'm sorry. Why did I say Lieutenant Oliver? Obviously he was lieutenant before he was deputy chief.
A. Yes, eventually. At some point he was.
Q. At the time that you talked to him he was a

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deputy chief?
A. Correct. He was my boss.
Q. And then you went back to Fred, and you told him on the phone, sorry, decision of the administration is we are not going to reopen those issues that a prior administration, if you will, made?
A. Yes, sir.
Q. And then what did he do next or what did he say?
A. There were some other conversations. He sounded disappointed, if I recall. I don't remember the specifics of the conversation.
Q. Do you remember when the conversation occurred, the first conversation when he asked you to look into it?
A. No, I do not. It was some time after I had been put in that position. So it would have been some time after June of '04. I don't remember the specific month or time.
Q. Is it fair to say that what he was saying to you is that he was on a medical disability, but he was denied his CCW by the prior administration because they thought he was on a psychologic[illegible] disability?
A. He offered some conversation about the -- that the stress was not psychological. It was medical or more medical, as I recall some of the conversation.
Q. Did he tell you that -- whether or not he was

offered a review or an appeal of the prior administration's decision?
A. I don't remember.
Q. Do you remember saying anything to him about an appeal or review?
A. I don't remember.
Q. Do you remember telling him it was too late to have an appeal?
A. I don't remember.
Q. Do you remember answering these interrogatories that were questions put forth to you? I will let you look at them. Obviously it's in a format developed by your lawyer. But do you remember at least helping your attorney or someone from their office --
A. Was this the one --
MR. DODSON: Reviewed.
THE WITNESS: -- reviewed? Yes, I do remember this. And that is my signature or a copy of it on the second-to-the-back page, page nine. Yes.
BY MR. KIRCHICK:
Q. In this interrogatory you were asked -- you were asked to explain your denial of certain paragraphs of the complaint as interrogatory number four and then you gave a response; is that right?
A. May I take a second to read it?

Q. Yes.
A. Thank you.
Q. Take as long as you want.
A. Okay. Just number -- and then my answer? Okay.
Q. Yeah, it's number four.
Do you recall looking at the complaint at the time you answered that so you could understand what the question called for?
A. I do not. I was not given the complaint.
MR. DODSON: For the record, obviously you're talking about answers to allegations in a complaint that was prepared with the assistance of counsel. So --
BY MR. KIRCHICK:
Q. Right. But the question asks for the facts that justify your denials of certain paragraphs in the lawsuit, right?
A. I don't remember reading the lawsuit.
MR. DODSON: It might be easier if you want to refer to specific allegations in the complaint and ask him if he has information on it. It might be easier than doing it that way.
MR. KIRCHICK: I'm just trying to lay foundation of his knowledge.
BY MR. KIRCHICK:
Q. In your response to interrogatory number four

you state that you deny the allegation in the complaint, which is that you told Fred Bates that he was not entitled to an appeal of the denial of the CCW permit because it was not made within 45 days. But here today when I just asked you that, you said you don't recall.
A. I don't recall that, no.
Q. All right. So, if anything, in your interrogatories is it fair to say you denied it, but the more accurate response is you just don't recall as you sit here today?
A. I don't recall saying that. I don't recall the details of the conversation, like I said before.
MR. DODSON: Let me just interject. I don't have the answer in front of me. But, in part, many of the answers, parts of the answers, are denials based upon lack of information and belief. And I don't know if that is one of them, but it very well might be. As I said, I don't have the answer in front of me to determine that.
MR. KIRCHICK: For the record, the answer says defendants -- and this is response to interrogatory number four. "Defendant's contention that Plaintiff did, in fact, receive something in writing regarding paragraph eight. Defendant has admitted the allegations of that paragraph with the exception of the allegation that Defendant Younis told Plaintiff he was not entitled to an

appeal and that Defendant Younis told Plaintiff that his conversation with Amoroso was his appeal."

Now, is that true, or as you sit here today are you saying you don't recall saying that one way or the other?

A. I don't recall saying that one way or the other. And as far as the language in there, very confusing. So I don't -- no matter what, the statement you just made, I don't remember saying that.

Q. Very well. And just so it's clear, at the time you signed off on these interrogatories, is it fair to say that you had the same recollection, which is that you didn't recall --

A. That's correct.

Q. -- that?

Thank you. Are you aware whether or not retired Sergeant Fred Bates ever received anything in writing from Deputy Chief Amoroso at the time she denied the CCW permit?

A. I'm not aware of any.

Q. Did you ever send him anything relative to the reconsideration request?

A. No, I did not. Ultimately when I did tell him that he would be entitled to his CCW privileges, I did that via a phone call. I did not -- we had no

correspondence from my part. I did ultimately see something from him or his doctor.

Q. I think we have that, so let's just, for the record, pin that down so we all know what we are talking about.

A. Okay.

Q. I believe that was in August of 2004; is that your recollection?

A. The dates, I don't recall.

Q. Here is a letter, it's Bates stamped 71, from the city's responses dated August 25th, 2004, addressed to you from a Jonathan Ng, M.D. Let me show you that.

A. This does look like a copy of the letter I received, yes.

Q. And was that -- do you remember if that was before or after having a conversation with him regarding reconsideration?

A. Well, the phone call that I initially received from him, conversation with Deputy Chief Oliver, then the subsequent phone call to Fred saying that the administration was not going to reopen up the matter, this letter was received after that series of events.

Q. Do you know generally how long after that? And I would like to put into context the fact that you were just handling this job position -- what? -- from a month

earlier, is that right, in July?

A. From June.

Q. Two months?

A. From June.

Q. Does that help put the time frame on it a little?

A. The time of August seems like this would be a reasonable -- that time frame would be about the right time frame, yes.

Q. So you feel that it was -- best recollection is it was shortly after those two conversations that you then received this letter from Dr. English?

A. I wouldn't represent it short or long. I have no recollection as far as what the time frame is. I'm sorry.

Q. But fair to say it would have had to have been after June?

A. Absolutely, absolutely.

Q. And this letter made you aware that Jonathan Ng was retired Sergeant Fred Bates' doctor; is that right?

A. Correct.

Q. And he explained in this letter that preclusion from psycho-emotional stress is a term of art frequently used in assessing work-related disability?

A. I'm not a doctor. I read what the paper had to

say, yes.

Q. Had you ever seen that term of art used for any other officer's work-related disability?

A. No.

Q. Are you aware of officers continuing to work as officers with such work restriction?

A. I am not. Rarely are we privileged with the medical data because of, obviously, privacy laws.

Q. Did you look at any other document, file, report, pertaining to retired Sergeant Frederick Bates after receiving this letter?

A. There were a series of events that occurred after I received the letter. I recontacted my boss, Deputy Chief Oliver. He and I had a conversation about the letter. I believe I showed him the letter. He then gave me instruction to go ahead and investigate, reevaluate the administration's decision made before, based on the evidence that -- new evidence that was provided by the doctor.

I pulled the tapes of Sergeant Bates' Retirement Board hearing. I reviewed those. I consulted with the retirement doctor, Dr. Raj Das. Raj Das. And he is also the city physician. And I also had consultation with the police department's city attorney representative, Carl Mitchell.

Q. When you talked to Dr. Das were you speaking particulars regarding Frederick Bates' condition or just generalities?
A. I was talking specific to the letter that the other doctor gave.
Q. Okay. All right. And did you look at any medical documentation?
A. I did not.
Q. And did you conclude from your review of what you've testified to that, in fact, retired Sergeant Frederick Bates was retired on a medical disability?
A. I concluded that based on the information, the additional information that the doctor provided, that the stress was medical and not psychological and, therefore, recommended to Deputy Chief Oliver that we give Sergeant Bates his CCW and Sergeant -- Deputy Chief Oliver agreed with my analysis based on the new evidence, and then I contacted Sergeant Bates.
Q. And he got a CCW permit in -- what was it? December of that year?
A. I don't recall when.
Q. My question actually was, though, when you looked into the disability hearing and talking to Dr. Das, isn't it true that you determined that Sergeant Frederick Bates retired on a medical disability as

Q. So you had access to the tape from the retirement disability hearing, correct?
A. I pulled the -- I requested the tapes be sent to me from the Retirement Board, yes.
Q. And that is something that is accessible to you in your capacity?
A. Correct.
Q. Obviously it was acceptable to the prior administration, right?
MR. DODSON: Assumes facts not in evidence, calls for speculation. You can answer.
BY MR. KIRCHICK:
Q. That is a reasonable inference?
A. Absolutely.
Q. There is nothing private or confidential about it?
A. I believe it's private or confidential. You have to have a right to know or a need to know to gain that information, was my understanding of it.
Q. So, surely, the prior deputy chief making a decision about denying or granting a CCW permit would have access to this if she or he so chose; is that right?
A. I would believe so. Currently I know that we do.
Q. And, likewise, were you able to talk to Dr. Das?

opposed to a psychological disability?
A. That was not the conclusion I drew based upon the information that I had. The way I stated it in my answer before is the conclusion that I drew.
Q. Which was that his stress was medical and not psychological?
A. That the stress was medical related, not psychological related.
Q. Well, are you aware that there are two different categories of disability, one being psychological and one being medical?
A. No, I'm not. I was aware that there was a disability retirement and that there are factors that go into what that person gets a disability retirement for.
Q. All right. So when you looked into it, you determined it was medical disability and not psychological disability?
A. Based on the new evidence, correct.
Q. You say "based on the new evidence." The only thing you knew that you had was a letter from Dr. Ng that simply discussed, quote, "Preclusion from psycho-emotional stress is a frequently-used term of art."
A. That's correct. That's the new evidence that I was referring to.

A. That's correct.
Q. And could you have -- you're able to talk to Ed Overton?
A. Correct. I don't believe I talked to Ed Overton, but I can talk to Ed Overton.
Q. And you're able to talk to the retired officer to get more information, right?
A. Absolutely.
Q. In other words, if a retired officer wants to share his or her medical records, that is up to them to waive that privilege and confidentiality, isn't it?
A. I believe so.
Q. And, likewise, if you ask the retired officer to give authorization so you could talk to the physician that is treating the retired officer, that could be done as well, right?
A. Yes, I believe so.
Q. Was part of making this decision, in addition to what you've already stated, the fact that Mr. Bates had counsel who had filed a claim for damages with the city because of the denial of the CCW?
MR. DODSON: Assumes facts not in evidence. You can answer.
THE WITNESS: Reask the question.
BY MR. KIRCHICK:

Q. Sure. In addition to the other reasons that you decided, along with Deputy Chief Oliver, to grant him his CCW permit, was there additionally the facts that retired Sergeant Bates had retained counsel to try and make a preliminary legal move to sue the city for damages?
MR. DODSON: Do you understand the question?
THE WITNESS: Yes, I do understand the question. I don't believe that that was part of the decision making, and I don't remember when that occurred, that part of the time line. I don't believe that was part of the decision making.
BY MR. KIRCHICK:
Q. And was it just the decision to reinstate it, was that yours and Deputy Chief Oliver's or just Deputy Chief Oliver's?
A. It was my recommendation to Deputy Chief Oliver, and he concurred with that.
Q. In your interrogatory response, same one, number four, it says that, "It is Defendant's contention that Plaintiff did, in fact, receive something in writing regarding paragraph eight," referring to the complaint. And you're saying you didn't actually read the complaint when you answered this; is that right?
A. That's correct.
Q. Do you know what writing is referred to in this

interrogatory response?
A. No, I do not.
Q. Okay. Well, paragraph seven of the complaint alleges that retired Sergeant Bates never received anything in writing from Defendant Amoroso or Defendant City that he was denied CCW authorization due to his psychological disability or otherwise. And your response to interrogatory number four says, "It's Defendant's contention at that Plaintiff did, in fact, receive something in writing regarding paragraph eight" -- oh, no. There should have been a period there. That is not phrased correctly.
So it was Defendant's contention that Plaintiff did, in fact, receive something in writing. Are you aware of any writing from Deputy Amoroso or the City of San Jose advising Frederick Bates of his CCW authorization being denied?
A. I am not.
MR. KIRCHICK: Counsel, would you mind making sure on the record that we stipulate there is sort of a typographical error here in this response? And if could you read line 5 to 11 and see if you agree with me on that.
MR. DODSON: It appears in line six there should be a period right after where it says paragraph eight,

and then a new sentence starts.
MR. KIRCHICK: Starts with "regarding," and the "r" in regarding should be capitalized.
MR. DODSON: "Defendant has admitted the allegations." It states, "It's Defendant's contention that Plaintiff did, in fact, receive something in writing regarding paragraph eight."
There was a comma there. I believe it should be a period and new sentence starting, "Defendant has admitted the allegations of that paragraph with the exception of the allegation of Defendant," et cetera, et cetera.
MR. KIRCHICK: Do you mind telling me in your response to production of documents, is that writing obtained in here?
MR. DODSON: I was under the impression there was a writing. Apparently that was mistaken. So perhaps it was based on something that I thought that the other witness, Deputy Chief Amoroso, had told me. But apparently that is mistaken.
MR. KIRCHICK: Thanks. One moment.
THE WITNESS: Take your time.
BY MR. KIRCHICK:
Q. Did you, in recommending the change of decision to Deputy Chief Oliver, did you review the personnel file

of retired Sergeant Frederick Bates?
A. I don't recall doing that, no.
Q. I may be done. I'm just going to look through some notes.
A. Sure.
Q. I will get you back to work.
(Discussion off the record.)
BY MR. KIRCHICK:
Q. I'm just trying to look for the date of the actual reissuance of the CCW permit. I think it was December, but I should have something here in my file that pins that down. I think I have a photocopy of it.
Do you know who POA director Jeff Ricketts is?
A. Yes, I do.
Q. Did you ever talk to him about this matter?
A. Yes, I did.
Q. And what was that conversation?
A. I don't remember the details of the conversation other than the fact that he was calling on behalf of Fred, and I don't know if Fred was in the office with him or not at the time. But basically along the same questions as Fred had from our phone conversation.
Q. Do you recall advising POA director Jeff Ricketts that Frederick Bates did not have a right to an appeal?

A. I don't recall that.
Q. That would be consistent with your opinion, if at the time you made that statement, that he was on a psychological disability, though, wouldn't it?
A. No. It would be based on the fact that the right to appeal -- I don't remember making that statement. My conversation with Jeff, as I remember, is that we had already visited this with Fred, and we are not going to relook at the decisions made from prior administrations. As far as the right to appeal, I don't remember that.
Q. But, I mean, I guess what I'm saying is to be fair to you, in a sense, if you made that statement, it would be consistent with the situation at the time; that number one, it was well beyond 45 days of his denial, right?
A. I don't remember what the time limit is for the denial, number one. Number two, I don't know what Deputy Chief Amoroso had done with her denial. So I would -- I don't recall making those statements.
Q. You're aware, though, that the Penal Code does not permit someone to appeal the denial of a CCW if you have a psychological disability?
A. I'm aware of that, yes.
Q. So if that was your belief at the time, saying

immediately and do it, but I don't know when that conversation was.
Q. Okay. Do you recall receiving from Fred Bates his last three yearly evaluations, last of which one was completed in March 2004, to further aid in your reconsideration decision?
A. I don't remember that.
Q. I'm going to show you Bates stamp page 75 through 85 and see if that refreshes your recollection.
A. It does not. And I'll tell you partially the reason why is that part of the job of the bureau administration captain is to review the performance appraisals of all 1800 employees of the San Jose Police Department.
Q. So they all start to look the same?
A. They all start to look the same. You do read them. But that does not refresh my memory.
Q. I would hope that every officer in your department has evaluations that looked like Sergeant Fred Bates. Seriously. They are good. Aren't they?
A. Yeah.
MR. DODSON: I was going say there is no question there but he finally --
THE WITNESS: He finally asked one. That is what I was waiting for.

you have no right to appeal would be consistent with what the law is, right?
A. As -- putting it in context with your statement, yes. That is the definition of that. But my conversation with Jeff Ricketts, I can't characterize that's what I said or that's what I meant.
All I do remember is the fact that having had a conversation with Fred Bates before, is that we were not going to look at the matter because the decision had already been made by a prior administration. As far as the appeal process and time line or stress or not stress, I don't remember having any conversations with Jeff about that.
Q. Does it refresh your recollection that it was around the end of December 2004 that you informed Mr. Bates of the new decision to grant him the CCW permit?
A. As far as the timing when I told him that, I don't recall when that was. I'm trying to think of if I was still -- I had been transferred from that job. Maybe it was the beginning of '05 is when I had been transferred. So I would have been still on that job. I don't know exactly when I recontacted Fred and told him. But I did tell him when I called him on the phone that the decision was immediate. He could come down

MR. KIRCHICK: I slipped it in.
BY MR. KIRCHICK:
Q. When you went to --
When you went to look at the disability hearing information, did you listen to the tape of the hearing or did you look at documents pertaining to that hearing?
A. I only listened to the audio tape.
Q. That is all I have. Thanks.
THE REPORTER: Dr. Dodson, do you want a copy of these transcripts?
MR. DODSON: Yes.
(WHEREUPON, at 3:04 p.m. the deposition of CHARLES "TUCK" YOUNIS, II was concluded.)

_____
CHARLES "TUCK" YOUNIS, II

_____
Date

Vanguard Featured Article

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Featured Article: 5/10/2004

Davis Interview

by: Paul Francois

Photographs by: Barb Melloch

Chief Rob Davis

On January 22, 2004, Rob Davis was sworn-in as the Chief of the San Jose Police Department. At 46, he is among the youngest men to hold the position. During his 23 years on the job he has held the following positions: Deputy Chief, 2001-2004—Bureau of Investigations; Captain, 1998-2001—Bureau of Technical Services, Patrol Division Commander, Bureau of Administration; Lieutenant, 1993-1998—Violent Crimes Unit, Patrol Area Commander; Sergeant, 1989-1993—Internal Affairs, Night Detective, Fraud Unit, Airport Division, Patrol Supervisor; Police Officer, 1980-1989—Administrative Unit, Police Academy TAC Officer, Field Training Officer, Patrol officer.

Chief Davis holds a Master of Public Administration Degree from Golden Gate University and a Bachelor of Arts Degree with Honors in English from San Jose State University. He also graduated from the first POST Master Instructor's program in 1993. He has lived in Argentina, ridden a bicycle across the United States, and served as a Board Member for the Santa Clara County Big Brothers/Big Sisters organization. We sat down for an interview with the Chief, and here is what he had to say.

VANGUARD: First of all, congratulations on your appointment as Chief of Police.

Davis: Thank you.

VANGUARD: What will change at the San Jose Police Department under Chief Rob Davis?

Davis: Part of what has made this department so great is what we have been doing for the last 30 years. I don't believe that I'm going to change those things just for the sake of making change. What you have to look at, though, is how police work itself is changing, how the expectations of the community are changing, and how the expectations of our own

Office and see if that could be done.

And I think during that initial discussion, I believe I told him I could get a letter from the doctor who wrote that work restriction, explaining that it was -- had nothing to do with my mental status, and it didn't -- it didn't mean that I couldn't -- it didn't mean that I had a psychological disability.

There was some discussion about a letter, and I told him I could get the doctor to write a letter.

Q. In your earlier conversation with Deputy Chief Amoroso in April 2004, she related to you the reason for the denial being that the information she had received was that you retired on a -- with a psychological issue or problem, if you will; correct?

A. Uh-huh.

MR. KIRCHICK: Objection; that misstates his prior testimony.

BY MR. DODSON:

Q. Let me rephrase it.

Your understanding in that conversation in April 2004 with Deputy Chief Amoroso was that she and the department were denying your CCW based on a work restriction that included in part psycholog- -- restrictions from physically or psychologically stressful work; correct?

A. Yes. Preclusion from psychological or psycho-emotional work, stress.

Q. And she referred you in that conversation to the subsection of the Penal Code that she was basing her decision on; correct?

A. Correct.

Q. And that's 12027.1, subsection (e); correct?

A. Correct.

Q. In that conversation, did you offer to get her additional documentation from your doctor to support the claim that you were not or didn't have a psychological disability?

A. I don't recall doing that. I may have. Because I was trying to convince her -- I recall trying to convince her in some way that it -- my disability was medically related. But I don't know what I said in my attempt to convince her. I can't recall what I did.

Q. Between your -- the time of your conversation in April 2004 and the time of your conversation with then-Captain Younis, did you have any contact with the San Jose Police Department relative to this issue, be it an attempt to contact somebody on the phone, an email, a letter, anything of that nature?

A. My recollection is the only -- The first person I talked to after my conversation with Chief

Amoroso regarding this matter was Captain Tuck Younis.

Q. Now, do you recall when that conversation was?

A. It was in --

MR. DODSON: We're going to have this marked, anyway. Let's go ahead and do that (indicating).

(Deposition Exhibit 2 was marked for identification.)

THE WITNESS: I think it was in August of 2004.

MR. DODSON: We'll mark this as Exhibit 2. Thank you.

BY MR. DODSON:

Q. Exhibit 2, if you'll look at that, and can you identify what that is.

A. That is a Claim Against the City of San Jose form.

Q. And just for the record, on the second page of the document, there's a signature line, April 26, 2005.

Is that your signature?

A. Right.

Q. Okay. And my main purpose of marking it at this time was to refresh your memory of when that conversation was, but you already answered it. You can see sort of in the middle of the page, it's stated, "I contacted Captain Tuck Younis at Police Personnel in

August of 2004 ..."

Do you see that?

A. Right. I see that.

Q. All right. So between April and August, the April conversation with Deputy Chief Amoroso and August 2004, you didn't do anything relative to contacting anyone in the department regarding this issue; correct?

A. That's my recollection.

Q. All right. Did you, in that intervening time period, go to your doctor or any other doctor to attempt to get some type of clarifying information or a note of some sort, or a report saying that you didn't have psychological problems and would thus be capable of having a concealed weapon permit?

A. I don't remember exactly what happened between that time, but I believe I had a conversation with Dr. Ng -- that's N-g, Dr. Ng -- and I think the conversation was that I had spoke to him about being denied a CCW permit and if he would write a letter. I may have asked him that. I don't recall, but I think I did. But I can't say for sure exactly. But that conversation may have happened after my first conversation with Tuck Younis, so I don't know if it was before or after.

Q. Now, Exhibit 2 is the claim that you filed

against the City. And we've identified your signature on page 2. The body of the document is typed with various information. Did you fill this out yourself?

A. Yes, I did.

Q. Again, without getting into the substance of any communication, my question is as of the time that you had filled this out in April of 2005, had you conferred or consulted an attorney, prior to filling this out?

A. Yes. Yes, I did.

Q. All right. It even says that. "I obtained legal representation through the Law Offices of Stuart D. Kirchick." And that's stated in the body of Exhibit 2.

A. And I think you had a question earlier about the date, so that would have been 200- -- October 2004 when I first spoke to an attorney.

Q. And you also state that "A complaint was filed by me with the Department of Fair Employment and Housing on December 9, 2004."

What was the basis of your filing a complaint with the Department of Fair Employment and Housing?

A. Well, the basis was that I had been denied my rights to due process; constitutional rights had been violated.

Q. And that's based on the feeling that you were legally entitled to a hearing on that issue and were denied a hearing; correct?

A. Correct.

Q. Now, when you contacted then-Captain Younis, I believe you said that he would refer the matter to the City Attorney's Office; is that correct?

A. Yes.

Q. Did he ask you for any additional documentation or medical reports or anything of that nature?

A. Well, the discussion came up about a letter from the doctor that wrote that work restriction, and I believe I told him I could get that doctor to write a letter and explain that the work restriction did not mean that I have a psychological disability, and he instructed me to do that. In the meantime, he was going to contact the City Attorney's Office.

Q. I want to refer to an allegation in your complaint -- This is the actual lawsuit that's been filed in the federal court, and I realize that your attorney filled this out, but it's based on, I assume, factual information, that's why I want to ask you about it.

Referring to -- Do you have it, Stuart? --

paragraph 8, paragraph 8 in part states, "On or about August 25, 2004, Defendant Tuck Younis, an acting captain for the police department received a letter from Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and clarified that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability.

Did your conversation that you had with Tuck Younis on the phone, did that -- I assume that took place prior to August 25, 2004; is that correct?

A. Right.

Q. All right. So in your initial conversation, you related to him that you would get some additional medical documentation?

A. Right.

Q. Did he ask for it?

A. I'm not -- I'm not sure if he asked for it or I volunteered it. I believe I volunteered it. Because I -- Like I said, I don't remember exactly when I had the conversation with Dr. Ng regarding the letter. I think I had it before because I wanted to be able to say, when I spoke to Captain Younis, that the doctor would in fact write the letter. So I -- I believe -- I believe I wa- the one that brought up that issue.

Q. All right. And then, how is it that you know that he received it on August 25, 2004?

A. I believe I read somewhere on the letter that it was -- a date. That's why I'm assuming that's when he received it at. So it's just a guess that he received it on or about that time.

Q. And further in paragraph 8, it says, "In response, on or about September 10, 2004, Defendant Younis advised Plaintiff" -- that's you -- "that Plaintiff was not entitled to an appeal of the denial of the CCW permit because it was, quote, 'It was not made within 45 days,' period unquote."

Did he say that?

A. Yes.

Q. And did you question him about that, what he meant by 45 days?

A. I don't recall our conversation exactly, but I think I was saying that that did not apply. There was no 45-day rule to make an appeal, that I was -- and I'm sure we had a discussion about the requirements of Penal Code Section 12027.1, first of all, that I had no hearing. And so I -- I am sure I told him that that did not apply, there was no 45-day rule applicable in this situation.

Q. And then the last part of paragraph 8 says,

"The defendant, Younis, further told plaintiff that plaintiff's telephone conversation in April 2004 with defendant Amoroso was his appeal."

Did he make that statement?

A. Yes.

Q. Can you recall as best you can the exact wording that he used when he said that.

A. I can't recall the exact wording, but he -- he made it clear that the City Attorney's Office -- I'm assuming that it was coming from the City Attorney's Office -- that I had no right to appeal because of the 45 days. And I explained to him that there was no 45 days; that it was -- it had something to -- It was written in the statute, as a matter of fact, as to the requirements for an appeal.

It had something about the department has to notify an officer or something, they have to give him so many days to request a hearing. So I told him that didn't apply. But I don't know exactly what I said in regards to the 45-day thing. But -- And I can't say exactly what the wording was when he said that "Your conversation with Chief Amoroso was your appeal." I can't say the exact wording. But that was the substance of the statement that he made.

Q. Okay. So it was your understanding in that

September 10, 2004 conversation that's referred to in paragraph 8 that he was basing his decision or at least his information that he related to you on advice that he had received from the City Attorney's Office?

A. That was my understanding.

Q. Did he tell you that?

A. I believe he did say, you know, he had conferred. Because we had that in our conversation, in our first conversation, that he was going to confer with the City Attorney's Office. So I believe he did say that the City Attorney said they weren't going to -- that I couldn't have an appeal because it wasn't done in a timely manner, meaning the 45-day rule. But I think that the last part, where he said my conversation with Chief Amoroso was my appeal, my feeling is he made that statement on his own.

Q. Based on any of your dealings with then-Captain Amoroso in connection with this issue, did you have any feeling that any of his interactions or decisions or information that he related to you was in any way motivated by personal ill will, animosity, or anything of that nature towards you?

A. You say Captain Amoroso. I'm assuming you mean --

Q. I'm sorry. Captain Younis.

A. -- Captain Younis. At the time -- No. Like I said when you asked me if I knew him, I had considered him -- I considered him a friend. So no, I didn't -- I was assuming that he was going on the advice of the City Attorney's Office.

Q. When you say at the time you didn't feel that way, did you feel that way subsequently?

A. What was that?

Q. That he was -- his decision or information or dealings with you in September of 2004 were motivated by ill will or animosity or something other than information supplied to him by the City Attorney's Office or other matters of that nature?

A. Well, I don't -- I don't think they were made by personal ill will on his part. I think he was probably following instructions that he received from higher-ups.

Q. Do you have any information to support that?

A. No, I don't.

Q. Is it your sense that somehow or other the San Jose Police Department as a whole was denying you a concealed weapon permit for some illegitimate reason?

Do you have anything to support that other than what you've already testified to?

A. No.

Q. Paragraph 9 of your complaint says that a couple of weeks later -- "Approximately 2 weeks later, September 24, 2004, Defendant Younis advised a director of the Police Officers Association that plaintiff did not have the right to appeal the denial of his CCW authorization."

What do you base that claim on?

A. Can I -- If you'll give me 1 minute to read it, please.

Q. Sure.

A. I think I understand your question. And after my second conversation with Captain Younis where he told me that, first, it wasn't done in a timely manner, it wasn't done in 45, and I explained that didn't apply in this case. And then when he made the statement that my conversation with Amoroso was my appeal, that was my second -- that was my -- that was during my second conversation. So after that conversation, I said that I would do everything I could reasonably possible to resolve this issue without having to seek legal representation. And that was my goal.

So I said I was going to contact the POA; maybe they could use their influence to help resolve this matter. So I went over to the POA office and I spoke to Sergeant Jeff Ricketts, who is a POA director,

to see if he would intervene and maybe we could resolve this.

Q. And what did Sergeant Ricketts tell you?

A. Well, I explained to Sergeant Ricketts that, you know, it had been denied, and it was based on that work restriction. And I also explained to him that -- the law, 12027, and I explained to him the law required that I have a hearing and I didn't get a hearing.

So he called Captain Younis because he wanted to get a better understanding of what was going on.

Q. Did -- in your -- Well, first of all, the conversation you had with Sergeant Ricketts, was that in person?

A. Yes.

Q. And did you review the statute with him at that time? I'm referring to the penal code section.

A. Right, right. I'm not sure if we actually sat down and read over the section together, but I believe he did get a copy of the section and read it, prior to calling Captain Younis. Because he called Captain Younis in my presence. I was in Sergeant Ricketts' office at the time he called Captain Younis. And I think that answers your question as to how I know that he said it was the appeal, because I was sitting in the office and he relayed he information that he received

from Captain Younis directly to me.

Q. Did you talk to anyone else in the POA about this issue, other than Sergeant Ricketts?

A. I don't recall. I don't recall talking to anybody else.

Q. Did Sergeant Ricketts state whether or not he agreed with your interpretation of the penal code section that entitled you to a hearing on this issue?

A. I don't know if he gave his opinion. I think he was probably acting more as like a mediator, you know, helping resolve this. That's why he called Captain Younis and said, you know -- well, to get a better understanding of what's going on.

And that was my purpose, to see if he could facilitate a resolution to this issue, you know. Because I really didn't want to go -- take this, you know, any -- I didn't really want to continue this process. I just wanted to get it over with. I wanted some closure in this matter.

And I said I was going to do -- in my mind, I told myself I'm going to do everything I can reasonably do before I take the next step, which is getting legal representation. But -- but the answer to your question is I don't know if he gave me his opinion or not, but my -- my feeling is, if you want me to guess, I think he

did.

Q. I don't want you to guess.

A. Okay. Sorry.

Q. Well, do you have a recollection of him stating one way or the other what his opinion was relative to this issue of whether or not you were entitled to a hearing?

A. No. I don't have a recollection if he said yeah, you're entitled to a hearing, no, I don't. I don't have that recollection.

Q. And you said a moment ago you were present in the room when he contacted Captain Younis?

A. Yes.

Q. Did he get ahold of Captain Younis?

A. Yes.

Q. What do you recall about -- and I know you probably -- Well, let me withdraw the question. Did he have it on speaker phone?

A. No.

Q. Were you able to hear anything that Captain Younis was saying on the other end of the conversation?

A. No.

Q. What do you recall Sergeant Ricketts saying to Captain Younis in this conversation?

A. I don't remember any exact wording. I just

recall him asking about what was going on -- probably what was going on here, you know, why -- why it was denied, and that -- why couldn't I get an appeal, what was the reason for not allowing me to have an appeal, something similar to that. But I don't remember the wording of the conversation.

Q. Do you remember how -- approximately how long the conversation lasted?

A. No, I don't.

Q. At the conclusion of the conversation, did you then have a further conversation with Sergeant Ricketts about what his conversation with Captain Younis entailed?

A. I don't recall.

Q. He didn't tell you what the reaction was or the information that Captain Younis had supplied to him on the telephone?

A. He may have. I don't recall. Because I had heard what I needed to hear, that I wasn't going to get an appeal. That's -- I don't recall anything else that was said between -- you know, any of the conversation that I had with Sergeant Ricketts. Now, I'm sure there was conversation, but I just don't remember what it was.

Q. Now, as a retired member of the police department at that time, did you feel that you had the

right to have the POA represent you in any capacity relative to your rights and obligations as either a police officer or retired police officer?

A. Repeat that, please.

Q. Yeah. I'm just wondering, did you have an understanding -- Certainly the POA is your representative on many issues --

A. Right.

Q. -- as a police officer. Did you have an understanding of any of those rights and obligations following your retirement from the police department? In other words, could they represent you? Did you have that understanding that they could -- they could represent you in some capacity?

A. I had that -- I had the -- I was of the opinion that they could. And now that you bring that up, I believe we did have a conversation about them representing me.

Q. Did -- Who did you talk to about that?

A. I feel confident saying that, after the conversation Sergeant Ricketts had with Captain Younis, that we did have a discussion about the POA representing me in a legal capacity in this CCW issue.

Q. All right. And what would be the nature of their representation, at least as you discussed in that

conversation?

A. Providing me an attorney.

Q. And did they in fact do so?

A. I believe that Sergeant Ricketts told me he would have to check with the -- the full board of directors for the POA. He couldn't make that decision himself.

Q. And did they -- Did he ever get back to you or anyone from the POA get back to you on that issue, whether or not they could supply you with an attorney?

A. No, because I -- Actually, he told me that I could come to one of the meetings and make that request, one of the director's meetings and make that request, and I did not.

Q. Why not?

A. I just -- I just decided to get my own attorney. Because -- For whatever reason. I don't remember exactly what was going through my mind.

Q. So they never made -- The POA never made a decision, at least to your knowledge, one way or the other, as to whether or not they would supply you with an attorney on this issue; correct?

A. At that time, no.

Q. Okay. Did they ever subsequently give you a d cision on that?

A. I subsequently asked them again, with a different -- it was a different POA administration that was in place, the current POA administration. I asked for -- if they would provide me with an attorney or provide me some type of legal representation, and they said they couldn't.

Q. Who told you that?

A. The president, current president of the POA, Robert Lopez, L-o-p-e-z.

Q. When did you receive that information from Robert Lopez?

A. This was -- I can't say exactly. But a lot of things had transpired after that conversation.

Q. Well, I'm not so much looking for an exact date. If you can give me a time frame. I mean, your discussions, it appears, with Sergeant Ricketts occurred sometime in late September of 2004. Was it within 6 months of that? A year of that? Do you know?

A. I believe it was shortly after my unsuccessful attempt to obtain damages in small claims court.

Q. Okay. We'll get to that in a minute. But at least your understanding, as of the time of your conversation with Sergeant Ricketts in September of 2004, was that at least there was the potential for you to have the POA supply you with an attorney relative to

this issue, and that you needed to follow up by going to a director's meeting and making that request; is that true?

A. That is correct. Making that request in person.

Q. And you made that decision on your own, not to -- not to go to the meeting and make that request because you had decided to hire your own attorney at that point; correct?

A. Correct.

Q. All right. Did you only have the one conversation with Sergeant Ricketts about this issue that we just talked about?

A. To the best of my recollection, yes, just that one conversation.

Q. And other than being advised by the current president of the POA, Robert Lopez, that they wouldn't supply you with an attorney, did you have any further contact with the POA relative to this issue?

A. I don't recall having anymore contact.

Q. Are you aware of the POA ever writing any letters or doing anything else on your behalf relative to this issue, other than Sergeant Ricketts contacting Captain Younis by telephone?

A. I don't recall anything else being done

Q. Did you make the request of them to do anything else on your behalf?

A. I don't recall making the request to do anything else.

Q. Is it your understanding or was it your understanding at that time that if the POA provided an attorney to you relative to this issue, it would have been at no cost to you?

A. That was my understanding; that it would have been at no cost to me.

Q. Now, following that conversation in September of 2004 with Sergeant Ricketts, what's the next thing you did relative to the issue of your concealed weapon permit?

A. I believe I contacted Stuart Kirchick's office.

Q. And your complaint, paragraph 10, says that in October of 2004, you were forced to hire an attorney to pursue your CCW authorization. Do you see that?

A. Yes.

Q. Now, in between the -- Withdraw that. Paragraph 11 says, "Towards the end of December 2004, Defendant Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff."

Is that true?

A. That is correct. Well, let me clear -- make a correction on that. I initially thought it was toward the end of December 2004, but actually, my notes, I have it as being December 14th when he actually called me.

Q. December 14, 2004?

A. Right.

Q. In between the time that you hired Mr. Kirchick in October 2004 and December 2004, did you yourself do anything relative to the issue of your concealed weapon permit, as opposed to anything that Mr. Kirchick may have done?

A. I'm sorry. You're going to have to repeat that one.

Q. My question is, between the time that you hired Mr. Kirchick and December 14, 2004, did you yourself take any action or contact anyone or do anything relative to this issue, or did you just leave it all to him?

A. No, I did something on my own.

Q. And what was that?

A. I made a complaint with the Department of Fair Housing, Fair Employment and Housing.

Q. And what was that complaint based on, the fact tha you were denied a hearing?

A. Exactly. I was -- I was denied due process. My constitutional rights were violated.

Q. Had you consulted with Mr. Kirchick prior to making that claim?

A. I believe I did.

Q. And what was the outcome of that claim?

A. They interviewed me, and I believe the interview was on December 9th of 2005 -- or is it 2004?

Q. And what were you advised?

MR. KIRCHICK: First of all, objection; it's irrelevant. But you can answer the question as to what you were advised.

BY MR. DODSON:

Q. What were you advised by the Department of Fair Employment and Housing?

MR. KIRCHICK: You can answer.

THE WITNESS: I can answer? Okay. They informed me, I believe it was a week later or a few days later, that they would take my case.

BY MR. DODSON:

Q. And what was the outcome of that, what happened?

A. Well, prior to them taking the case and doing any further investigation or whatever, I was contacted by Captain Younis,and told that, you know, I would --

they had reversed the decision, the department had reversed the decision to deny me a CCW permit. So I called back the Department of Fair Employment and Housing and told them that the issue had been resolved.

Q. Now, it was your understanding that your attorney, Stuart Kirchick, had sent a letter to the department which enclosed a -- some additional medical documentation from your doctor; is that accurate?

A. That was my understanding.

Q. And when you were contacted by -- When you were contacted by Captain Younis on December 14, 2004, did he relate to you that he and the department had received additional follow-up medical documentation from your doctor clarifying the nature of your disability?

A. No, he did not. And I specifically asked him why the department changed its mind, and he said all I need to know -- the only thing is the decision was changed, and that's all he could say.

Q. So he didn't -- he didn't state a reason why the department reversed its decision and granted you the CCW; correct?

A. No, he did not. Even after I asked him.

Q. Did he say he was precluded from answering that for some reason?

A. No. He just said the answer s the decision

that it was -- it was -- they reconsidered it and they changed it.

Q. And when was it that you physically got the -- your retired ID card with an actual endorsement or approval to carry a concealed weapon? Was it shortly thereafter?

A. No, it was not. It was, I believe, February 17th of 2005.

Q. Do you know why it took that long to actually get it?

A. Because I was -- had some travel plans for the holidays, the Christmas holidays, that were going to require me to be out of town for at least a month, probably 2 months.

Q. So it had nothing to do with the department delaying it in any fashion; it was more to do with your own travel plans; is that accurate?

A. That is accurate.

Q. So in other words, if you had wanted it shortly after, say, within a day or 2 after December 14, 2004, it was your understanding at the time that you could have received it; correct?

A. That is correct.

Q. Now, in between April 2004 when the permit was initially denied and December of 2004 when it was -- the

E-FILING

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FILED
AUG 29 2006
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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IN THE UNITED STATES DISTRICT COURT

IN THE NORTHERN DISTRICT OF CALIFORNIA

C06 05302RMW PVT

FREDRICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Police Deputy Chief of Police, TUCK YOUNIS, individually and in his official capacity as City of San Jose Police Captain,

Defendant(s).

Case No.:

COMPLAINT FOR DAMAGES DUE TO DEPRIVATION OF CIVIL RIGHT UNDER COLOR OF LAW-DENIAL OF DUE PROCESS

INTRODUCTION

This is a complaint for money damages against ROBERT DAVIS, ADONNA AMOROSO, and TUCK YOUNIS, all supervisory police officers for the CITY OF SAN JOSE and the CITY OF SAN JOSE, for violation of plaintiff's constitutional rights. Plaintiff alleges that the defendants' unlawfully denied plaintiff due process of law by specifically violating California Penal Code Section 12027 and 12027.1, and that the CITY OF SAN JOSE is liable because the individual defendants were acting in a supervisory capacity in damaging plaintiff's

constitutional rights.

PLAINTIFF ALLEGES:

1) Plaintiff FREDRICK BATES is a resident of the State of California, and resides in the City of Folsom, County of El Dorado, in that state.

2) Defendants, CITY OF SAN JOSE, ROBERT DAVIS, ADONNA AMOROSO and TUCK YOUNIS, were at times relevant herein duly appointed and acting officers of the police department of the defendant CITY OF SAN JOSE.

3) Defendant CITY OF SAN JOSE is a municipality duly incorporated under the laws of the State of California. At all times pertinent to this complaint, Defendant ROBERT DAVIS was Chief of Police for the City of San Jose, State of California; Defendant ADONNA AMOROSO was a Deputy Chief of that city; Defendant TUCK YOUNIS was a Captain of Police of that city. In doing the acts and things herein after set forth, defendants were acting in their respective capacities as stated, under color of law, specifically violating Penal Code Section 12027 and 12027.1. Further, defendants' actions deprived plaintiff of his property without due process of law, and thereby deprived plaintiff of his rights, privileges and immunities as guaranteed by the first, second, fifth and fourteenth amendments to the Constitution of the United States.

4) This action is brought pursuant to 42 U.S.C. § 1983 and 1988, and the first, second, fifth and fourteenth amendments of the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331 and 1341(3)(4), and the aforementioned constitutional and statutory provisions.

FIRST CAUSE OF ACTION AGAINST INDIVIDUAL DEFENDANTS

5) On or about April 1, 2004, plaintiff retired from the police department for the CITY OF SAN JOSE where he was employed as a police sergeant. Plaintiff's retirement was due to a medical disability. During his employment as a sergeant for the police department of defendant CITY OF SAN JOSE, plaintiff received exceptional performance appraisals consistently above

standards while employed for the police agency over 20 years.

6) Shortly thereafter, on or about April 6, 2004, plaintiff received his police sergeant retirement ID card which was not stamped for carrying a concealed weapon (herein after referred to as "CCW") privilege. Plaintiff did not receive any explanation or written notification that authorization for him to carry a concealed and loaded firearm was denied.

7) On or about April 16, 2004, plaintiff contacted defendant ADONNA AMOROSO, a deputy chief with the defendant CITY OF SAN JOSE. Approximately one (1) week later, defendant AMOROSO advised plaintiff that the CCW authorization was denied based on a work restriction he had on his medical records which was for him to avoid psychological stress. Defendant AMOROSO further informed plaintiff that he had no right to appeal since "his disability was based on a psychological disability". Plaintiff never received anything in writing from defendant AMOROSO or defendant CITY OF SAN JOSE that he was denied CCW authorization due to his psychological disability or otherwise.

8) On or about August 25, 2004, defendant TUCK YOUNIS, an acting captain for the police department of the defendant CITY OF SAN JOSE, received a letter from a Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and clarified that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability. In response, on or about September 10, 2004, defendant YOUNIS advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because "it was not made within 45 days". Defendant YOUNIS further told plaintiff that plaintiff's telephone conversation in April 2004 with defendant AMOROSO was his appeal.

9) Approximately two (2) weeks thereafter, on or about September 24, 2004, defendant YOUNIS advised a director of the Police Officer's Association that plaintiff did not have the right

to appeal the denial of his CCW authorization.

10) Thereafter, in October 2004, plaintiff was forced to hire an attorney to pursue his CCW authorization. Additionally, plaintiff filed a complaint to the Department of Fair Employment and Housing on December 9, 2004.

11) Toward the end of December 2004, defendant YOUNIS informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff.

12) The actions alleged above deprived plaintiff of the following rights under the United States Constitution:

a. Freedom from deprivation of due process of law

b. Freedom from summary punishment

c. Freedom from the deprivation of the right to bear arms

13) Defendants subjected plaintiff to such deprivations by either malice or a reckless disregard of plaintiff's rights.

14) The direct and proximate result of defendants' acts is that plaintiff suffered from severe embarrassment and humiliation resulting in severe emotional distress, was forced to expend legal expenses and deprived of a liberty and property right without due process of law.

SECOND CAUSE OF ACTION AGAINST DEFENDANT MUNICIPALITY

15) Defendant CITY OF SAN JOSE has maintained no system of review or compliance with Penal Code Section 12027 *et. seq.*, thereby systematically denying eligible retiring police officers from due process of law.

16) Further, the individual defendants acted in their supervisory capacity as chief, deputy chief, and captain for defendant CITY OF SAN JOSE thereby creating a system of depriving plaintiff, and people in like positions, from a denial of due process of law. Since said actions

were undertaken by Chief of Police DAVIS, Deputy Chief AMOROSO and Captain YOUNIS, and their capacities as final decision makers pursuant to the authority granted to them by defendant CITY OF SAN JOSE, such actions represented official municipal policy and practice.

17) WHEREFORE, plaintiff FREDRICK BATES demands judgment against defendants CITY OF SAN JOSE, ROBERT DAVIS, ADONNA AMOROSO and TUCK YOUNIS, jointly and severally for compensatory damages according to proof and further demands, judgment against each of said defendants jointly and severally for punitive damages in an amount deemed just by the court, plus attorney's fees and costs of this action and such other relief as court may deem just, proper and equitable.

Dated: August 23, 2006

Respectfully Submitted,

LAW OFFICES OF STUART D. KIRCHICK

By: _____
STUART D. KIRCHICK,
Attorney for Defendant, Fredrick Bates

RICHARD DOYLE, City Attorney (#88625)
NORA FRIMANN, Chief Trial Attorney (#93249)
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Attorneys for Defendants,
CITY OF SAN JOSE, ROBERT DAVIS,
ADONNA AMOROSO, and TUCK YOUNIS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSÉ DIVISION

FREDRICK BATES, Plaintiff, vs. CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Police Deputy Chief of Police, TUCK YOUNIS, individually and in his official capacity as City of San Jose Police Captain, Defendants.	NO. C06-05302 RMW **DEFENDANTS' ANSWER TO COMPLAINT FOR DAMAGES DUE TO DEPREVATION OF CIVIL RIGHT UNDER COLOR OF LAW – DENIAL OF DUE PROCESS** **JURY TRIAL DEMANDED**

Defendants City of San Jose, Robert Davis, Adonna Amoroso, and Tuck Younis hereby respond to the Complaint of Plaintiff Fredrick Bates in the above-entitled matter as follows:

1. Answering paragraph 1 of Plaintiff's Complaint, Defendants lack sufficient information in belief and, therefore, deny the allegations contained therein.

2. Answering paragraph 2 of Plaintiff's Complaint, Defendants admit that Robert Davis, Adonna Amoroso and Tuck Younis were at the relevant times alleged in Plaintiff's Complaint, employed by the Police Department of the City of San Jose. However,

Defendants deny that "City of San Jose" was also employed by the City of San Jose Police Department.

3. Answering paragraph 3 of Plaintiff's Complaint, Defendants admit that the City of San Jose is a municipality incorporated under the laws of the state of California and that Robert Davis, Adonna Amoroso, and Tuck Younis were the Chief of Police, Deputy Chief of Police, and Captain of Police, respectively, for the City of San Jose. Defendants deny the remaining allegations contained in paragraph 3.

4. Answering paragraph 4 of Plaintiff's Complaint, Defendants lack sufficient information of belief and, therefore, deny any allegations contained therein.

5. Answering paragraph 5 of Plaintiff's Complaint, Defendants lack sufficient information of belief and, therefore, deny any allegations contained therein.

6. Answering paragraph 6 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

7. Answering paragraph 7 of Plaintiff's Complaint, Defendants admit that on or about April 16, 2004, Plaintiff contacted Adonna Amoroso who thereafter communicated with Plaintiff regarding his concealed weapon permit. Defendants deny the remaining allegations contained in paragraph 7.

8. Answering paragraph 8 of Plaintiff's Complaint, Defendants admit that on or about August 25, 2004, Defendant Tuck Younis received a letter from Dr. Jonathan Ng regarding Plaintiff's medical disability. Defendants deny the remaining allegations contained in paragraph 8.

9. Answering paragraph 9 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

10. Answering paragraph 10 of Plaintiff's Complaint, Defendants lack sufficient information of belief and, therefore, deny any allegations contained therein.

11. Answering paragraph 11 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

/ / / / /

12. Answering paragraph 12 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

13. Answering paragraph 13 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

14. Answering paragraph 14 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

15. Answering paragraph 15 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

16. Answering paragraph 16 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

17. Answering paragraph 17 of Plaintiff's Complaint, Defendants deny the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

1. As and for a first affirmative defense, Defendants allege that the Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. As and for a second affirmative defense, Defendants allege that all actions were undertaken in good faith and with reasonable belief that the actions were valid, necessary, constitutionally proper, and objectively reasonable for a police officer in the same circumstances, entitling Defendants to the Qualified Immunity of Good Faith.

THIRD AFFIRMATIVE DEFENSE

3. As and for a third affirmative defense, Defendants allege that they are immune from liability pursuant to the provisions of California Government Code sections 818.4 and/or 818.8.

FOURTH AFFIRMATIVE DEFENSE

4. As and for a fourth affirmative defense, Defendants allege that Plaintiff has failed to mitigate his damages, if any.

/ / / / /

WHEREFORE, Defendants pray:

1. That Plaintiff take nothing by his Complaint;

2. That Plaintiff's Complaint be dismissed with prejudice;

3. That Defendants be awarded their costs of suit, including attorney's fees incurred herein; and

4. For such other and further relief as the Court deems proper.

Dated: November 27, 2006

Respectfully submitted,

RICHARD DOYLE, City Attorney

BY: /s/
MICHAEL J. DODSON
Sr. Deputy City Attorney

Attorneys for Defendants,
CITY OF SAN JOSE, ROBERT DAVIS, ADONNA AMOROSO, and TUCK YOUNIS

REQUEST FOR JURY TRIAL

Defendants City of San Jose, Robert Davis, Adonna Amoroso, and Tuck Younis hereby request a jury trial in this action.

Dated: November 27, 2006

Respectfully submitted,

RICHARD DOYLE, City Attorney

BY: /s/
MICHAEL J. DODSON
Sr. Deputy City Attorney

Attorneys for Defendants,
CITY OF SAN JOSE, ROBERT DAVIS, ADONNA AMOROSO, and TUCK YOUNIS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES, PLAINTIFF, VS. CITY OF SAN JOSE, ROBERT DAVIS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY OF SAN JOSE CHIEF OF POLICE, DONNA AMOROSO, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS CITY OF SAN JOSE POLICE DEPUTY CHIEF OF POLICE, DEFENDANT.	C-06-05302 RMW SAN JOSE, CALIFORNIA NOVEMBER 9, 2007 PAGES 1-18

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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FOR THE DEFENDANT: OFFICE OF THE CITY ATTORNEY
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OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

SAN JOSE, CALIFORNIA NOVEMBER 9, 2007

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE C-06-5302, FREDERICK BATES VERSUS CITY OF SAN JOSE, ON FOR DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FOR PARTIAL SUMMARY JUDGMENT.

COUNSEL, PLEASE STATE YOUR APPEARANCES, PLEASE.

MR. KIRCHICK: GOOD MORNING, YOUR HONOR. STUART KIRCHICK FOR MR. BATES.

THE COURT: GOOD MORNING.

MR. DODSON: GOOD MORNING, YOUR HONOR. MICHAEL DODSON FOR THE DEFENDANTS.

THE COURT: DID YOU SEE THE QUESTIONS I LISTED?

MR. KIRCHICK: YES.

MR. DODSON: YES, YOUR HONOR.

THE COURT: OKAY. WOULD -- I GUESS I'LL HEAR FROM THE CITY FIRST.

MR. DODSON: WELL, I AGREE FOR THE MOST PART WITH THE COURT'S TENTATIVE RULING. I THINK THAT --

THE COURT: I THINK THEY'RE QUESTIONS

RATHER THAN RULINGS, BUT GO AHEAD.

MR. DODSON: WELL, YEAH.

THE COURT'S QUESTIONS, IF I'M READING THEM PROPERLY, SEEM TO INDICATE WHERE THE COURT'S HEADED WITH REGARD TO ITS RULING. MAYBE I'M WRONG ABOUT THAT.

BUT IN ANY EVENT, AS WE INDICATED IN OUR PAPERS, WE DON'T BELIEVE THAT THERE'S A CONSTITUTIONALLY PROTECTED INTEREST THAT WAS IN ANY WAY VIOLATED BY ANY OF THE ACTIONS OF THE DEFENDANTS, PARTICULARLY DEFENDANT AMOROSO.

THERE'S NO FEDERAL DUE PROCESS RIGHT AS INDICATED IN THE CASES THAT WE CITED, PARTICULARLY IN OUR REPLY BRIEF.

THE GATES CASE -- THERE'S NO DUE PROCESS RIGHT TO HAVE A CONCEALED WEAPONS PERMIT AND, THEREFORE, ASSUMING THAT THERE WAS SOME VIOLATION OF THAT RIGHT, IT'S NOT A FEDERALLY PROTECTED CONSTITUTIONAL RIGHT AND THERE CAN'T BE A DUE PROCESS VIOLATION.

AS FAR AS THE OTHER QUESTION THE COURT HAD REGARDING WHETHER OR NOT AMOROSO COULD BE A FINAL DECISION MAKER, ORDINARILY THAT RESTS WITH THE CITY ITSELF.

THERE'S NO INDICATION -- THERE'S NO

EVIDENCE SUBMITTED BY, I BELIEVE BY THE PLAINTIFF THAT SHE WAS VESTED WITH THAT AUTHORITY, EITHER BY THE CITY OF SAN JOSE OR BY THE CITY'S POLICE CHIEF.

SHE WAS ACTING IN THE CAPACITY OF A DEPUTY CHIEF OF POLICE AT THE TIME THAT THE OPERATIVE EVENTS TOOK PLACE, AND THERE'S NO EVIDENCE THAT SHE WAS VESTED WITH ANY FINAL DECISION MAKING AUTHORITY ON BEHALF OF THE CITY OF SAN JOSE AS IT RELATES TO ITS POLICIES AND PROCEDURES.

THE COURT: WELL, DIDN'T -- DIDN'T THE POLICE CHIEF DELEGATE TO HER THE RESPONSIBILITY FOR MAKING DECISIONS ON CONCEALED WEAPONS?

MR. DODSON: THE POLICE CHIEF DID DELEGATE THAT LIMITED AUTHORITY FOR HER TO MAKE DECISIONS AND PASS ON DECISIONS WHETHER OR NOT TO ISSUE A CONCEALED WEAPONS PERMIT TO INDIVIDUALS WHO WERE RETIRING.

BUT I DON'T THINK THAT THAT IN AND OF ITSELF MAKES HER A, QUOTE UNQUOTE, "FINAL DECISION MAKER" WITH REGARD TO ALL OF THE POLICIES AND PROCEDURES WITH REGARD TO THE SAN JOSE POLICE DEPARTMENT AND THE CITY OF SAN JOSE.

THE COURT: OKAY. IT DOESN'T HAVE TO BE PERTAINING TO ALL. IT JUST HAS TO BE PERTAINING TO

THIS PARTICULAR RESPONSIBILITY.

MR. DODSON: WELL, IN ANY EVENT, IF THAT IS -- I WOULD DISAGREE WITH THAT ANALYSIS. I THINK IT HAS TO BE A DELEGATION AS TO ALL OF THE POLICIES AND PROCEDURES.

BUT IN ANY EVENT, I DON'T THINK THAT GIVES RISE TO MONELL LIABILITY ON THE PART OF THE CITY AND THE LIMITED INSTANCE, ASSUMING IT'S A CONSTITUTIONAL VIOLATION OF THAT, IN AND OF ITSELF ESTABLISHES THAT THE CITY HAS A POLICY AND PROCEDURE AND PRACTICE OF VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS.

THE COURT: OKAY. ANYTHING ELSE YOU WANT TO ADDRESS?

MR. DODSON: I'M SORRY. WHAT -- I, FRANKLY, GLANCED AT THE COURT'S QUESTIONS VERY QUICKLY. I DON'T KNOW IF THE COURT HAD -- WAS THERE ANOTHER QUESTION IN THE TENTATIVE THAT I MISSED?

THE COURT: HOW ABOUT NUMBER 3?

MR. DODSON: YEAH, I -- I AGREE. I DON'T THINK THAT THERE IS A CONSTITUTIONAL RIGHT THAT WAS IN ANY WAY VIOLATED.

AS I INDICATED EARLIER, THERE'S NO FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT OR LIBERTY

OR PROPERTY INTEREST IN HAVING A CONCEALED WEAPONS PERMIT, SO EVEN IF THERE WAS A VIOLATION, IT'S NOT A FEDERALLY PROTECTED RIGHT THAT WOULD IN ANY WAY IMPLICATE A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

THE COURT: WHAT REMEDY WOULD SOMEONE HAVE FOR AN ERRONEOUS DENIAL OF A PERMIT?

MR. DODSON: WELL, I THINK ANY POTENTIAL REMEDIES WOULD, WOULD FALL UNDER STATE LAW. I DON'T THINK THERE'S A FEDERAL CONSTITUTIONAL VIOLATION.

THE COURT: WHAT WOULD THAT REMEDY BE?

MR. DODSON: PERHAPS NEGLIGENCE, A NEGLIGENCE STATE LAW CAUSE OF ACTION.

IF IT WAS FOUND THAT SOMEHOW AMOROSO, IN THIS INSTANCE, WAS NEGLIGENT IN HER DUTIES IN PASSING ON HIS APPLICATION, I THINK THAT COULD POTENTIALLY GIVE RISE TO A STATE LAW NEGLIGENCE CAUSE OF ACTION.

BUT I DON'T BELIEVE IN ANY WAY THERE'S A FEDERAL CONSTITUTIONAL VIOLATION IN THIS INSTANCE.

THE COURT: OKAY. MR. KIRCHICK?

MR. KIRCHICK: THANK YOU, JUDGE.

I'LL ADDRESS EACH QUESTION IN THEIR ORDER.

AS FAR AS RES JUDICATA, I WOULD -- I

WOULD ARGUE THAT MR. BATES, IN PRO PER, DID NOT PLEAD A MONELL CLAIM AGAINST THE CITY.

THE COURT: DOES THAT MATTER? I MEAN, HE COULD HAVE.

MR. KIRCHICK: I THINK IT MATTERS BECAUSE REALLY WHAT HE WAS DOING IN THE STATE CASE WAS HE NAMED THE CITY, BUT HE WAS COMPLAINING ABOUT AMOROSO'S PERSONAL CONDUCT.

SO IN THAT SENSE, I BELIEVE IT DOES MATTER BECAUSE THE CLAIM WAS NOT CLEARLY PLED.

I DO AGREE THE FACTS ESSENTIALLY ARE THE SAME. IT'S THE SAME CLAIM IN THAT SENSE.

BUT I DON'T THINK THAT RES JUDICATA WOULD APPLY TO THROW OUT THE MONELL CLAIM IN THIS CASE BECAUSE HE ONLY PLED AGAINST THE CITY IN THE SMALL CLAIMS CASE REALLY ARGUING A VIOLATION OF STATE LAW. THAT'S MY ARGUMENT AS TO THAT.

THE COURT: OKAY.

MR. KIRCHICK: AND I THINK THAT'S IN MY PAPERS.

AS TO NUMBER 2, I AGREE -- I MEAN, THE QUESTION'S FRAMED IN SUCH A WAY THAT AMOROSO WAS A FINAL DECISION MAKER.

I THINK THE EVIDENCE SUBMITTED TO THE COURT IS CLEAR THAT THERE'S NO WRITTEN POLICY

WHATSOEVER WITH THE CITY ON DENIAL OF CCW PERMITS.

AND SHE MADE THE SOLE DECISION. SHE SAID THAT IN HER TESTIMONY. THE CHIEF DELEGATED HER THAT DUTY. SHE IS THE FINAL DECISION MAKER. THERE'S JUST NO OTHER EVIDENCE TO BELIEVE OTHERWISE.

AND IF HER FAILURE IS UNCONSTITUTIONAL, THEN AS THAT SOLE DECISION MAKER, I BELIEVE UNDER THE PEMBAUR CASE, THAT ACT IN AND OF ITSELF CAN GIVE RISE TO A MONELL CLAIM.

AS TO NUMBER 3, THE VIOLATION OF THE CONSTITUTIONAL RIGHT, YOUR HONOR, IS THAT THE STATE LAW, WHEN IT WAS AMENDED IN 1988, GAVE A CLAIM OF ENTITLEMENT TO RETIRED PEACE OFFICERS IN THE STATE OF CALIFORNIA WHO RETIRED ON A MEDICAL DISABILITY TO CARRY A CONCEALED WEAPON. THAT IS A CLAIM OF ENTITLEMENT.

THAT'S NOT SOMETHING THAT'S ARBITRARY, AND IT'S NOT SOMETHING THAT IS SIMPLY A, A DESIRE OF THE OFFICER. IT IS AN ENTITLEMENT UNDER STATE LAW.

AND UNDER THE RYAN VERSUS CALIFORNIA INTERSCHOLASTIC FEDERATION CASE, WHICH I DIDN'T CITE BECAUSE I DIDN'T GET THE ARGUMENT -- THIS IS KIND OF IN RESPONSE TO THE REPLY ON SOME NEW

ARGUMENTS THAT WERE MENTIONED, IT'S A 2001 CASE, 94 CAL.APP. 4TH 1048, AND IN PARTICULARLY AT 1061, THE COURT TALKS ABOUT WHAT A PROPERTY OR LIBERTY INTEREST IS, AND THAT IT MUST FIND ITS SOURCE IN SOME ASPECT OF STATE LAW. IT MUST STEM FROM AN INDEPENDENT SOURCE, SUCH AS STATE LAW, RULES, OR UNDERSTANDINGS THAT SECURE CERTAIN BENEFITS AND THAT SUPPORT CLAIMS OF ENTITLEMENT TO THOSE BENEFITS.

AND THEN, OF COURSE, THE BULWARK OF THE DUE PROCESS VIOLATION IS THE HEARING, THE DENIAL OF A HEARING, AN OPPORTUNITY TO BE HEARD.

THE RODRIGUEZ VERSUS DEPARTMENT OF REAL ESTATE CASE, A 1996 CASE, 51 CAL.APP. 4TH 1218, THAT TALKS ABOUT THE CENTRAL PURPOSE OF PROCEDURAL DUE PROCESS IS TO PROVIDE AFFECTED PARTIES WITH THE RIGHT TO BE HEARD AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER.

SO WE DO HAVE A CLAIM OF ENTITLEMENT, ACCORDING TO STATE LAW, DEVELOPED IN 1988, AS A RESULT OF THE CITY OF SAN JOSE PEACE OFFICERS SUING THE CITY OF SAN JOSE BECAUSE OF DENIALS OF PERMITS JUST BECAUSE SOME OFFICER WAS FINDING GOOD CAUSE TO DENY IT.

AS A RESULT OF THAT CASE, THE LEGISLATURE

ACTED IN ORDER TO PROVIDE GREATER PROCEDURAL PROTECTIONS TO POLICE OFFICERS.

IT'S CLASSIC DUE PROCESS. IT'S A CLASSIC CLAIM OF ENTITLEMENT BECAUSE THAT STATE LAW IS TELLING ALL PEACE OFFICERS IN THE STATE OF CALIFORNIA THAT WHEN THEY RETIRE ON A MEDICAL DISABILITY, THEY'RE GOING TO BE ABLE TO PROTECT THE COMMUNITY.

THEY'RE GOING TO BE ABLE TO PROTECT THEMSELVES IF THEY RUN INTO PEOPLE THAT THEY'VE HAD -- THAT THEY'VE DEALT WITH ON THE STREETS WHEN THEY WERE OFFICERS.

THEY'RE GOING TO BE ABLE TO GET OTHER JOBS THAT ALLOW THEM TO CARRY CONCEALED WEAPONS. IT'S GOING TO KEEP A LOT OF OPPORTUNITIES OPEN TO THEM.

SO WHEN SOMEONE IS RETIRING ON A MEDICAL DISABILITY IN SUCH A CLEARCUT FASHION AS MR. BATES, AND ONE DEPUTY CHIEF SAYS, "SORRY, I'M NOT GIVING YOU THAT ENTITLEMENT, AND I'M NOT EVEN GIVING YOU A HEARING OR A RIGHT TO BE HEARD, OR EVEN NOTICE THAT YOU HAVE A RIGHT TO BE HEARD," THAT'S CLASSIC DUE PROCESS VIOLATION.

THE COURT: ASSUMING THE HEARING REQUIREMENT DOES NOT APPLY TO SOMEONE WHO RETIRES

ON A PSYCHOLOGICAL --

MR. KIRCHICK: DISABILITY.

THE COURT: -- DISABILITY.

WHAT HAPPENS IF SOMEBODY, IN GOOD FAITH, BELIEVES THAT SOMEBODY IS RETIRED ON A PSYCHOLOGICAL DISABILITY, BUT, IN FACT, THEY AREN'T?

MR. KIRCHICK: THE --

THE COURT: OR THEY HAVEN'T?

MR. KIRCHICK: THE STATUTE IS THE SAME AS IT WAS PRE-1988. IT DOESN'T GIVE THEM ANY DUE PROCESS RIGHTS.

I THINK THAT PORTION OF THE STATUTE COULD BE ATTACKED ON DUE PROCESS GROUNDS ON ITS FACE.

I -- IN MY ESTIMATION.

BUT I WOULD GUESS THAT THE REMEDY WOULD BE TO DO WHAT MR. BATES DID, WHICH IS JUST TO TRY AND CONVINCE THE DEPARTMENT, YOU KNOW, THAT "HERE'S ALL MY MEDICAL RECORDS, HERE'S EVERYTHING. I DIDN'T RETIRE ON A PSYCHOLOGICAL DISABILITY."

I MEAN, DEPUTY AMOROSO WAS PLAYING THIS CAT AND MOUSE GAME IN HER DEPOSITION TRYING TO, YOU KNOW, JUSTIFY HER ACTIONS WHEN IT WAS CRYSTAL CLEAR THAT, YOU KNOW, YOU EITHER RETIRE ON A PSYCHOLOGICAL DISABILITY OR A MEDICAL DISABILITY.

BUT I AGREE WITH THE COURT. THE STATUTE GIVES US UNFETTERED DISCRETION WHEN, IN FACT, IT'S A PSYCHOLOGICAL DISABILITY, AND THAT'S THAT. THERE'S NOTHING ELSE WITHIN THE STATUTE.

THAT'S WHAT SEPARATES THIS CASE FROM THAT SCENARIO, BECAUSE THE LAW MAKES IT CLEAR, IF IT'S A MEDICAL DISABILITY, PROCEDURAL DUE PROCESS PROTECTIONS ARE IN PLACE IF THERE IS THIS ARBITRARY DECISION BY A DEPUTY CHIEF.

THE COURT: WELL, WHAT I'M TRYING TO GET AT IS LET'S ASSUME SOMEONE DOESN'T RETIRE ON A PSYCHOLOGICAL DISABILITY, BUT THE PERSON WHO'S MAKING THE DECISION WITH RESPECT TO PERMITS, IN GOOD FAITH, BELIEVES THEY ARE.

IS THERE NO LIABILITY?

MR. KIRCHICK: NO. THERE IS LIABILITY. THAT'S WHY WE'RE HERE. THAT'S EXACTLY THE SITUATION WHY WE'RE HERE IN COURT.

THE COURT: BUT --

MR. KIRCHICK: I'M SORRY IF I'M NOT UNDERSTANDING THE COURT.

THE COURT: WELL, MAYBE I'M NOT PHRASING IT VERY WELL.

IF SUBSECTION, I THINK IT'S (E) --

MR. KIRCHICK: RIGHT.

THE COURT: -- SAYS THAT IF YOU RETIRE ON A PSYCHOLOGICAL DISABILITY, YOU'RE NOT ENTITLED TO A CONCEALED WEAPONS PERMIT, END OF STORY. NO HEARING IS REQUIRED, NO NOTHING.

MR. KIRCHICK: RIGHT.

THE COURT: TAKE TWO OR THREE -- WELL, TAKE TWO DIFFERENT SITUATIONS AND TELL ME WHAT THE ANSWER IS.

ONE SITUATION, THE PERSON MAKING THE PERMIT, OR IN CHARGE OF ISSUING THE PERMITS, IN GOOD FAITH BELIEVES, WRONGLY, THAT THE PERSON RETIRED ON A PSYCHOLOGICAL DISABILITY AND SO TURNS DOWN THE PERMIT.

THE SECOND SITUATION IS THAT THE PERSON WHO'S MAKING THE DECISION TURNS IT DOWN ON THE BASIS THAT THEY RETIRED ON A PSYCHOLOGICAL DISABILITY WHEN, IN FACT, THEY DIDN'T AND THAT WAS NOT A GOOD FAITH DECISION.

MR. KIRCHICK: SURE.

THE COURT: IS THE ANALYSIS OF THOSE SITUATIONS THE SAME?

MR. KIRCHICK: IT IS. IT'S A SAUCIER V. KATZ ANALYSIS. THAT'S EXACTLY WHAT IT IS. THAT'S GOING TO BE A GOOD FAITH QUESTION EITHER WAY.

THE COURT: SO LET ME FOLLOW THROUGH WITH

THAT.

MR. KIRCHICK: SURE.

THE COURT: SO YOU'RE SAYING, IN BOTH THOSE CASES, SINCE THE PERSON DIDN'T RETIRE ON A PSYCHOLOGICAL DISABILITY, IT'S A CONSTITUTIONAL VIOLATION FOR WHICH THEY'RE ENTITLED TO A HEARING?

MR. KIRCHICK: RIGHT.

THE COURT: OR THE DUE PROCESS ISSUE COMES INTO EFFECT?

MR. KIRCHICK: UM-HUM.

THE COURT: BUT IF IT'S IN GOOD FAITH, THERE MIGHT BE QUALIFIED IMMUNITY, WHERE IF THEY'RE IN BAD FAITH, THERE'S NO QUALIFIED IMMUNITY?

MR. KIRCHICK: RIGHT. I MEAN, THERE'S NO CASE ON POINT THAT HAS APPLIED THE GOOD FAITH SAUCIER ANALYSIS TO THIS SITUATION.

I WILL SAY THAT, AS I POINTED OUT IN MY PAPERS, THAT A GOOD FAITH ANALYSIS IS WHEN OFFICERS ARE ON THE STREET MAKING SPLIT SECOND DECISIONS AND THE LAW IS NOT CLEAR.

SO I THINK IN THIS SITUATION WHEN THE LAW IS CLEAR, THE DEPUTY CHIEF IS SITTING IN HER OFFICE FOR TWO WEEKS LOOKING THROUGH ANYTHING THAT SHE WANTS TO, TALKING TO ANYONE THAT SHE WANTS TO AND MAKING DECISIONS THAT ARE NOT DANGEROUS TO HER,

SUCH AS YOUR TYPICAL GOOD FAITH ANALYSIS, IT SEEMS TO ME THAT IT'S AN EASY GOOD FAITH ANALYSIS IN TERMS OF IS THE LAW CLEAR, AND DID SHE KNOWINGLY VIOLATE THE LAW?

I MEAN, WAS SHE PLAINLY INCOMPETENT IN DOING HER JOB? AND THE ANSWER IN THIS CASE IS YEAH, SHE WAS PLAINLY INCOMPETENT.

SO I'M NOT NECESSARILY AGREEING THERE IS A GOOD FAITH APPLICATION HERE BECAUSE ALL THE GOOD FAITH CASES THAT I'M AWARE OF ARE MORE OF OFFICERS ON THE STREET MAKING SPLIT SECOND DECISIONS WHERE THE LAW IS NOT CLEAR, SUCH AS FOURTH AMENDMENT VIOLATIONS.

IN THIS PARTICULAR SITUATION, I DON'T EVEN SEE HOW A GOOD FAITH ANALYSIS REALLY APPLIES.

BUT IF IT DOES AND GOOD FAITH IS SOMEHOW OFFERED TO DEPUTY CHIEF AMOROSO FOR CLEARLY VIOLATING DUE PROCESS UNDER STATE LAW AS IT'S SPELLED OUT, THEN I WOULD SAY UNDER THE SAUCIER V. KATZ ANALYSIS, SHE KNOWINGLY VIOLATED THE LAW. IT WAS A CRYSTAL CLEAR LAW.

THE COURT: SORT OF UNRELATED TO THE MOTION, WHAT ARE ANY DAMAGES IN THIS CASE?

MR. KIRCHICK: WELL, YOU KNOW, I MEAN, MR. BATES TESTIFIED THAT THIS WAS THE MOST

HUMILIATING ACTION, ACT THAT HE'S EVER SUFFERED, AND FOR AN OFFICER OF SO MANY YEARS AND A SERGEANT AND INVOLVED IN INTERNAL AFFAIRS TO SAY THAT, IT WAS A SIGNIFICANT HUMILIATION.

I MEAN, OFFICERS REALLY WANT THEIR CCW PERMIT. IT'S VERY MEANINGFUL TO THEM. IT GIVES THEM JOB OPPORTUNITIES.

HE WAS STRESSED OUT BY THIS QUITE A BIT. HE'S ALREADY AN EGG SHELL. HE ALSO HAS HEART HYPERTENSION AND THIS STRESSED HIM OUT QUITE A BIT.

HE DID PAY SOME ATTORNEY'S FEES TO TRY AND APPROACH THE CITY TO RESOLVE THE MATTER.

AND --

THE COURT: OKAY.

MR. KIRCHICK: THOSE ARE HIS DAMAGES.

THE COURT: OKAY. ANYTHING FURTHER?

MR. DODSON: JUST 20 SECONDS, YOUR HONOR.

IT'S A CLASSIC HINDSIGHT ARGUMENT THAT'S BEING MADE. AS MR. KIRCHICK SAYS, IT'S CRYSTAL CLEAR THAT THE EVIDENCE SHOWS THAT HE DIDN'T HAVE A PSYCHOLOGICAL DISABILITY.

WELL, THE EVIDENCE BEFORE DEPUTY CHIEF AMOROSO AT THE TIME THAT SHE MADE HER DECISION, AND I THINK AT THE TIME THAT ANY REASONABLE PERSON IN HER POSITION WOULD HAVE MADE THE DECISION, WAS THAT

HE HAD A PSYCHOLOGICAL DISABILITY.

IT WAS ONLY UNTIL EIGHT OR NINE MONTHS LATER WHEN ADDITIONAL MEDICAL DOCUMENTATION WAS SUBMITTED TO THE CITY, AND THEN THE CITY REVERSED ITS DECISION AND GAVE HIM HIS PERMIT. SO --

THE COURT: IT WASN'T EIGHT OR NINE MONTHS, WAS IT?

MR. DODSON: SOMETHING LIKE THAT. IT WAS LESS THAN A YEAR.

THE COURT: I WAS THINKING IT WAS FOUR.

DO YOU REMEMBER?

MR. KIRCHICK: HE WAS WITHOUT HIS PERMIT FOR ABOUT EIGHT MONTHS.

THE COURT: EIGHT MONTHS, OKAY.

OKAY. THANK YOU.

MR. KIRCHICK: THANK YOU, YOUR HONOR.

MR. DODSON: THANK YOU.

MR. KIRCHICK: OH, I'M SORRY. I APOLOGIZE. WHEN WAS TRIAL SET IN THIS CASE?

MR. DODSON: I BELIEVE IT'S DECEMBER 10TH.

THE COURT: I DON'T KNOW OFF THE TOP OF MY HEAD.

MR. KIRCHICK: OKAY. IF -- IF THERE'S STILL A TRIABLE ISSUE IN THIS CASE, IS THE COURT

OPEN TO A RESETTING OF THAT BECAUSE OF CRIMINAL TRIALS THAT JUST RECENTLY GOT SET?

THE COURT: PROBABLY.

MR. KIRCHICK: OKAY.

THE COURT: I'VE GOT SOME CONFLICTS MYSELF.

MR. KIRCHICK: OKAY. THANK YOU.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

FREDRICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Deputy Chief of Police, TUCK YOUNIS, individually and in his official capacity as City of San Jose Police Captain,

Defendants.

Case Number: C-06-05302 RMW

STIPULATION OF DISMISSAL AS TO DEFENDANT TUCK YOUNIS

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IT IS HEREBY STIPULATED by and between the parties to this action, through their designated counsel, that this action be, and hereby is dismissed with prejudice as to Defendant Tuck Younis only, pursuant to FRCP 41(a)(1).

Dated: August 2, 2007

Respectfully submitted,

/S/
STUART D. KIRCHICK
Attorney

Attorneys for Plaintiff, FREDERICK BATES

Dated: August 2, 2007

Respectfully submitted,

RICHARD DOYLE, City Attorney

By: /S/
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Deputy Chief of Police, TUCK YOUNIS, individually and in his official capacity as City of San Jose Police Captain,

Defendants.

Case Number: C-06-05302 RMW

DECLARATION OF TUCK YOUNIS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

Date: November 9, 2007
Time: 9:00 a.m.
Room: 6, 4th Floor
Judge: Hon. Ronald M. Whyte

I Tuck Younis, hereby declare:

1. I am Assistant Chief of Police for the San Jose Police Department.

2. I am thoroughly familiar with all the facts contained within this Declaration and could competently testify thereto.

3. I was originally a Defendant in this case until I was dismissed pursuant to Stipulation of the parties in August 2007.

4. I have personal knowledge that Defendant Chief of Police Robert Davis played no role whatsoever in either the decision to initially deny Plaintiff Fred Bates his

permit to carry a concealed weapon, nor in the subsequent decision on my part to reverse that earlier decision and grant Defendant Bates a permit to carry a concealed weapon.

5. I am thoroughly familiar with all of the customs, policies, and practices of the City of San Jose, and specifically the San Jose Police Department with regard to all aspects of police duties.

6. I am also thoroughly familiar with the San Jose Police Department Duty Manual as well as all other applicable policies regarding police procedures within the City of San Jose.

7. I am aware that Plaintiff Bates has alleged in his Complaint that the City of San Jose has an official municipal policy and practice of depriving individuals of due process of law.

8. The City of San Jose, and the San Jose Police Department, have no policy, either written or otherwise, of subjecting people to violation of their constitutional rights, of denying them due process or any other violations of citizen's civil and/or constitutional rights.

9. Quite to the contrary, the policy of the City of San Jose and the San Jose Police Department is to conduct all procedures in accordance with and consistent with the United States and California Constitutions, as well as all other applicable laws.

10. The City of San Jose and San Jose Police Department have no policy, custom, or practice of violating anyone's constitutional rights. All of the policies and procedures of the City of San Jose, and of the San Jose Police Department, are consistent with performance of police duties in accordance with and consistent with all applicable laws, and in accordance with and consistent with all provisions of the United States and California Constitutions.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 12, 2007 at San Jose, California.

/S/
TUCK YOUNIS
Assistant Chief,
San Jose Police Department

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IN THE UNITED STATES DISTRICT COURT

IN THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK BATES, Plaintiff, v. CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, DONNA AMOROSO, individually and in her official capacity as City of San Jose Police Deputy Chief of Police, Defendant(s).	Case Number: C-06-05302 RMW PLAINTIFF FREDERICK BATES' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: November 9, 2007 Time: 9:00 a.m. Room: 6, 4th Floor Judge: Hon. Ronald M. Whyte

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COMES NOW Plaintiff Frederick BATES who hereby opposes Defendants' Motion for Summary Judgment or Partial Summary Judgment and submits this memorandum of points and authorities, a declaration of his counsel, Stuart D. Kirchick, herein, and attached exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Frederick BATES (herein after referred to as "BATES") was unlawfully denied due process of law because of the clear and plain incompetence of former Deputy Chief ADONNA AMOROSO (hereinafter referred to as "AMOROSO"), who was at all times acting in her supervisory capacity as Deputy Chief for the police department of Defendant CITY of SAN JOSE (hereinafter referred to as, "CITY"). Defendants bring their motion for summary judgment based primarily upon the grounds that AMOROSO's actions are protected by the doctrine of qualified immunity.

However, the Supreme Court has ruled that the scope of the doctrine of qualified immunity will not protect "the plainly incompetent or those who knowingly violate[d] the law." (*Malley v. Briggs*, 475 U.S. 335 (1986)). As will be further explained hereinbelow, Defendant Chief of Police ROBERT DAVIS (hereinafter referred to as "DAVIS") empowered his former Deputy Chief, AMOROSO, with the sole and exclusive authority to grant or deny retiring San Jose officers a permit to carry a concealed weapon. (hereinafter referred to as a "CCW permit")

In doing so, Defendants are bound to follow California Penal code sections 12027 and 12027.1. As to BATES, AMOROSO incompetently came to conclusions about his disability retirement and knowingly violated the law as a result thereof. Thus, Defendants are not entitled to qualified immunity. Defendant CITY is liable for AMOROSO's incompetence because she acted in a supervisory capacity and the CITY has no written policy or procedure

in place regarding CCW permits. Further, the doctrine of *res judicata* is not applicable to this action. First, defendants waived that defense by failing to plead it as an affirmative defense in its Answer. Additionally, the CITY was sued in small claims court based upon state law only and a full hearing on the merits was not held. For the reasons set forth hereinbelow, it is respectfully requested that this court deny Defendants' motion.

II. FACTUAL BACKGROUND

On or about April 1, 2004, plaintiff retired from the police department for the CITY OF SAN JOSE where he was employed as a police sergeant. Plaintiff's retirement was due to a medical disability. During his employment as a sergeant for the police department of the CITY OF SAN JOSE, plaintiff received exceptional performance appraisals consistently above standards while employed for the police agency over 20 years.

Shortly thereafter, on or about April 6, 2004, plaintiff received his police sergeant retirement ID card which was not stamped for carrying a concealed weapon. Upon receipt, Plaintiff did not receive any explanation or written notification that authorization for him to carry a concealed and loaded firearm was denied.

As a retired police sergeant with a CCW permit, Bates would be able to benefit the public by being able to render aid, and protect himself in the event he encounter lawlessness people who recognize him from prior on-duty interactions.

On or about April 16, 2004, plaintiff contacted AMOROSO, as deputy chief with the CITY. Approximately one (1) week later, AMOROSO advised plaintiff that the CCW authorization was denied based on a work restriction he had on his medical records which was for him to avoid psychological stress. AMOROSO further informed plaintiff that he had no right to appeal since "his disability was based on a psychological disability". Plaintiff never received anything in writing from AMOROSO or the CITY that he was denied CCW

authorization due to a psychological disability or otherwise.

On or about August 25, 2004, Tuck Younis, an acting captain for the police department of the CITY, received a letter from Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and stated that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he used in describing plaintiff's disability. In response, on or about September 10, 2004, Younis advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because "it was not made within 45 days". Younis further told BATES that his telephone conversation in April 2004 with AMOROSO was his appeal.

Thereafter, in October 2004, plaintiff was forced to hire an attorney to pursue his CCW authorization. Additionally, plaintiff filed a complaint with the Department of Fair Employment and Housing on December 9, 2004. Toward the end of December 2004, Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to BATES.

There existed many available resources for AMOROSO to learn that BATES' disability was not psychological but medical. First, BATES' disability retirement packet with the CITY includes several relevant documents. (see Exh. A, pgs. 1-67). In his initial application for retirement, BATES indicates his disability is "injury to heart and cardiovascular system." (see Exh. A, at pg. 3.) In a memorandum from AMOROSO, as Deputy Chief, to Ed Overton, of the Police Retirement Board, dated November 20, 2003, AMOROSO acknowledges BATES' application for service connected disability retirement referencing an attached report of occupational injury or illness that states the specific injury as "cumulative-heart/cardiovascular." (see Exh. A, pgs. 60-61.)

Additionally, in the application for disability retirement there is a medical report dated

August 13, 2001, from Dr. William S. Breall, who was hired by the CITY's finance department, risk management division, to conduct a complete cardiovascular evaluation of BATES. (see Exhibit A, at pgs. 50-58.)

Also in BATES' disability retirement packet is a report dated August 21, 2001, by Dr. Jonathon Ng hired by BATES' workman's compensation attorney, James Jeffers. Dr. Ng noted BATES' history of hypertension since the 1990's that has been treated for four to six years prior to the date of his report. (see Exh. A, at pg. 39.) Dr. Ng's overall professional impression was that BATES' hypertension was caused by on the job psychoemotional stress. (see Exhibit A pgs. 45-49.) On or about August 31, 2001, Dr. Ng supplemented his report opining under penalty of perjury that he agreed with Dr. Breall that BATES' heart trouble is related to his work and the psychoemotional stress suffered therefrom. (see Exh. A, at pgs. 35-37.) Dr. Ng concurred with Dr. Breall that BATES could continue to do his work in his current capacity as a Sergeant for the CITY. (see Exh. A, at pg. 37.)

Additionally contained in BATES' disability retirement packet is a prescription from Dr. John Phillip Smith indicating that of December 18, 2003, BATES has significant high blood pressure which was difficult to control even on limited work duties and medications. (see Exh. A, at pg. 27.) Dr. Smith further reiterated that it would benefit him to consider early retirement as a result thereof. (*Id.*)

Also, contained in BATES' disability retirement packet is a report from Dr. Ng, dated February 7, 2004, to Dr. Rajiv Das, the CITY's, who saw BATES for a retirement evaluation on February 5, 2004. (see Exh. A, at pgs. 13-26 .) As explained in Dr. Ng's report, retired Sgt. BATES was on a restriction at work of no physical altercations and preclusion from psychoemotional stress. (*Id.*) As indicated in Dr. Ng's report, BATES stayed on with Internal Affairs for about a year after Dr. Ng saw him in 2001 and by August of 2002,

BATES returned as a patrol sergeant. (*Id.*) Once again, Dr. Ng opined that BATES suffered from hypertensive cardiac disease in the form of left arterial enlargement and left ventricular hypertrophy, hypertension and psychoemotional stress. (see Exh. A, at pg. 18.)

Also in the disability packet is a memorandum dated March 16, 2004, from AMOROSO to Ed Overton, of the Police Retirement Board, indicating that BATES submitted his application for a service connected disability retirement and the CITY's medical director has restricted BATES' job duties based on "the medical records submitted by the applicant and independent medical evaluations." (see Exh. A, pg. 10). The memorandum is written and signed by AMOROSO. (*Id.*) AMOROSO concludes in her memorandum to Mr. Overton that if BATES were to continue in the work place he would be restricted to avoid "psychologically or physically stressful work." (*Id.*) Based on such, she concludes there would not be a position available for BATES to continue as a Sergeant. (*Id.*) Nothing in her memorandum to Mr. Overton indicates that BATES had a psychological evaluation, condition or disability. (*Id.*)

Lastly, in BATES' disability retirement packet, Dr. Rajiv Das on behalf of his employer, the CITY, wrote a memorandum to the Police and Fire Retirement Board of the CITY, dated February 27, 2004, indicating that BATES was applying for a service connected disability retirement for injury suffered to his heart. (see Exh. A, pgs. 4-7.) After reviewing BATES' present illness of hypertension and high blood pressure, Dr. Das summarized the medical reports from Dr. Breall, Ng, and Smith, and stated his impression that BATES suffers from hypertension with history of left ventricular and aortal enlargement. (*Id.*) Dr. Das concluded in his report dated, March 17, 2004, that the restriction for BATES to avoid psychologically or physically stressful work was provided in order to "decrease Mr. BATES' perceived stress that may help control his blood pressure." (see Exh. A, pg. 7.)

On or about April 6, 2004, the same day BATES received his Police Sergeant

Retirement Identification Card, BATES received a letter signed by DAVIS, as Chief of Police, indicating that in accordance with federal law, the San Jose Police Department was transferring to his control a large capacity pistol magazine used in the performance of his official duties while employed by the CITY of San Jose Police Department. The letter further states that, "it is understood that these large capacity magazines described in the above United States Code as "large capacity ammunition feeding devices" are for your exclusive use only. Ownership of these magazines shall not be transferred in any manner expect as provided by law." (see Exh. B.)

Thus, AMOROSO, as Deputy Chief, denied BATES his CCW privilege and a hearing under state law granting him a review of that decision because he supposedly had a psychological disability; albeit, Defendant Chief DAVIS returned to BATES a large capacity ammunition feeding device for his exclusive use, which is illegal to be possessed by the general public. (see Exh. B)

Former Defendant Younis testified that a private citizen cannot own such a magazine. (see Depo. of Younis, attached hereto as Exhibit C, at pg. 9, lines 6-7.) Even, Younis, who at the time of his deposition was Assistant Chief of Police for the San Jose Police Department, could see the lunacy in returning a large ammunition magazine to an officer retired with a psychological disability. (see Exh. C, at pg. 10, lines 13-23.)

On or about November 10, 2005, BATES filed a small claims complaint against the CITY of San Jose. (attached to Defendant's Motion as Exhibit A to the Declaration of James Brennan.) BATES was seeking recovery of damages that he suffered as a result of Defendant's CITY of San Jose's denial of his authorization to carry a concealed weapon.

In his declaration, attached to the small claims complaint, as required, BATES indicates the following:

> I was forced to obtain legal representation, after which, the police department reversed its decision and granted me authorization to carry a concealed weapon on February 17, 2005. Because of the department's wilful violation of my rights and State law (California Penal Code section 12027.1), I suffered monetary loss of $1,500 that I paid in attorney fees.

Without any witnesses testifying on behalf of CITY of San Jose that were subject to cross examination, judgment was entered in favor of Defendant CITY. No federal causes of action were alleged in the small claims complaint. Subsequent thereto, BATES filed this action for damages due to deprivation of his civil rights under color of law: to wit, the denial of his constitutional rights to due process of law by specifically violating California Penal Code section 12027 and 12027.1.

A. Plaintiff's Allegations in His Complaint and Defendants' Answer Thereto

BATES alleged in his first cause of action against individual defendants AMOROSO, in her official capacity as the CITY's Deputy Chief of Police, and DAVIS in his official capacity as the Chief of Police, that BATES was denied his freedom from deprivation of due process of law, his freedom from summary punishment, and his freedom from his deprivation of his right to bear arms. In his second cause of action, BATES alleged that the municipality defendant, CITY, maintained no system of review or compliance with Penal Code section 12027 *et seq*., thereby systematically denying eligible retiring police officers from due process of law.

Further, that Defendants, AMOROSO and DAVIS in their supervisory capacities as Deputy Chief and Chief of Police respectively, created a system of depriving BATES, and people in like positions, of due process of law because in their capacities as final

decision makers pursuant to the authority granted to them by the CITY, such actions represent an official municipal policy and practice. Defendants set forth four affirmative defenses in their Answer to BATES' Complaint. Defendants failed to plead the defense of *res judicata*.

B. Relevant Testimony of Defendant AMOROSO

At all relevant times, Defendant AMOROSO was Deputy Chief of the Bureau of Administration. In her capacity as Deputy Chief, AMOROSO oversaw a number of departments within the police department, one of which was the personnel unit. (see Depo. of AMOROSO, attached hereto as Exhibit D, at pg. 7) AMOROSO was also in charge of some policies and procedures for the CITY of San Jose. (see Exh. D, at pg. 9.) It was also her duty to determine whether or not to accept an officer's application for disability retirement. (*Id.*)

When asked what generally her role was to determine whether there was a job available for the applicant based upon a work limitation, Deputy AMOROSO started to indicate that she would "review the medical…", and then quickly stopped herself. (see Exh. D, at pg. 9, line 25.) She continued to state that she would evaluate the CITY physicians' restrictions in terms of jobs that are available and make a determination. (see Exh. D, at pg. 10.)

AMOROSO testified that she had an independent recollection that BATES had a situation with his heart that was affected by psychological stress, "a heart condition of some type". (see Exh. D, at pgs. 13-14.) AMOROSO denied ever reviewing BATES' application for service connected disability retirement, nor medical reports, indicating that she was not privy to that information. (see Exh. D, at pg. 14.)

Although AMOROSO admits that she reviewed the report on his occupational illness or injury, because it was attached to a memorandum signed by her, she only admits that he had "some type of disability but not knowing exactly what it was." (see Exh. D, at pg. 16.)

She claims that the medical information she received was kept confidential from her, although she is charged with deciding whether or not she can accommodate someone in a job based on medical limitations. (see Exh. D, at pg. 17.)

(A letter dated August 26, 1999, to former Officer Rey Dominguiz, executed by AMOROSO, further calls into question AMOROSO's testimony in this case. In the letter, attached hereto as Exhibit E, AMOROSO shows her clear understanding of Penal Code sections 12027 and 12027.1. In that letter to former officer Rey Dominguiz, AMOROSO makes it very clear that she reviewed his doctor's assertions, the submitted medical evidence, the record at the retirement hearing, and his application for retirement. (see Exh. E.) Her testimony now in this action, after being involved in over 300 CCW permit decisions, that she does not review such information, or even the application for disability retirement submitted by the officer, is ludicrous at best, and more likely disingenuous.)

AMOROSO, testified that she was unaware of BATES ever being required to have a mental fitness examination. (see Exh. D, at pg. 22.) She admitted that she was not aware of BATES having a psychiatric diagnosis of a certain psychiatric condition. (see Exh. D, at pg. 23.) Defendant AMOROSO admitted that it was not her job to interpret the job limitations, such as, to avoid psychological stress, as a diagnosis of whether a person had a psychological or a medical condition. (see Exh. D, at pg. 24.) **AMOROSO admitted that she did not understand that BATES' disability retirement was for a medical disability as opposed to a psychological disability.** (see Exh. D, at pg. 25.) AMOROSO also testified that such knowledge would not be important in terms of her job function to know whether his disability retirement was medical or psychological. (*Id.*) AMOROSO admitted that only she made the decision to deny BATES his CCW permit. (Exh. D, at pg. 27.)

In her decision to deny BATES a CCW permit, Defendant AMOROSO testified as follows:

> "And Sgt. Toney and I discussed Fred's case, reason for his disability retirement being granted. That included psychological stress. And under that circumstance, based upon that medical restriction and approval, basis of approval, I had Bruce Toney deny his request for a CCW." (Exh. D, at pg. 28.)

Although AMOROSO did not review BATES' medical records nor claims to have reviewed his disability application file, she testified that his disability was based in part on psychological stress. (see Exh. D, at pgs. 28-29.) When it was pointed out to AMOROSO that psychological stress was simply BATES' work restriction, she claimed that as far as she knew, it was the basis for his retirement and so that was the basis of her decision. (Exh. D, at pg. 29.) She admitted that she did not know whether retired Sgt. BATES under-went any kind of psychological examination prior to her decision. (see Exh. D, at pg. 30.)

She also admitted that it would not be practice, policy or procedure with the CITY to consult with anyone else before making her decision. (see Exh. D, at pgs. 30-31.) She confirmed that such decision was solely hers for all officers that retire only subject to review by the Chief of Police. (see Exh. D, at pg. 31.)

Prior to making the decision for BATES, AMOROSO participated in approximately 300 decisions to approve or disapprove CCW permits and denied only about seven or eight out of 300. (see Exh. D, at pgs. 31-32.) AMOROSO also testified that Officer Toney went to the disability hearing for Fred BATES and reported to her what had occurred. (see Exh. D, at pg. 33.) (attached hereto as Exhibit F, is a transcript of the Retirement Board Hearing.) From a review of Exhibit F, it is clear that Dr. Das, for the CITY, discussed BATES' long standing hypertension, not in control, which provides BATES with a risk of strokes, heart problems, and heart attack.

Notwithstanding, AMOROSO claims that Sgt. Toney did not make it clear to her that BATES' disability was medical and not psychological. (see Exh. D, at pg. 33). She further claims that Sgt. Toney did not tell her that as a result of the hypertension, Mr. BATES actually had an enlarged heart as well. (*Id.*) Even after that, AMOROSO claims that she did not have knowledge that BATES was retired on a medical disability and believed he retired on a psychological disability based on the work restriction of psychological stress. (see Exh. D, at pg. 34.)

Further, AMOROSO testified that she is familiar with the Penal Code and was trained as a police officer in the academy to understand the Penal Code. (see Exh. D, at pg. 35.) She further admitted that she is familiar with Penal Code section 12027.1. (see Exh. D, at pgs. 35-36.) It is obvious that she knows the statutory scheme for issuing CCW permits. (see also, Exh. E.)

AMOROSO admitted that under certain circumstances, from her understanding of the penal code, that an officer has a right to appeal a denial of a CCW permit decision. (see Exh. D, at pg. 36.) It was not AMOROSO's practice, policy or procedure to forward a letter to the officer after her decision was made if there was a denial. (*Id.*) AMOROSO admitted that after denying BATES' permit she never sent him a letter informing him of the same. (see Exh. D, at pg. 37.)

In response to BATES calling AMOROSO about his denial, she testified that she read the penal code as understanding that because of his psychological disability, he was not entitled to the CCW permit. (*Id.*) She understood that the words "psychological disability" in the penal code had no different meaning than a work restriction for a person to avoid psychological stress. (*Id.*) She admitted that she understood that one either retires on a medical disability or a psychological disability. (see Exh. D, at pg. 38.) Subsequent to her

deposition and after reading the transcript, AMOROSO submitted an amendment sheet to her deposition transcript in August of 2007, changing that testimony by adding words "however, it could be both." (see Exh. D, amendment sheet)

Although BATES told her over the phone that he disagreed with her evaluation, AMOROSO admitted that she did not offer him a hearing and continued to tell him that he retired on a psychological disability without doing any further investigation into the matter. (see Exh. D, at pgs. 38-39.) Other than telling BATES on the telephone that he retired on a psychological disability, she admitted that she did not offer him a hearing or a way to review her decision for the denial of the CCW permit. (see Exh. D, at pgs. 40-41.)

AMOROSO testified that she could not recall whether or not she offered BATES to provide her with his own medical records to prove his disability retirement was medical, and not psychological. (see Exh. D, at pg. 42.) She admitted that she did not offer him the three-member hearing to allow him to appeal the denial of her decision. (*Id.*) She further stated that her decision was final and she could not remember whether or not she spoke to the Chief of Police, DAVIS about her decision. (see Exh. D, at pgs. 43-44.) AMOROSO further admitted that she did not set up a time and date for BATES to explain his disability to a three-member panel, or anyone for that matter, and that the CITY and AMOROSO were mistaken. (*Id.*)

C. Relevant Testimony of Charles "Tuck" Younis

Sometime in the summer of 2004, BATES contacted Younis in light of a change in administration, to see if they would review the denial of his CCW permit. (see portions of Depo. of Younis, attached hereto as Exhibit G, at pg. 14.) After receiving some preliminary information, Younis received the go ahead from Deputy Chief Oliver, since AMOROSO had retired, and then did the following:

> "I pulled the taped of Sergeant BATES' Retirement Board hearing. I reviewed those. I consulted with the retirement doctor, Dr. Rajiv Das. Rajiv Das. And he is also the CITY physician…" (see Exh. G, at pg. 21.)

Younis concluded that the disability was medical and not psychological. (see Exh. G, at pg. 22.)

Younis admitted that since he had access to the tapes of the Retirement Board that it is a reasonable inference that the prior administration did as well. (see Exh. G, at pg. 24.) Further, he agreed that a person working in his role, would be able to talk to Ed Overton, the retired officer, review the retired officer's medical records, and talk to the physician treating the retired officer. (see Exh. G, at pg. 25.)

D. Relevant Testimony of Frederick BATES

Relating his conversation with AMOROSO, BATES testified that AMOROSO told him his CCW permit was denied based on his work restriction to which BATES told her that he had a medical disability and it was not psychological. (see portions of Depo. of BATES, attached hereto as Exhibit H, at pg. 21.) AMOROSO told him the work restriction meant he had a psychological disability. (*Id.*) BATES told her that he retired on a medical disability as opposed to a psychological disability. (*Id.*) He further testified that AMOROSO said she could give BATES a hearing, but she would not do so because there is no way that he could prove he did not go out on a psychological disability. (*Id.*) BATES further recalled in that phone conversation that AMOROSO said that she would not change her mind. She also said that it was ok that he had a gun in his home but he was not going to get his CCW permit. (see Exh. H, at p. 22.)

On or about September 10, 2004, Tuck Younis advised BATES that he was not entitled to an appeal to a denial of a CCW permit because it was not made within 45 days. (see Exh. H, at pg. 44.) Younis further stated to BATES that his telephone conversation in

April 2004 with AMOROSO was his appeal. (see Exh. H, at pg. 45).

On or about December 14, 2004, Captain Younis advised BATES that the department had reversed its decision and decided to grant him a CCW permit. (see Exh. H, at pg. 60.) BATES believes that AMOROSO willfully violated state law because she has been a deputy chief for several years who dealt with work restrictions in her capacity as deputy chief. She clearly knew what the law was because she was the one who directed BATES to the statute to review and stated it was 12027.1 (e) that she was relying upon for the denial of his CCW permit. (see Exh. H, at pgs. 68-69.)

After reviewing his personnel file, which is a controlled document, BATES knew that niether AMOROSO nor anyone from the Police Department's administration checked his personnel file before denying him his CCW permit. (see Exh. H, pg. 52.) Doing so would have been very relevant in BATES' opinion because his file would show that he has an above average mental capacity instead of someone with a disabled mental capacity due to his evaluations and letters of commendation from citizens. (see Exh. H, at pg. 73.) BATES testified that being denying his CCW permit without a hearing based on a false understanding of his disability caused him embarrassment, humiliation and had a more profound impact on him than any other event in his last 15-20 years. (see Exh. H, pg. 80.)

At the small claims action, BATES was not permitted to testify. (see Exh. H, at pgs. 83- 84.)

E. Defendants' Further Admissions in Response to Plaintiff's Discovery Requests

In response to Plaintiff's Requests for Admissions, Defendants have agreed that BATES was never evaluated by the CITY for a psychological disability and that his application for service connected disability retirement was based on medical records and independent medical evaluations of both his own and the CITY's doctors. (see Exh. I, Response Nos. 1, 3, 5, and 8.) Defendants have also admitted in this action that the cause of BATES' heart

problems were from stress and hypertension. (see Exh. I, Response Nos. 6, 7, and 8.)

Regarding the issue of Due Process, Defendants admitted that no one ever communicated to BATES in writing that he was denied his CCW permit authorization because his disability was based on a psychological disability. (see Exh. I, Response No. 10.) Further, Defendants admit that BATES was never advised in writing that he was entitled to an appeal for the denial of his CCW permit. (see Exh. I, at Response Nos. 11 and 12.) Further, Defendants have admitted that they did not give BATES a hearing pursuant to California Penal code section 12027.1 (d) relative to the denial of his CCW permit. (see Exh. I, at Response No. 13.) Lastly, Defendants admit that is was only AMOROSO's decision to deny BATES his CCW permit acting in her capacity as a Deputy Chief for the CITY. (see Exh. I, Response No. 15.)

Although, Defendants would not admit that the CITY and DAVIS maintain no written policy and/or procedure relating to the issuance and/or denial of a retired San Jose police officer's CCW permit, when asked to produce such writing, the CITY's response was that they had no responsive documents to such request. (see Defendant CITY's Response to Plaintiff's Request for Admissions, Set Two, attached hereto as Exh. J, Response No. 18; and, Defendant's Response to Plaintiffs Request for Production of Documents, Set One, attached hereto as Exh. K, Response No. 7.)

III. DISCUSSION OF LAW AND ARGUMENT

A. Standard for Summary Judgment.

Plaintiff does not disagree with Defendant's version of the law for the standard for summary judgment stated in its moving papers other than to clarify that such standard is inextricably intertwined with the analysis that the court is to follow pursuant to *Saucier v.*

Katz, 533 U.S. 194 (2001.)

Additionally, Defendant fails to clarify that the movant's papers are to be carefully scrutinized, while those of the opposing party are on the whole indulgently regarded. (*Bishop v. Wood*, 426 U.S. 341 (1976.) In *Bishop v. Wood*, the United States Supreme Court clearly stated that they "must accept [plaintiff's] version of the facts as established by the evidence." (*Id.* at 348.)

It has also been made clear by several cases following *Saucier v. Katz*, *supra*, that in the context of evaluating summary judgment based upon the qualified immunity defense, facts must be viewed in the light most favorable to the Plaintiff's evidence. (*Saucier v. Katz*, supra. at 201; *Marquez v. Guiterrez*, 322 F.3d 689, 692 (9th Cir. 2003.); *Merideth v. Erath*, 342 F.3d 1057, 1060 (9th Cir. 2003, *et al.*)

B. Defendants Clearly Violated BATES' Constitutional Rights to Due Process in Denying him his CCW Permit.

Before the 1988 amendments to the statutory scheme in California governing CCW endorsements, police agencies could deny CCW permits for good cause, including psychological disability, without a "full adversarial hearing before a neutral third party. (*Knapp v. City of Gardena* (1990) 221 Cal.App. 3d 344, 347.) The amendments changing the law by adding 12027.1, in part, requires hearings, with notice, before an impartial three-member panel on the good cause to revoke or deny a CCW endorsement unless the officer retires due to a psychological disability. (*Unland v. Block* (1997) 59 Cal.App. 4th 1537, 1539.) In enacting the 1988 amendments, the state legislature were making changes, in part, to a reaction to the case of San *Jose Police Officer's Assn. v. City of San Jose,* (1988) 199 Cal.App. 3d 1471. (*Id.* at 1543.)

The Unland court found that, **"in San Jose, the Police Chief's stated policy was to review each CCW endorsement application on a case by case basis, review all available**

medical and psychiatric evidence, and offer a hearing before himself or his designated representative on any denial." (*Id.* at 1544.) The new statutory scheme gave, "greater procedural protection to retired peace officers in general, except those that retired because of psychological disabilities." (*Id.*) Unland further found that, "section 12027.1 did not on its face remove the law enforcement agency's preexisting authority to examine medical and psychiatric records for evidence of a psychological disability in denying a CCW endorsement." (*Id.* at 1545.)

Currently, California Penal Code section 12027.1 governs authorization of permits for concealed weapons for retired police officers. Subdivision (b) (1) states, "an endorsement may be revoked or denied by the issuing agency only upon a showing of cause. Good cause shall be determined at a hearing as specified in subdivision (d)." Subdivision (d) states:

> "Any hearing conducted under this section shall be held before a three-member hearing board. One member of the board shall be selected by the agency, one member shall be selected by the retired peace officer or his/her employee organization. The third member shall be selected jointly by the agency and the retired peace officer or his/her employee organization.
>
> Any decision by the board shall be binding on the agency and the retired peace officer."

The Senate Rules Committee's reading of the proposed bill suggests that the legislative history was to prevent such broad discretion which could result in abuse by some commanding officers who base their decisions on subjective attitudes toward the former employee rather than an objective assessment of service or conduct. The proposal was to "establish statutorily the grounds for denying or revoking the privilege **and to ensure due process by requiring a hearing before a balanced board to determine whether or not such cause exists for denial or revocation**" (*Sommerfield v. Helmick* (1997) 57 Cal.App. 4th 315, 319,(emphasis added) citing Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading

analysis of Assem. Bill No. 3446 (1987-1988 Reg. Sess.) p. 2. fn. 3.)

As, succinctly stated by the United States Supreme Court in *County of Sacramento v. Lewis*, 532 U.S. 833 (1998), " [w]e have emphasized time and time again that '[t]he touchstone of due process is protection of the individual against the arbitrary action of government.' *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in the denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against 'arbitrary takings'), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., *Daniels v. Williams*, 474 U.S. at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised)..." (*County of Sacramento v. Lewis*, *supra* at pgs. 845-846.)

(Sacramento v. Lewis, supra at p.) As noted in the same decision, in *Collins v. Harker Heights*, 503 U.S. at 129, the court said that "the Due Process Clause was intended to prevent government officials from 'abusing [their] power or employing it as an instrument of oppression.'" 503 U.S. at 126, (*Id.* at 846.)

Thus, in the case at bar it is quite clear as to what the constitutional violation is that was violated by AMOROSO and DAVIS. The legislative history and the very words of the statutory scheme for CCW endorsements clearly sets forth due process procedural protections to guard against the very evil that AMOROSO and DAVIS imposed upon BATES. All the evidence is overwhelming that BATES retired on a medical disability. The evidence is equally overwhelming that AMOROSO and DAVIS ignored that fact and arbitrarily imposed their own interpretation based on a work restriction. Defendants have admitted that they failed to provide notice of their decision to BATES, failed to offer any review of such decision, and failed to follow the Penal code knowing the clearly language and import of those sections that

applied to CCW permits for retiring police officers.

C. Defendants AMOROSO and DAVIS are not Entitled to Qualified Immunity Because they were Both Plainly Incompetent and Knowingly Violated the Law.

The facts of this case present a very different scenario than the typical qualified immunity analysis that courts must undertake relative to Fourth Amendment violation such as in the *Saucier* case. The cases such as *Katz and Graham v. Conner*, 490 U.S. 386, 397 and many others that discuss emphasizing broad discretion afforded to police officers because they face tense and unique situations that should not be viewed with 20/20 hindsight are not applicable to this case. This is not a case where officers were in the field of battle facing someone armed with a weapon where they had to make a split second decision to use a certain amount of force to preserve their life or the lives of others.

Rather, this case involves two police officers, the Deputy Chief and, Chief of Police, who had weeks behind their desks to sift through records, make phone calls to CITY officials and physicians, interview Plaintiff and do a plethora of many other things within the confines of the Police Department to come to a learned decision about the CCW permit of BATES.

Another unique situation about this case is that when an officer must decide what amount of force is objectively reasonable under the Fourth Amendment and a court must exercise its discretion with hindsight as to whether such amount of force is reasonable, the law under any given set of unique facts out, on the streets is not always so clear. However, in this case, the analysis of whether the constitutional right was clearly established or whether or not the law was clear, is an easy one.

First, the Penal code at issue here is an unambiguously written law that was amended as a result of Defendant CITY's own case having once been sued by the Police Officer's Association. The actual policy of the San Jose Police Department regarding CCW permits

was at issue in their prior litigation which resulted in the legislature amending the statutes. AMOROSO herself makes it very clear in her testimony, her letter to a former San Jose police officer, and her conversations with BATES, that she is very well aware of the law governing CCW permits.

Thus, in conducting the *Saucier* analysis, this court is first to determine the facts, taken in the light most favorable to BATES, to show that Defendants' conduct violated a constitutional right. (*Saucier*, *supra*.) If Defendants' violated such a right, this court must then determine whether this right was clearly established. (*Id.*, *Rudebusch v. Hughes*, 313 F.3d 506, 514 (9th Cir. 2002).) A right is clearly established if a reasonable agent would have understood that what he was doing violated that right. (*Id.*)

In the case at bar, given the clear laws, the legislative history of such, and all the evidence attached to this opposition with such evidence taken in the light most favorable to BATES, AMOROSO knowingly violated BATES' rights to due process. There is simply no question that BATES' disability was medical and the initial decision to deny his CCW permit must have been followed up with providing BATES his due process rights to notice and a three-member hearing to allow him to present evidence that in fact he should retire with a CCW permit to not only protect himself but to be a benefit to the public at large.

As to the second prong, that right was clearly established because it was set forth in the California Penal Code itself. A reasonable Chief of Police, or Deputy Chief of Police, would have known that what AMOROSO did violated BATES' right to due process. Even Younis' testimony is reflective of that fact. Younis, who now does AMOROSO's job, admitted that he has access to interviewing the retired officer, the CITY's physician, and reviewing the entire medical records of the officer.

Defendants' argument that assuming AMOROSO was mistaken in her belief because

she supposedly had good faith that BATES retirement was for psychological reasons, such mistake was reasonable "given the information she had at the time she made the decision." (see Defandants' Memo. of points and Authorities, pg. 10-11.) That argument is no different than saying that even though the Penal Code existed, AMOROSO was not aware of it because she did look it up. Even dating back to 1988, according to the Unland court, CITY, its Police Chief, or designated representative, had a policy in place to make CCW endorsement decisions on a case by case basis utilizing medical records and everything available about the disability of the retiring officer.

Additionally, the *Saucier* analysis is not about the information AMOROSO had at the time she made her decision. Rather it is about the analysis of whether a reasonable officer could have believed his conduct was lawful (*Browning v. Vernon*, 44 F.3d 818, 822. (9th Cir. 1995). The evidence in this case overwhelmingly establishes that a reasonable officer in AMOROSO's position could not have believed her conduct was lawful and in compliance with the Penal code. First, Younis, who now does her job, testified as to what he would have done. That is evidence not only of a reasonable officer, but the officer who took over her very job, who is now making those determinations for the CITY. Further, AMOROSO herself wrote memorandums to the Police Retirement Board regarding BATES, referencing an attached report of occupational injury or illness specifying that such injury or illness is injury to his heart and cardiovascular system. Any honest, reasonably trained officer would know that the evidence without too much effort, that BATES retired on a medical disability. As such, BATES' would therefore be afforded all due process protections relative to his CCW permit.

D. The City's Defense of *Res Jusdicata* Was Waived By Failing to Plead the Affirmative Defense in Its Answer

In its Answer, which is on file with this court, defendants set forth four affirmative defenses. None affirmatively allege the defense of *res judicata*. Federal Rules of Civil Procedure, Rule 8 (c) requires, in mandatory language, a party to set forth affirmatively in its answer the defense of *res judicata*. The basic premise of such rule is to afford fair notice to the parties the defenses that will be relied upon. (*Conley v. Gibson*, 355 U.S. 41, 47 (1957).

In the case at bar, since the affirmative defense of *res judicata* was not plead in Defendant's answer, BATES was not on notice that such defense would be raised and did not conduct any discovery or do any investigation to counter such defense. The first time BATES became aware of Defendant's defense of *res judicata* was upon receipt of its motion for summary judgment. BATES is now severely prejudiced by being placed in a position of having not done any discovery or investigation to counter such defense. In *Marcus v. Sullivan*, 926 F.2d 604 (7th Cir. 1991). In *Sullivan*, *res judicata* would have barred plaintiff's claims but it was waived because it was not included in defendant's answer. (*Id.*)

1. Assuming Arguendo the Defense Has Not Been Waived, BATES' Action Against the CITY is not Barred by the Doctrine of *Res Judicata* Because he Did Not Clearly Allege a Monell Claim to the Small Claims Court.

The constitutional claims were not raised in small claims court. The only claim that BATES has in this federal court action against the CITY, is a *Monell* claim. Small claims court, BATES was alleging a violation of state law and seeking damages for $1,500.00 that he paid counsel to help him obtain his CCW permit.

Since there is not an identity of claims, in any event *res judicata* does not apply.

a. Plaintiff Can Prevail on His *Monell* Claim Because AMOROSO was Acting as the CITY's Final Decision Maker Endorsed by Defendant DAVIS.

A triable issue of fact remains as to BATES' *Monell* claim against the CITY in the facts taken in a light most favorable to BATES. The pleadings suggest that there is no written policy or procedure relative to CCW permits. It is clear that AMOROSO was given the power by DAVIS to solely make the CCW permit decisions which were not subject to review by anyone.

Thus, AMOROSO's actions represented official municipal policy and practice.

For instance, in *Pembaur v. Cincinnati*, 475 U.S. 481 (1986) a decision by a county prosecutor acting as the county's final decision maker, to direct county deputies to forcibly enter petitioners' place of business to serve capiases upon third parties may give rise to municipal liability under section 1983. (*Pembaur v. Cincinnati*, 475 U.S. 481, 485.) In *Pembaur*, it was not in dispute that the prosecutor had specifically directed the action resulting in the deprivation of petitioner's rights. The conclusion that the decision was that of a final municipal decision maker and was therefore properly attributable to the municipality established municipal liability. (*Board of the Commissioners of Bryan County, Oklahoma v. Brown* (520 U.S. 397,406. (1995)

Here in this case, the decision of AMOROSO, endorsed by DAVIS, leaving her to be the sole and final arbiter of the CCW permit decisions, if found to be unconstitutional, provides the fault and causation of the due process violation, and therefore municipal liability. (see Board of the County Commissioners of Bryan County, Oklahoma; supra.) This is clearly unlike the situation where a city employee applies a policy in an unconstitutional manner.

Rather, this is about a policy maker of the CITY's Police Department in a supervisory

capacity, position without a written policy or procedure, making a decision in an unconstitutional manner causing the unconstitutional deprivation to plaintiff. (see *City of Canton v. Harris,* 489 U.S. 378, 387 (1989.) AMOROSO's actions were deliberately indifferent to the constitutional rights of BATES and her conduct was the cause in fact and proximate cause of BATES' constitutional deprivation.

Thus, all the elements of a *Monell* claim have been met on the face of the evidence presented in opposition to defendant' motion for summary judgment.

C. Conclusion

For all the foregoing reasons, Plaintiff respectfully requests that the court deny defendant's motion for summary judgment or alternatively partial summary judgment.

Date:

Respectfully Submitted By:

_____

Stuart D. Kirchick

UNITED STATES OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16757

FREDERICK BATES

Plaintiff-Appellant

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Police Deputy Chief of Police,

Defendants-Respondents

Appeal from the United States District Court
For the Northern District of California

Initial Brief For Plaintiff-Appellant, Fredrick Bates

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Plaintiff is not corporate entity and has no parent corporate, subsidiaries or affiliates that has issued shares to public.

JURISDICTIONAL STATEMENT

The court below had jurisdiction to entertain this matter because all claims brought herein related to alleged violations of the United States Constitution and various federal statutes, including 42 U.S.C. Secs. 1985 and 1981. The claims were brought by virtue of 42 U.S.C. Sec. 1983. The Ninth Circuit Court of Appeals has jurisdiction to entertain this appeal pursuant to 28 U.S.C. Sec. 1291. Final Judgment was rendered on June 25, 2008. Plaintiff filed a timely Notice of Appeal on July 29, 2008.

NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

Plaintiff has no knowledge of any pending cases related to the issues herein.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred finding that the individual Officers were entitled to qualified immunity where the court held that Cal. Penal Code section 12027.1

was not a clearly established constitutional right. Plaintiff submits that the answer to this is "yes" since the words of the law itself are clear and unambiguous. The standard of review of the trial court's order of summary judgment is de novo. (Hernandez v. Hughes Missile Systems Co., 362 F.3d 564 (9th Cir. 2004).)

II. Whether the District Court erred finding that defendants did not waive their collateral estoppel defense by failing to plead it in their answer as required by F.R.C.P., Rule 8(c)? Plaintiff submits that the answer to this is "yes." The standard of review of the trial court's order of summary judgment is de novo. (Id.)

STATEMENT OF THE CASE

This is an action alleging defendants violated plaintiff's civil rights by denying him his freedom from deprivation of due process of law and equal protection under the law with regard to denying retired Police Sergeant Bates a permit to carry a concealed weapon, under 42 U.S.C.§§ 1985 and 1981, with all claims being brought by virtue of 42 U.S.C. SCC. 1983.

STATEMENT OF THE FACTS

Plaintiff's complaint alleges that Plaintiff, a retired police sergeant, was denied his due process of law by his former employer and supervisorial officers who failed to initial grant him a concealed weapons permit under California Penal Code section 12027.1. (App4) On or about April 1, 2004, plaintiff retired from the police department for the CITY OF SAN JOSE where he was employed as a police sergeant. (App4) Plaintiff's retirement was due to a medical disability. (App4) During his employment as a sergeant for the police department of the CITY OF SAN JOSE, plaintiff received exceptional performance appraisals consistently above standards while employed for the police agency over 20 years. (App4)

Shortly thereafter, on or about April 6, 2004, plaintiff received his police sergeant retirement ID card which was not stamped for carrying a concealed weapon. (App4) Upon receipt, Plaintiff did not receive any explanation or written notification that authorization for him to carry a concealed and loaded firearm was denied. (App4)

As a retired police sergeant with a CCW permit, Bates would be able to benefit the public by being able to render aid, and protect himself in the event he encounter lawlessness people who recognize him from prior on-duty interactions. (App4)

On or about April 16, 2004, plaintiff contacted AMOROSO, as deputy chief with the CITY. (App4) Approximately one (1) week later, AMOROSO advised plaintiff that the CCW authorization was denied based on a work restriction he had on his medical records which was for him to avoid psychological stress. (App4) AMOROSO further informed plaintiff that he had no right to appeal since "his disability was based on a psychological disability". Plaintiff never received anything in writing from AMOROSO or the CITY that he was denied CCW authorization due to a psychological disability or otherwise. (App5)

On or about August 25, 2004, Tuck Younis, an acting captain for the police department of the CITY, received a letter from Dr. Jonathan Ng clarifying portions of his medical disability report regarding plaintiff and stated that plaintiff has no problem or difficulty in carrying a concealed weapon simply because of certain terms of art he

used in describing plaintiff's disability. (App5) In response, on or about September 10, 2004, Younis advised plaintiff that plaintiff was not entitled to an appeal of the denial of the CCW permit because "it was not made within 45 days". (App5) Younis further told BATES that his telephone conversation in April 2004 with AMOROSO was his appeal. (App5)

Thereafter, in October 2004, plaintiff was forced to hire an attorney to pursue his CCW authorization. (App5) Additionally, plaintiff filed a complaint with the Department of Fair Employment and Housing on December 9, 2004. (App5) Toward the end of December 2004, Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to BATES. (App5)

There existed many available resources for AMOROSO to learn that BATES' disability was not psychological but medical. First, BATES' disability retirement packet with the CITY includes several relevant documents. (App5,29-95) In his initial application for retirement, BATES indicates his disability is "injury to heart and cardiovascular system." (App5,31) In a memorandum from AMOROSO, as Deputy

Chief, to Ed Overton, of the Police Retirement Board, dated November 20, 2003, AMOROSO acknowledges BATES' application for service connected disability retirement referencing an attached report of occupational injury or illness that states the specific injury as "cumulative-heart/cardiovascular." (App5,88-89) Additionally, in the application for disability retirement there is a medical report dated August 13, 2001, from Dr. William S. Breall, who was hired by the CITY's finance department, risk management division, to conduct a complete cardiovascular evaluation of BATES. (App6,78-86)

Also in BATES' disability retirement packet is a report dated August 21, 2001, by Dr. Jonathon Ng hired by BATES' workman's compensation attorney, James Jeffers. Dr. Ng noted BATES' history of hypertension since the 1990's that has been treated for four to six years prior to the date of his report. (App6,67) Dr. Ng's overall professional impression was that BATES' hypertension was caused by on the job psychoemotional stress. (App6,73-77) On or about August 31, 2001, Dr. Ng supplemented his report opining under penalty of perjury that he agreed with Dr. Breall that BATES' heart trouble is related to his work and the

psychoemotional stress suffered therefrom. (App6,63-65) Dr. Ng concurred with Dr. Breall that BATES could continue to do his work in his current capacity as a Sergeant for the CITY. (App6,65)

Additionally contained in BATES' disability retirement packet is a prescription from Dr. John Phillip Smith indicating that of December 18, 2003, BATES has significant high blood pressure which was difficult to control even on limited work duties and medications. (App6,55) Dr. Smith further reiterated that it would benefit him to consider early retirement as a result thereof. (Id.)

Also, contained in BATES' disability retirement packet is a report from Dr. Ng, dated February 7, 2004, to Dr. Rajiv Das, the CITY's, who saw BATES for a retirement evaluation on February 5, 2004. (App6,41-54) As explained in Dr. Ng's report, retired Sgt. BATES was on a restriction at work of no physical altercations and preclusion from psychoemotional stress. (Id.) As indicated in Dr. Ng's report, BATES stayed on with Internal Affairs for about a year after Dr. Ng saw him in 2001 and by August of 2002, BATES returned as a patrol sergeant. (Id.) Once again, Dr. Ng opined that BATES suffered from hypertensive cardiac

disease in the form of left arterial enlargement and left ventricular hypertrophy, hypertension and psychoemotional stress. (App7,46)

Also in the disability packet is a memorandum dated March 16, 2004, from AMOROSO to Ed Overton, of the Police Retirement Board, indicating that BATES submitted his application for a service connected disability retirement and the CITY's medical director has restricted BATES' job duties based on "the medical records submitted by the applicant and independent medical evaluations." (App8,38) The memorandum is written and signed by AMOROSO. (Id.) AMOROSO concludes in her memorandum to Mr. Overton that if BATES were to continue in the work place he would be restricted to avoid "psychologically or physically stressful work." (Id.) Based on such, she concludes there would not be a position available for BATES to continue as a Sergeant. (Id.) Nothing in her memorandum to Mr. Overton indicates that BATES had a psychological evaluation, condition or disability. (Id.)

Lastly, in BATES' disability retirement packet, Dr. Rajiv Das on behalf of his employer, the CITY, wrote a memorandum to the Police and Fire Retirement Board of the

CITY, dated February 27, 2004, indicating that BATES was applying for a service connected disability retirement for injury suffered to his heart. (App7) After reviewing BATES' present illness of hypertension and high blood pressure, Dr. Das summarized the medical reports from Dr. Breall, Ng, and Smith, and stated his impression that BATES suffers from hypertension with history of left ventricular and aortal enlargement. (Id.) Dr. Das concluded in his report dated, March 17, 2004, that the restriction for BATES to avoid psychologically or physically stressful work was provided in order to "decrease Mr. BATES' perceived stress that may help control his blood pressure." (App7)

On or about April 6, 2004, the same day BATES received his Police Sergeant Retirement Identification Card, BATES received a letter signed by DAVIS, as Chief of Police, indicating that in accordance with federal law, the San Jose Police Department was transferring to his control a large capacity pistol magazine used in the performance of his official duties while employed by the CITY of San Jose Police Department. The letter further states that, "it is understood that these large capacity magazines described in the above United States Code as "large capacity ammunition

feeding devices" are for your exclusive use only. Ownership of these magazines shall not be transferred in any manner expect as provided by law." (App7,8,96)

Thus, AMOROSO, as Deputy Chief, denied BATES his CCW privilege and a hearing under state law granting him a review of that decision because he supposedly had a psychological disability; albeit, Defendant Chief DAVIS returned to BATES a large capacity ammunition feeding device for his exclusive use, which is illegal to be possessed by the general public. (App8,96)

Defendant Younis testified that a private citizen cannot own such a magazine. (App8,97;corrected cite App8,188, Lines6-7) Even, Younis, who at the time of his deposition was Assistant Chief of Police for the San Jose Police Department, could see the lunacy in returning a large ammunition magazine to an officer retired with a psychological disability. (App8,189, Lines13-23)

On or about November 10, 2005, BATES filed a small claims complaint against the CITY of San Jose. (App8, 190-196) BATES was seeking recovery of damages that he suffered as a result of Defendant's CITY of San Jose's denial of his authorization to carry a concealed weapon. (Id.) In his

declaration, attached to the small claims complaint, as required, BATES indicates the following:

> I was forced to obtain legal representation, after which, the police department reversed its decision and granted me authorization to carry a concealed weapon on February 17, 2005. Because of the department's willful violation of my rights and State law (California Penal Code section 12027.1), I suffered monetary loss of $1,500 that I paid in attorney fees. (Id.)

Without any witnesses testifying on behalf of CITY of San Jose that were subject to cross examination, judgment was entered in favor of Defendant CITY. No federal causes of action were alleged in the small claims complaint. Subsequent thereto, BATES filed this action for damages due to deprivation of his civil rights under color of law: to wit, the denial of his constitutional rights to due process of law by specifically violating California Penal Code section 12027 and 12027.1.

SUMMARY OF ARGUMENT

Plaintiff submits that the court was correct in determining that Penal Code section 12027.1 was a constitutional right. However the court erred in determining that such right was not clearly established, where the court also found that reading plaintiff's retirement application packet reasonably leads to the

conclusion that plaintiff did not retire due to a psychological disability. Plaintiff also alleges that defendants waived their right to present the defense of collateral estoppel by failing to affirmatively allege it in their answer. The court determined that it was sufficient for defendants to raise it in their motion for summary judgment. Plaintiff's argument is that these are both reversible errors.

ARGUMENT

I. Summary Judgment Was Inappropriate Because California Penal Code Section 12027.1 Is A Clearly Established Constitutional Right Where Plaintiff's Retirement Application Reasonably Leads To The Conclusion That Plaintiff Did Not Retire Due To A Psychological Disability.

The district court's order granting defendant's motion for summary judgment and its grant of qualified immunity is subject to de novo review (Aguilera v. Baca, 510 F.3d 1161, 1167 (9th Cir. 2007).)

A. Defendants AMOROSO and DAVIS are not Entitled to Qualified Immunity Because they were Both Plainly Incompetently and Knowingly Violated the Law.

The facts of this case present a very different scenario than the typical qualified immunity analysis that courts must undertake relative to Fourth Amendment violations such as in the *Saucier* case. The cases such as

Saucier v. Katz, 533 U.S. 194 (2001.) and Graham v. Conner, 490 U.S. 386, 397, and many others that discuss the broad discretion afforded to police officers because they face tense and unique situations that should not be viewed with 20/20 hindsight are not applicable to this case. This is not a case where officers were in the field of battle facing someone armed with a weapon where they had to make a split second decision to use a certain amount of force to preserve their life or the lives of others.

Rather, this case involves two police officers, the Deputy Chief and, Chief of Police, who had weeks behind their desks to sift through records, make phone calls to CITY officials and physicians, interview Plaintiff and do a plethora of many other things within the confines of the Police Department to come to a learned decision about the CCW permit of BATES.

Another unique situation about this case is that when an officer must decide what amount of force is objectively reasonable under the Fourth Amendment and a court must exercise its discretion with hindsight as to whether such amount of force is reasonable, the law under any given set of unique facts out on the streets is not always so clear.

However, in this case, the analysis of whether the constitutional right was clearly established or whether or not the law was clear, is an easy one.

First, the Penal code at issue here is an unambiguously written law that was amended as a result of Defendant CITY's own case having once been sued by the Police Officer's Association. (See San Jose Police Officer's Assn. v. City of San Jose (1988) 199 Cal.App.3d. 1471.) The actual policy of the San Jose Police Department regarding CCW permits was at issue in their prior litigation which resulted in the legislature amending the statutes. AMOROSO herself makes it very clear in her testimony, her letter to a former San Jose police officer, and her conversations with BATES, that she is very well aware of the law governing CCW permits. (App21,22)

The District Court first determined that the facts, taken in the light most favorable to BATES, reflected that Defendants' conduct violated a constitutional right. (*Saucier, supra*) If Defendants' violated such a right, this court must then determine whether this right was clearly established. (*Id.*,*Rudebusch v. Hughes*, 313 F.3d 506, 514 (9th Cir. 2002).) A right is clearly established if a

reasonable agent would have understood that what he was doing violated that right. (*Id.*)

In the case at bar, given the clear law, the legislative history of such, and all the evidence taken in the light most favorable to BATES, AMOROSO knowingly violated BATES' rights to due process. There is simply no question that BATES' disability was medical and the initial decision to deny his CCW permit must have been followed up with providing BATES his due process rights to notice and a three-member hearing to allow him to present evidence that in fact he should retire with a CCW permit to not only protect himself but to be a benefit to the public at large.

As to the second prong, that right was clearly established because it was set forth in the California Penal Code itself. A reasonable Chief of Police, or Deputy Chief of Police, would have known that what AMOROSO did violated BATES' right to due process. In fact, AMOROSO herself testified that BATES'CCW was denied without a hearing because she believed that his disability was psychological. Thus she knew how to read CA Penal section 12027.1. Even Younis' testimony is reflective of that fact. Younis, who now does AMOROSO's job, admitted that he

has access to interviewing the retired officer, the CITY's physician, and reviewing the entire medical records of the officer.

Even dating back to 1988, according to the *Unland* court, the CITY, its Police Chief, or designated representative, had a policy in place to make CCW endorsement decisions on a case by case basis utilizing medical records and everything available about the disability of the retiring officer. (*Unland v. Block* (1997) 59 Cal.App. 4th 1537, 1539.)

Additionally, the *Saucier* analysis is not about the information AMOROSO had at the time she made her decision. Rather it is about the analysis of whether a reasonable officer could have believed his conduct was lawful (*Browning v. Vernon*, 44 F.3d 818, 822. (9th Cir. 1995). The evidence in this case overwhelmingly establishes that a reasonable officer in AMOROSO's position could not have believed her conduct was lawful and in compliance with the Penal Code.

First, Younis, who now does her job, testified as to what he would have done. That is evidence not only of a reasonable officer, but the officer who took over her very

job, who is now making those determinations for the CITY. Further, AMOROSO herself wrote memorandums to the Police Retirement Board regarding BATES, referencing an attached report of occupational injury or illness specifying that such injury or illness is injury to his heart and cardiovascular system. Any honest, reasonably trained officer would know that BATES retired on a medical disability. As such, BATES' would therefore be afforded all due process protections relative to his CCW permit, based upon the clean language of CA Penal Code section 12027.1.

The trial court rationalized that the constitutional right was not clearly established because on the one hand a good cause hearing is required before a retired officer can be denied a concealed weapons permit. On the other hand, a good cause hearing does not apply if an officer retired due to a psychological disability. The court concluded that a reasonable official under the same circumstances would not know that her conduct violated BATES'S rights to a good cause hearing, even though the court found that reading BATE'S retirement application packet reasonably leads to the conclusion that BATES did not retire due to a psychological disability. That factual finding will lead a

reasonable officer, who had several weeks to review Penal Code section 12027.1, to the only logical conclusion that retired officer BATES was entitled to a good cause hearing.

> "The relevant, dispositive inquiry… is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (*Saucea v. Katz, supra* at 202.)

II. THE CITY'S DEFENSE OF *RES JUSDICATA* WAS WAIVED BY FAILING TO PLEAD THE AFFIRMATIVE DEFENSE IN ITS ANSWER

In its Answer, which is on file with this court, defendants set forth four affirmative defenses. None affirmatively allege the defense of *res judicata*. Federal Rules of Civil Procedure, Rule 8 (c) requires, in mandatory language, a party to set forth affirmatively in its answer the defense of *res judicata*. The basic premise of such rule is to afford fair notice to the parties the defenses that will be relied upon. (*Conley v. Gibson*, 355 U.S. 41, 47 (1957).

In the case at bar, since the affirmative defense of *res judicata* was not plead in Defendant's answer, BATES was not on notice that such defense would be raised and did not conduct any discovery nor do any investigation to counter such defense. The first time BATES became aware of Defendant's defense of *res judicata* was upon receipt of its motion for summary judgment. BATES is now severely

prejudiced by being placed in a position of having not done any discovery or investigation to counter such defense. (*Marcus v. Sullivan*, 926 F.2d 604 (7th Cir. 1991).) In *Sullivan*, *res judicata* would have barred plaintiff's claims but it was waived because it was not included in defendant's answer. (*Id.*)

A. Assuming Arguendo the Defense Has Not Been Waived, BATES' Action Against the CITY is not Barred by the Doctrine of *Res Judicata* Because he Did Not Clearly Allege a *Monell* Claim to the Small Claims Court.

The constitutional claims were not raised in small claims court. The only claim that BATES has in this federal court action against the CITY, is a *Monell* claim. In small claims court, BATES was alleging a violation of state law and seeking damages for $1,500.00 that he paid counsel to help him obtain his CCW permit.

The trial court makes no reference in its order to F.R.C.P., Rule 8(c) and simply holds without authority that it is sufficient that defendants raise the issue of collateral estoppel in their motion for summary judgment. If this were the law, then F.R.C.P. Rule 8(c) is apparently obsolete and fair notice to parties of the defenses that will be relied upon is no longer the law.

Since there is not an identity of claims, in any event *res judicata* does not apply.

B. Plaintiff Can Prevail on His *Monell* Claim Because AMOROSO was Acting as the CITY's Final Decision Maker Endorsed by Defendant DAVIS.

A triable issue of fact remains as to BATES' *Monell* claim against the CITY in the facts taken in a light most favorable to BATES. The pleadings suggest that there is no written policy or procedure relative to CCW permits. It is clear that AMOROSO was given the power by DAVIS to solely make the CCW permit decisions which were not subject to review by anyone.

Thus, AMOROSO's actions represented official municipal policy and practice.

For instance, in *Pembaur v. Cincinnati*, 475 U.S. 481 (1986) a decision by a county prosecutor acting as the county's final decision maker, to direct county deputies to forcibly enter petitioners' place of business to serve capiases upon third parties may give rise to municipal liability under section 1983. (*Pembaur supra* at 485.) In *Pembaur*, it was not in dispute that the prosecutor had specifically directed the action resulting in the deprivation of petitioner's rights. The conclusion that the

decision was that of a final municipal decision maker and was therefore properly attributable to the municipality established municipal liability. (*Board of the Commissioners of Bryan County, Oklahoma v. Brown* (520 U.S. 397,406. (1995)

Here in this case, the decision of AMOROSO, endorsed by DAVIS, leaving her to be the sole and final arbiter of the CCW permit decisions, if found to be unconstitutional, provides the fault and causation of the due process violation, and therefore municipal liability. (see Board of the County Commissioners of Bryan County, Oklahoma; supra.) This is clearly unlike the situation where a city employee applies a policy in an unconstitutional manner.

Rather, this is about a policy maker of the CITY's Police Department in a supervisory capacity, without a written policy or procedure, making a decision in an unconstitutional manner causing the unconstitutional deprivation to plaintiff. (see *City of Canton v. Harris*, 489 U.S. 378, 387 (1989.) AMOROSO's actions were deliberately indifferent to the constitutional rights of BATES and her conduct was the cause in fact and proximate cause of BATES' constitutional deprivation.

Thus, all the elements of a *Monell* claim have been met on the face of the evidence presented in opposition to defendant' motion for summary judgment.

CONCLUSION

In light of the foregoing, the court should reverse the trial court's Order of Summary Judgment and remand this matter for further proceedings.

Respectfully Submitted,

Stuart D. Kirchick

Dated: 3-16-09

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), I certify that this brief is proportionately spaced with one inch margins on all four corners with a total of 4,101 words.

Stuart D. Kirchick

Dated: 3-16-09

Subj: **Comments on the City's Appellate Brief**
Date: 6/7/2009
To: SDKirchick@aol.com

Hi Stuart! I want to share some comments on the City's Brief. On page four, the City makes a declaration of fact that only four months had elapsed from the time I retired to the time I received my CCW in Aug 2004. As we all know eight months had elapsed when I got approved for a CCW in Dec 2004. I was wondering if you thought this was a significant blunder on their part. Secondly, the City made a reference to qualified immunity in cases involving false arrest/probable cause. I believe my case is not dissimilar to these type cases. I believe that the Circuit Courts have consistently held that officers should ask simple and basic questions and do some type of investigation when a person offers evidence to prove their innocence, or when evidence of their innocence is easily accessible. I am attaching a copy of a Amicus Curiae Brief in a false arrest case that you might find interesting, or maybe helpful.

Fred Bates

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KREMER v. CHEMICAL CONSTRUCTION CORP., 456 U.S. 461 (1982)

United States Supreme Court

KREMER v. CHEMICAL CONSTRUCTION CORP.(1982)

No. 80-6045

Argued: December 07, 1981Decided: May 17, 1982

Title 28 U.S.C. 1738 (as did its predecessors dating back to 1790) requires federal courts to afford the same full faith and credit to state court judgments that would apply in the State's own courts. Petitioner filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, and the EEOC, as required by the Act, referred the charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination. The NYHRD rejected the claim as meritless and was upheld on administrative appeal. The Appellate Division of the New York Supreme Court affirmed. Subsequently, a District Director of the EEOC ruled that there was no reasonable cause to believe that the discrimination charge was true and issued a right-to-sue letter. Petitioner then brought a Title VII action in Federal District Court. Ultimately, the District Court dismissed the complaint on res judicata grounds, and the Court of Appeals affirmed.

Held:

The District Court was required under 28 U.S.C. 1738 to give preclusive effect to the state court decision upholding the state administrative agency's rejection of the employment discrimination claim. Pp. 466-485.

> (a) Where under New York law the New York court's determination precludes petitioner from bringing any other action based on the same grievance in the New York courts, 1738, by its terms, precludes him from relitigating the same question in federal courts. Pp. 466-467.
> (b) There is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that an employment discrimination claim is unproved. An exception to 1738 will not be recognized unless a later statute contains an express or implied partial repeal. Allen v. McCurry, 449 U.S. 90 . Here, there is no

claim that Title VII expressly repealed 1738, and no implied repeal is evident from the language, operation, or legislative history of Title VII, there being no manifest incompatibility between Title VII and 1738. Pp. 468-476.
(c) While initial resort to state administrative remedies does not deprive an individual of a right to a federal trial de novo on a Title VII claim, this does not mean that a prior state court judgment can be disregarded. Alexander v. Gardner-Denver Co., 415 U.S. 36 , [456 U.S. 461, 462] distinguished. The comity and federalism interests embodied in 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Rather, to deprive state judgments of finality not only would violate basic tenets of comity and federalism but also would reduce the incentive for States to work toward effective and meaningful systems prohibiting employment discrimination. Pp. 476-478.
(d) The procedures provided in New York for the determination of employment discrimination claims, complemented by administrative as well as judicial review, offer a full and fair opportunity to litigate the merits and thus are sufficient under the Due Process Clause of the Fourteenth Amendment. State proceedings need do no more than satisfy the minimum procedural requirements of the Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments, but rather goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. Here, petitioner received all the process that was constitutionally required in rejecting his employment discrimination claim. Pp. 479-485.

623 F.2d 786, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 486. STEVENS, J., filed a dissenting opinion, post, p. 508.

David A. Barrett argued the cause for petitioner. With him on the brief was Frederick A. O. Schwarz, Jr.

Robert Layton argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Reynolds, Joshua I. Schwartz, Constance L. Dupre, Philip B. Sklover, and Sandra G. Bryan. *

[Footnote *] Robert E. Williams and Douglas S. McDowell filed a brief for the Equal Employment Advisory Council as amicus curiae urging affirmance.

JUSTICE WHITE delivered the opinion of the Court.

Marrese v. Orthopedic Surgeons, 470 U.S. 373 (1985)

Argued: December 4, 1984

Decided: March 4, 1985

Annotation
PRIMARY HOLDING

Preclusion does not apply from a judgment in a state court to a federal antitrust claim if it could not have been raised in state court.

Syllabus

U.S. Supreme Court

Marrese v. Orthopedic Surgeons, 470 U.S. 373 (1985)

Marrese v. American Academy of Orthopaedic Surgeons

No. 83-1452

Argued December 4, 1984

Decided March 4, 1985

470 U.S. 373

U.S. Supreme Court

Marrese v. Orthopedic Surgeons, 470 U.S. 373 (1985)Marrese v. American Academy of Orthopaedic Surgeons
No. 83-1452

Argued December 4, 1984
Decided March 4, 1985
470 U.S. 373
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Syllabus
After being denied membership in respondent American Academy of Orthopaedic Surgeons, petitioner orthopaedic surgeons each filed an action in an Illinois Circuit Court, alleging that the denial of membership violated their associational rights under Illinois common law. After the Illinois Appellate Court ultimately held that the complaint in one action failed to state a cause of action, the Circuit Court then dismissed the other complaint. Subsequently, petitioners filed an action in Federal District Court, alleging that the denial of membership constituted a boycott in violation of § 1 of the Sherman Act. Respondent filed a motion to dismiss on the ground that claim preclusion barred the federal antitrust claim because the state actions concerned the same facts and were dismissed with prejudice. The District Court denied the motion, holding, in reliance on federal law, that the state judgments did not bar the Sherman Act claim. Thereafter, the District Court held respondent in criminal contempt for refusing to comply with a discovery order as to its membership application files. Respondent then appealed from the contempt order, and, while this appeal was pending, the District Court certified its denial of the motion to dismiss for immediate appeal. The Court of Appeals authorized an interlocutory appeal and ordered it consolidated with the appeal from the contempt order. Ultimately, the Court of Appeals held that, as a matter of federal law, claim preclusion barred the federal antitrust action, and reversed the contempt order because the discovery order was invalid.
Held:
1. The Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. The pendency of the appeal from the contempt order did not prevent the District Court from certifying such denial for immediate appeal. Pp. 470 U. S. 378-379.
2. The courts below erred in not considering Illinois law in determining the preclusive effect of the state judgments. Pp. 470 U. S. 379-386.
(a) Title 28 U.S.C. § 1738 which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"
-- requires a federal court to look
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first to state law in determining the preclusive effects of a state court judgment. *Kremer v. Chemical Construction Corp.*, 456 U. S. 461. The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable in this case. While a state court will have no occasion to address the question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court, a federal court may nevertheless rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Pp. 470 U. S. 379-382.

(b) Reference to state preclusion law may make it unnecessary to determine if a federal court, as an exception to § 1738, should refuse to give preclusive effect to a state court judgment. Here, unless application of Illinois preclusion law suggests that petitioners' federal antitrust claim is barred, there will be no need to decide if there is an exception to § 1738. This Court will not create a special exception to § 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering judgment, and that effectively holds as a matter of federal law that a plaintiff can bring state law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims. Pp. 470 U. S. 383-386.

726 F.2d 1150, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST JJ., joined. BURGER, C.J., filed an opinion concurring in the judgment, *post,* p. 387. BLACKMUN and STEVENS, JJ., took no part in the consideration or decision of the case.

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JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims within the exclusive jurisdiction of the federal courts. The Court of Appeals for the Seventh Circuit, sitting en banc, held as a matter of federal law that the earlier state court judgments barred the federal antitrust suit. 726 F.2d 1150 (1984). Under 28 U.S.C. § 1738, a federal court generally is required to consider first the law of the State in which the judgment was rendered to determine its preclusive effect. Because the lower courts did not consider state preclusion law in this case, we reverse and remand.

I

Petitioners are board-certified orthopaedic surgeons who applied for membership in respondent American Academy of Orthopaedic Surgeons (Academy). Respondent denied the membership applications without providing a hearing or a statement of reasons. In November, 1976, petitioner Dr. Treister filed suit in the Circuit Court of

Cook County, State of Illinois, alleging that the denial of membership in the Academy violated associational rights protected by Illinois common law. Petitioner Dr. Marrese separately filed a similar action in state court. Neither petitioner alleged a violation of state antitrust law in his state court action; nor did either petitioner contemporaneously file a federal antitrust suit. The Illinois Appellate Court ultimately held that Dr. Treister's complaint failed to state a cause of action, *Treister v. American Academy of Orthopaedic Surgeons,* 78 Ill.App.3d 746, 396 N.E.2d 1225 (1979), and the Illinois Supreme Court denied leave to appeal. 79 Ill. 2d 630 (1980). After the Appellate Court ruled against Dr. Treister, the Circuit Court dismissed Dr. Marrese's complaint.

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In March, 1980, petitioners filed a federal antitrust suit in the United States District Court for the Northern District of Illinois based on the same events underlying their unsuccessful state court actions. As amended, the complaint alleged that respondent Academy possesses monopoly power, that petitioners were denied membership in order to discourage competition, and that their exclusion constituted a boycott in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. App. 8, 26-30, 33. Respondent filed a motion to dismiss, arguing that claim preclusion barred the federal antitrust claim because the earlier state court actions concerned the same facts and were dismissed with prejudice. [Footnote 1] In denying this motion, the District Court reasoned that state courts lack jurisdiction over federal antitrust claims, and therefore a state court judgment cannot have claim preclusive effect in a subsequent federal antitrust suit. 496 F. Supp. 236, 238-239 (1980), *on reconsideration,* 524 F. Supp. 389 (1981). Discovery began, and respondent refused to allow petitioners access to certain files relating to membership applications. After respondent persisted in this refusal despite a discovery order, the District Court held respondent in criminal contempt. App. to Pet. for Cert. N-1.

The judgment of contempt was reversed by a divided panel of the Court of Appeals in an opinion holding that the District Judge had abused his discretion by authorizing discovery of the membership files, and also suggesting that the federal action was barred by claim preclusion, and that the antitrust claims were groundless. 692 F.2d 1083 (1982). This opinion was vacated by an en banc vote, and the original panel issued a narrower opinion that did not discuss claim preclusion.

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706 F.2d 1488 (1983). The Court of Appeals then vacated the second opinion and ordered rehearing en banc. In a divided vote, the Court of Appeals held that claim preclusion barred the federal antitrust suit and reversed the contempt order because the discovery order was invalid. 726 F.2d 1150 (1984).

On the claim preclusion issue, no opinion commanded the votes of a majority of the Court of Appeals. A plurality opinion concluded that a state court judgment bars the subsequent filing of a federal antitrust claim if the plaintiff could have brought a state antitrust claim under a state statute "materially identical" to the Sherman Act. *Id.* at 1153. The plurality examined the Illinois Antitrust Act, Ill.Rev.Stat., ch. 38, 1160-3(2) (1981), and found that it is sufficiently similar to the Sherman Act to bar petitioners' federal antitrust claims in the instant case. *Id.* at 1155-1156. An opinion concurring in part concluded that *res judicata* required petitioners to bring their "entire cause of action within a reasonable period of time." *Id.* at 1166 (Flaum, J.). To avoid preclusion of their federal antitrust claim, petitioners should have either filed concurrent state and federal actions or brought their state claims in federal court pendent to their Sherman Act claim. *Ibid.*

Five judges also concluded that the discovery order was invalid, and therefore the contempt judgment should be reversed. A plurality opinion first observed that the discovery order was invalid because the District Court should have dismissed the suit on claim preclusion grounds before the discovery order was entered. *Id.* at 1158. Alternatively, the order constituted an abuse of discretion, because it did not adequately prevent petitioners from misusing the discovery process. *Id.* at 1158-1162. Three judges joined the entire discussion concerning the discovery order. A fourth judge did not believe that claim preclusion applied, but he agreed that the discovery order constituted an abuse of discretion. *Id.* at 1162 (Eschbach, J., concurring in part and dissenting in part). Finally, the fifth judge observed that it was sufficient

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to hold that the complaint should have been dismissed on claim preclusion grounds; he added, however, that, if he thought it necessary, he would join the portion of the plurality opinion holding the discovery order invalid. *Id.* at 1162 (Bauer, J., concurring).

We granted certiorari limited to the question whether the Court of Appeals correctly held that claim preclusion requires dismissal of the federal antitrust action, 467 U.S. 1258 (1984), and we now reverse.

II

Before addressing the merits of the decision below, we first examine whether the Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. Although the parties did not raise the jurisdictional issue before this Court, we address it to assure that the claim preclusion issue is properly before us. *See, e.g., United States v. Storer Broadcasting Co.,* 351 U. S. 192, 351 U. S. 197 (1956). In the present case, the District Court initially refused to certify its denial of the motion to dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b). The

District Court subsequently held respondent in criminal contempt for refusing to comply with a discovery order. Respondent then appealed from the judgment of criminal contempt pursuant to 28 U.S.C. § 1291. *See Bray v. United States*, 423 U. S. 73 (1975) (per curiam). While the appeal from the contempt judgment was pending, the District Court amended the earlier denial of the motion to dismiss in order to certify it for immediate appeal. App. to Pet. for Cert. I-1. The Court of Appeals authorized interlocutory appeal pursuant to § 1292(b), and ordered proceedings consolidated with the appeal from the contempt order. 726 F.2d at 1152; App. to Pet. for Cert. J-1.

Petitioners argued below that, because the appeal from the contempt order was pending, the District Court lacked jurisdiction to amend its order denying the motion to dismiss to

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allow interlocutory appeal. In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U. S. 56, 459 U. S. 58 (1982) (per curiam). This proposition, however, does not imply that an appeal from a judgment of criminal contempt based on noncompliance with a discovery order transfers jurisdiction over the entire case to the court of appeals. Criminal contempt judgments are immediately appealable pursuant to § 1291, because they result from "*a separate and independent proceeding . . . to vindicate the authority of the court*'" and are "`*not a part of the original cause.*'" *Bray, supra, at 423 U. S. 75, quoting Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 221 U. S. 445, 221 U. S. 451 (1911).*

Thus, prior to certification of the claim preclusion issue pursuant to § 1292(b), the contempt judgment was the only matter before the Court of Appeals. *See* 706 F.2d at 1497-1498; 692 F.2d at 1096. The District Court's amendment of its initial denial of the motion to dismiss did not interfere with, but instead facilitated, review of the pending appeal from the contempt order. We agree with the Court of Appeals, 726 F.2d at 1152, that the pendency of the appeal from the contempt judgment did not prevent the District Court from certifying the denial of the motion to dismiss for immediate appeal under § 1292(b). Accordingly, the Court of Appeals properly exercised jurisdiction over the consolidated appeals, and we have jurisdiction to review that court's decision with respect to dismissal of the antitrust claim.

III

The issue presented by this case is whether a state court judgment may have preclusive effect on a federal antitrust claim that could not have been raised in the state proceeding. Although federal antitrust claims are within the exclusive jurisdiction of the federal courts, *see, e.g., 260 U. S. S. 380* Co. v. Lake Shore & M. S.

R. Co.,@ 260 U. S. 261, 260 U. S. 286-288 (1922), the Court of Appeals ruled that the dismissal of petitioners' complaints in state court barred them from bringing a claim based on the same facts under the Sherman Act. The Court of Appeals erred by suggesting that, in these circumstances, a federal court should determine the preclusive effect of a state court judgment without regard to the law of the State in which judgment was rendered.

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings

"shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

28 U.S.C. § 1738. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered.

"It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken."

Kremer v. Chemical Construction Corp., 456 U. S. 461, 456 U. S. 481-482 (1982); *see also Allen v. McCurry*, 449 U. S. 90, 449 U. S. 96 (1980). Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts. *See Kremer, supra,* at 456 U. S. 478, 456 U. S. 481-483. *Cf. Riley v. New York Trust Co.*, 315 U. S. 343, 315 U. S. 349 (1942) (discussing preclusive effect of state judgment in proceedings in another State).

The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case. Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts. Without discussing § 1738,

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this Court has held that the issue preclusive effect of a state court judgment barred a subsequent patent suit that could not have been brought in state court. *Becher v. Contoure Laboratories, Inc.*, 279 U. S. 388 (1929). Moreover, *Kremer* held that § 1738 applies to a claim of employment discrimination under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, although the Court expressly declined to decide whether Title VII claims can be brought only in federal courts. 456 U.S. at 456 U. S. 479, n. 20. *Kremer* implies that absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state

judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts.

More generally, *Kremer* indicates that § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. *Cf. Haring v. Prosise,* 462 U. S. 306, 462 U. S. 314, and n. 8 (1983); Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C.L.Rev. 59, 110-111 (1984). The Court's analysis in *Kremer* began with the finding that state law would in fact bar relitigation of the discrimination issue decided in the earlier state proceedings. 456 U.S. at 456 U. S. 466-467. That finding implied that the plaintiff could not relitigate the same issue in federal court unless some exception to § 1738 applied. *Ibid. Kremer* observed that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied repeal." *Id.* at 456 U. S. 468; *see also Allen v. McCurry, supra,* at 449 U. S. 99. Title VII does not expressly repeal § 1738, and the Court concluded that the statutory provisions and legislative history do not support a finding of implied repeal. 456 U.S. at 456 U. S. 476. We conclude that the basic approach adopted in *Kremer* applies in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts.

To be sure, a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought

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only in federal court. Nevertheless, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. *Cf. FDIC v. Eckhardt,* 691 F.2d 245, 247-248 (CA6 1982) (applying state law to determine preclusive effect on claim within concurrent jurisdiction of state and federal courts). *Kremer* illustrates that a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding. *See* 456 U.S. at 456 U. S. 467.

With respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where

"[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts. . . ."

Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts. Even in the event that a party asserting the affirmative defense of claim preclusion can show that state preclusion rules in

Sanderson v. Niemann , 17 Cal.2d 563

[L. A. No. 17538. In Bank. March 7, 1941.]

HAZEL SANDERSON, Appellant, v. CHARLES NIEMANN, Jr., Respondent.

COUNSEL

Jack R. Kates and Kenneth C. Miller for Appellant.

Mills, Hunter, Dunn & Liljestrom and H. J. Hunter for Respondent.

OPINION

THE COURT.

This is an appeal from a judgment which was rendered in favor of the defendant Charles Niemann, Jr., individually, and doing business as Hillside Motor Company, in an action which was brought by the plaintiff, Mrs. Hazel Sanderson, to recover damages for injuries to her person. The damages were allegedly sustained as the result of an accident in which were involved an automobile owned as community property by plaintiff and her husband, Job Sanderson, and one owned by defendant, which automobile, at the time of the accident, was being operated by one William Frost. Plaintiff Hazel Sanderson was riding in the automobile which her husband was driving at the time when the collision occurred.

Subsequent to the happening of the accident and prior to the institution of the present action, Job and Hazel Sanderson filed an action in the small claims court of the City of Los Angeles against the defendant herein, Charles Niemann, Jr., for the recovery of a judgment for damages to their automobile, as well as for money which had been expended by the plaintiff husband for medical services rendered to the wife as a result of the injuries received by her in the said accident. The plaintiffs in that action were awarded a judgment in the sum of $12.58.

The complaint which was filed in the present action embraced two causes of action,--in the first of which was set forth a claim for damages for personal injuries, and in the second, in addition to the incorporation by reference of the allegations of the first cause of action, was set forth the claim that the judgment obtained in the small claims court was res judicata of the question of defendant's negligence and liability in connection with the accident. The court overruled a general demurrer to the complaint, but granted a motion to strike the second cause of action. Defendant's answer set forth the following as affirmative defenses: (1) contributory negligence of

plaintiff, which was asserted to be imputable to her by reason of the fact that her husband was the operator of the Sanderson automobile at the time of the **[17 Cal.2d 566]** collision; (2) that the plaintiff, Hazel Sanderson, had split and divided her claim for personal injuries and therefore was estopped from maintaining the present action; and (3) that the former judgment was res judicata of all claims which plaintiff might have had as a result of the accident.

At the trial of the instant action, the record of the proceedings which were had in the small claims court was introduced in evidence, and in that connection testimony was given by plaintiff and by the judge who presided at the hearing of the former action. At the close of that testimony, defendant objected to the introduction of further evidence on the part of plaintiff. The trial court sustained that objection,--whereupon plaintiff made an offer of proof with respect to the circumstances surrounding the happening of the accident, the extent of her injuries, etc., which offer was refused by the court. Thereafter, judgment was rendered in favor of defendant on the ground that the former judgment was a bar to the instant action, and that by virtue of the proceedings had in the small claims court plaintiff had "split" her cause of action against defendant and was estopped from prosecuting the present action. From the latter judgment plaintiff has instituted this appeal.

Perhaps it should first be made clear that appellant and her husband did not incorporate in the pleadings which they filed in the former action the issue of damages for appellant's personal injuries. No relief in that respect was prayed for, nor was any evidence received by the court in that connection, except in the following respect: During the proceedings had in the former action the judge made certain inquiries of Mrs. Sanderson with regard to the nature of the medical treatment which assertedly was received by her because of her alleged injuries. According to the testimony that was given by the judge, he had asked those questions for the reason that the statement of indebtedness for medical treatment which the plaintiffs had offered in evidence did not disclose the extent of the medical services that were rendered to appellant Hazel Sanderson as a result of the injuries--as distinguished from medical treatments which, it appeared, she had received in connection with a physical ailment which was not related to the said injuries. The statements which Mrs. Sanderson thereupon made to the judge with regard to the nature of her injuries, and the treatment thereof, were solely **[17 Cal.2d 567]** in response to his inquiries. The record shows that her answers were not intended to have the effect of injecting into the issues the question of general damages in connection with those injuries; and the judge's testimony was to the effect that such statements were not so understood by him.

Both parties to the appeal concede that the identical question here presented has not heretofore been brought before the appellate courts of this state for consideration. The question is: Did the plaintiff wife--by joining her husband in an action for the

recovery, in part, of "consequential" damages, i. e., financial loss resulting to the community, which were sustained from, and were solely incident to, the personal injuries which she suffered,--preclude herself from bringing a subsequent action in her own name for the recovery of general damages which were allegedly sustained by her strictly as a result of, and attributable solely to, the said personal injuries?

Respondent's argument is to the effect that--in view of the provisions of section 370, Code of Civil Procedure,--since appellant joined her husband in the former action in which was tendered the issue of consequential damages for indebtedness incurred as the result of her injuries, she was compelled to litigate therein, if at all, any claim which she might have had for injuries to her person; and that her failure to do so, and the presentation by her of that issue in this action amounted to such a "splitting" of a cause of action that, by reason thereof, she should be effectively estopped from recovering in the present proceeding. Respondent contends that the basis of the claim presented in the small claims court was the negligence of defendant and, therefore, that the latter was entitled to have presented therein all claims which resulted from, or which in any way depended upon, his alleged negligence.

[1] In this state it is well settled that the law has conferred upon a married woman a separate right to bring an action in her own name for damages for injuries to her person (section 370, Code Civ. Proc.), and that she is a necessary party to that action (Redwing v. Moncravie, 131 Cal.App. 569 [21 PaCal.2d 986]), although her husband may join her therein. Such a right of action establishes an exception to the rule that the husband has control of the community property and that he must bring all actions which concern **[17 Cal.2d 568]** it. But appellant directs attention to the fact that two separate and distinct causes of action are involved in this proceeding,--namely, appellant's present action which was brought in her own name for injuries to her person, and the former action which was filed in the small claims court, to which her husband alone was a necessary party, wherein it was sought to collect damages sustained to the community-owned automobile, and consequential or incidental damages due to financial loss which resulted to the community by virtue of the wife's injuries. [2] The wife was not a necessary party to the former action. However, no objection was made to her joinder therein as a party plaintiff and consequently none may now be made in that regard. (See Webb v. Tischauser, 89 Cal.App. 267, 272 [264 P. 526], and cases there cited.) Moreover, in the said former action respondent was not deprived of any substantial right by virtue of the joinder of the wife, since the husband was a necessary and proper party plaintiff therein, and the cause of action for which the wife is now seeking to recover damages for injuries to her person was not tendered as an issue. (Asevado v. Orr, 100 Cal. 293, 300 [34 P. 777]; Daly v. Ruddell, 137 Cal. 671, 674 [70 P. 784].) Therefore, unless it can be said that the provisions of section 370, Code of Civil Procedure, authorize the bringing of an action by the wife to

recover for incidental or consequential damages which may have been sustained by reason of financial loss to the community,--which right of action has heretofore been generally recognized as existing in the husband--there has been no "splitting" of a cause of action, and respondent's contentions may not be upheld. As amended in 1921, section 370, Code of Civil Procedure, provides as follows:

"A married woman ... may sue without her husband being joined as a party in all actions, including those for injury to her person, libel, slander, false imprisonment, or malicious prosecution, or for the recovery of her earnings, or concerning her right or claim to the homestead property." (Emphasis added.)

[3] However, under the provisions of section 174, Civil Code, a husband owes to his wife the duty of support. He must provide her with reasonable medical care and attention, for the payment of which services he is primarily responsible (Medical Finance Assn. v. Allum, 22 Cal.App.2d 747 **[17 Cal.2d 569]** [66 PaCal.2d 761]; Davis v. Fyfe, 107 Cal.App. 281 [290 P. 468]). And in determining the scope and meaning of the provisions of section 370, Code of Civil Procedure, as sought to be applied herein, they must be considered in the light of other provisions of the law, including those sections of the Civil Code wherein are defined the property rights and interests of husband and wife. Although under the provisions of section 161a, Civil Code, the husband and wife have an equal interest in the community property during the continuance of the marriage relation, they do not possess equal power of management, control or disposition thereof (Frost v. Mighetto, 22 Cal.App.2d 612 [71 PaCal.2d 932]). The husband has the management and control of the community property. (Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 388 [79 PaCal.2d 419]; sections 172, 172a, Civil Code.) And, based on the foregoing considerations, the rule which has long been recognized in this state is that (except where express statutory exceptions have been made in favor of the wife with respect to her right to bring an action in connection with the community property) the husband must bring all actions that concern the community property. (Johnson v. National Surety Co., 118 Cal.App. 227 [5 PaCal.2d 39]; 3 Cal.Jur. Supp., p. 612, and cases there cited.) When read in the light of the Civil Code sections hereinbefore referred to, there is nothing in the language of section 370 of the Code of Civil Procedure which would imply that in enacting the provisions of that section the legislature intended to divest the husband of the primary right (which theretofore had been recognized as existing in the husband) to bring an action for the recovery of damages due to financial loss which had resulted to the community through the wrongful act of another,--and, in lieu thereof, to vest that right in the wife, merely because the damages thus sought to be recovered may have been sustained as a result of injuries which were personal to the wife. In that regard, in one portion of his argument to this court, respondent concedes that "a wrongful act which causes an injury to the wife may involve two distinct wrongs, one

to the wife for personal injury and another to the husband for consequential damages." [4] Consequential damages which may be recovered for expenses incurred by either husband or wife in the treatment of his or her injuries--in the absence of an **[17 Cal.2d 570]** allegation that the separate property of either was obligated for the payment of such expenses--are presumably community property. (Scoville v. Keglor, 27 Cal.App.2d 17, 29 [80 PaCal.2d 162]; Martin v. Costa, 140 Cal.App. 494, 498 [35 PaCal.2d 362].) Although a few decisions have been rendered in this state wherein, in an action instituted by a married woman, in her own name, for the recovery of general damages for injuries to her person, it was held that she might also recover consequential damages,--the weight of authority in this state is to the effect that the right of action for the recovery of consequential damages which may result from financial loss suffered by the community resides in the husband by virtue of his right of control of the community property. Thus, in the case of Redwing v. Moncravie, 131 Cal.App. 569, 572 [21 PaCal.2d 986], after stating that it was well settled that damages for personal injuries sustained by a married woman were not recoverable unless she was a party plaintiff in an action brought therefor, the court said: "He [the husband], as the sole plaintiff, could sue only for consequential or special damages suffered by him as the proximate result of the injuries to her." Also, in the case entitled Martin v. Costa, 140 Cal.App. 494, 498 [35 PaCal.2d 362], wherein it appeared that a married woman had brought an action for damages for personal injuries, the following was said: "The complaint in the present suit states a good cause of action for personal injuries sustained by the plaintiff [wife]. Consequential damages were not alleged or sought. It was therefore not necessary for the husband of plaintiff to have joined in the action (Code Civ. Proc., sec. 370)." In each of the two last-mentioned decisions it is expressly recognized that the right exists in the husband to bring an action for consequential damages which may have resulted to the community by reason of personal injuries suffered by the wife; and both of those cases were decided subsequently to the enactment of section 370, Code of Civil Procedure. Also, in the case entitled Johnson v. National Surety Co., 118 Cal.App. 227, 230 [5 PaCal.2d 39], in referring to the provisions of section 370, Code of Civil Procedure, in effect the court said that the section confers on a married woman no right to sue alone on an obligation where the right of action is given to the husband. **[17 Cal.2d 571]**

Moreover, appellant directs attention to the fact that section 427, Code of Civil Procedure, which pertains to the subject of joinder of causes of action, contemplates the existence of a separate right of action in the husband for the recovery of consequential damages sustained by reason of personal injuries to the wife. That section provides, in part, as follows:

"... in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband

alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband." (Emphasis added.)

[5] The quoted language imports a recognition of two separate rights or causes of action for damages which may arise out of injuries to the wife, which have been sustained through the wrongful act of another; the one which exists in the wife for damages "caused by ... injury to the wife", and the other in the husband, for the recovery of consequential damages suffered or "sustained by the husband alone", which may include "indebtedness incurred by reason of such injury to his said wife". The joinder in one action of both of those causes is authorized by the provisions of that section. (Thomas v. Smith, 2 Cal.App.2d 701 [38 PaCal.2d 827]; Orrick v. Hoeptner, 110 Cal.App. 360 [294 P. 29]; Martin v. Costa, 140 Cal.App. 494 [35 PaCal.2d 362].) But the language is permissive and not mandatory. (Martin v. Costa, 140 Cal.App. 494 [35 PaCal.2d 362]; Lynch v. Kemp, 4 Cal.2d 440 [49 PaCal.2d 817]; Realty etc. Mtg. Co. v. Superior Court, 165 Cal. 543 [132 P. 1048].)

In consideration of the foregoing, it follows that the action which was brought in the small claims court was essentially one by the husband for the recovery of damages which had been sustained by the community interests; that although the wife joined in that action she was not a necessary party thereto; and that since the cause of action on which she now seeks recovery was not involved as an issue therein, no "splitting" of a cause or causes of action has resulted. **[17 Cal.2d 572]**

The case of Kidd v. Hillman, 14 Cal.App.2d 507 [58 PaCal.2d 662], which is cited and relied on by respondent, presents a factual situation that is distinguishable from the one here concerned. In that case the plaintiff brought two separate actions against the defendant therein,--in each of which she sought to recover for damages to personal property, where the respective damages were sustained as the result of one tort.

[6] Respondent also makes the contention--for the first time on this appeal--that appellant may not recover in the instant action for the reason that, in pursuance of the provisions of section 402, Vehicle Code, in order to impose liability against respondent as the owner of the automobile which was alleged to have been negligently driven by another, it was necessary that William Frost (who at the time of the accident was driving respondent's automobile) be made a party defendant in these proceedings. It appears that William Frost was not made a party to the former action; and that although in the present action he was joined as a party defendant, during the proceedings had in the superior court, appellant dismissed the action as against him. However, the ruling which was made in the case of Holland v. Kodimer, 11 Cal.2d

40 [77 PaCal.2d 843], does not support respondent's contention in that regard (see, also, cases cited therein).

Moreover, appellant contends that William Frost was not a necessary party to the instant action, in that in both the former and the present action liability was not predicated on the provisions of section 402, Vehicle Code, but was sought to be imposed against respondent on the theory of respondeat superior. Appellant cites the cases entitled Shippy v. Peninsula Rapid Transit Co., 97 Cal.App. 367 [275 P. 515], and Daniel v. Jones, 140 Cal.App. 145 [35 Pac. P. 198], in support of her contention that where, as in this type of action, liability against a defendant is predicated on an employer-employee relationship, the joinder of the employee as a party defendant is not necessary. Furthermore, it is alleged in the complaint, and appellant offered to prove (which offer was erroneously rejected), that William Frost was the employee of respondent at the time the accident occurred, and that as such employee he was then driving **[17 Cal.2d 573]** the automobile of respondent during the course and in the scope of his employment.

[7] Appellant further contends that, in any event, the issues of negligence and contributory negligence were conclusively determined in the former action in the small claims court and therefore may not be raised in the present action. We cannot accept that contention. As is pointed out in the leading case of Todhunter v. Smith, 219 Cal. 690 [28 PaCal.2d 916], the doctrine of res judicata has a dual aspect. The authorities indicate that although a judgment of any court whether of high or low jurisdiction, and of record or not, constitutes a complete bar against a second suit on the same cause of action,--in a second suit upon a different cause of action it constitutes but an estoppel or conclusive determination of such issues only as were actually raised and litigated. Inasmuch as the present litigation is based upon a different cause of action from that involved in the prior small claims suit, though tracing its origin to the same transaction, we are here solely concerned with the latter aspect of the doctrine of res judicata. It therefore is our problem to determine whether the judgment of a small claims court is res judicata on the issues of negligence and contributory negligence in a subsequent action in a higher court on a different cause of action. Our determination will be facilitated by a consideration of the nature of a small claims court.

[8] It is apparent that such a court was established in order to offer a means of obtaining speedy settlement of claims of small amounts. The theory behind its organization is that only by escaping from the complexity and delay of the normal course of litigation could anything be gained in a legal proceeding which may involve a small sum. Consequently, the small claims court functions informally and expeditiously. The chief characteristics of its proceedings are that there are no attorneys, no pleadings and no legal rules of evidence; there are no juries, and no

formal findings are made on the issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards--although made in accordance with substantive law--are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings. (See, generally, Leuschen v. Small Claims Court, 191 Cal. 133, **[17 Cal.2d 574]** 137 [215 P. 391]; Superior Wheeler C. Corporation v. Superior Court, 203 Cal. 384, 387 [264 P. 488]; 34 Columbia Law Review 932; 9 St. Johns Law Review 247.)

An examination of the significant portions of the California statute creating a small claims court serves to emphasize its peculiarly informal character. The action is commenced by an affidavit which states a claim for money due from the defendant, with no indication of the nature of the claim (Code Civ. Proc., sec. 117b). The claim must be prosecuted and defended by the parties themselves without the aid of attorneys (Code Civ. Proc., sec. 117g). No formal pleading, other than the claim and notice, is necessary, and the hearing and disposition of all such actions is informal, "with the sole object of dispensing speedy justice between the parties" (Code Civ. Proc., sec. 117h). The judge or justice may also informally make any investigation of the controversy between the parties "either in or out of court and give judgment and make such orders as to time of payment or otherwise as may, by him, be deemed to be right and just" (Code Civ. Proc., sec. 117g). The judgment is conclusive upon the plaintiff; only the defendant may appeal (Code Civ. Proc., sec. 117j).

The foregoing characteristics are of the utmost significance in disclosing sound theoretical grounds for refusing to apply the second aspect of the doctrine of res judicata to judgments of small claims courts. And we may reasonably assume that in an action arising out of an automobile collision, such as the case here involved, the technical aspects of proximate cause, contributory negligence, imputed negligence and the doctrine of last clear chance, of necessity have not been fully presented or considered. Nor would it seem probable that in proceedings had in a small claims court recognized rules of evidence could or would be observed. As was said in 1 Wigmore on Evidence (3d ed. 1940), section 4d, page 106: "In small cases generally ... it would be a defiance of common sense and a nullification of the main purpose, to enforce the jury-trial rules of evidence; for the parties are expected to appear personally without professional counsel, and they cannot be expected to observe rules which they do not know."

There are a number of cases which illustrate the application of the doctrine to inferior courts such as justices' and municipal tribunals, where such courts, though with lesser **[17 Cal.2d 575]** jurisdiction, nevertheless function as courts of law with some form of pleadings, and in accordance with legal rules of evidence and the right of representation by counsel. In such cases issues can be framed and decided and

therefore may be given conclusive effect in a subsequent suit based on a different cause of action. But a small claims court is not a typical inferior court, and no case has been called to our attention wherein a judgment of a tribunal which operates in the entirely informal manner of a small claims court, as hereinbefore indicated, has been considered to come within the second aspect of the doctrine of res judicata.

The policy which underlies the institution of a small claims court has been recognized in the legislation which created the small claims court for the City of New York. Therein it was provided that a judgment rendered by the small claims court may be pleaded as res judicata only as to the amount involved in the particular action, and that it should not otherwise be deemed to be an adjudication of any fact at issue or found therein in any other action or court (see 34 Columbia Law Review, pp. 932, 942, note 76). It is apparent that such a statutory provision was intended to prevent collateral findings made in such an informal proceeding from being conclusive in subsequent suits based on different causes of action.

For the reasons heretofore discussed on this point, it is our conclusion that the prior judgment which was rendered in the small claims court upon a different cause of action cannot be said to be determinative of the issues of negligence and contributory negligence here involved.

From the foregoing it follows that the judgment should be, and it hereby is, reversed.

Houser, J., took no part in the decision of this case.

Rosse *v.* DeSoto Cab Co., 34 Cal. App. 4th 1047 (Cal. Ct. App. 1995)

California Court of Appeal

Filed: May 4th, 1995
Precedential Status: Precedential
Citations: 34 Cal. App. 4th 1047, 40 Cal. Rptr. 2d 680
Docket Number: A065749
Author: John Anthony Kline

34 Cal.App.4th 1047 (1995)

40 Cal. Rptr.2d 680

WILLIAM ROSSE, Cross-complainant and Respondent,

v.

DeSOTO CAB COMPANY, Cross-defendant and Appellant.

Docket No. A065749.

Court of Appeals of California, First District, Division Two.

May 4, 1995.

*1048 COUNSEL

Brekhus, Williams, Wester & Hall and Matthew D. Brekhus for Cross-defendant and Appellant.

*1049 Stenberg, Sunseri, Roe & Pickard and Christopher G. Rudy for Cross-complainant and Respondent.

OPINION

KLINE, P.J.

Introduction

DeSoto Cab Company appeals from a judgment of the San Francisco Superior Court in favor of respondent William Rosse following the grant of summary judgment in his favor on the parties' respective cross-complaints for equitable and comparative indemnity. The trial court concluded the issues raised by the cross-complaints had been fully litigated and adjudicated in favor of respondent in a trial de novo of a small claims action involving the same parties and, therefore, that appellant was collaterally estopped from relitigating them. Appellant contends the record fails to satisfactorily establish that the identical issues were necessarily decided in the prior action. Appellant further argues the trial court abused its discretion in applying collateral estoppel to this case.

Because we determine the doctrine of collateral estoppel has no application to small claims judgments, we shall reverse the judgment.

Statement Of Facts/Statement Of The Case

The underlying action arose out of a December 7, 1991, auto accident at the intersection of Taylor and California Streets in San Francisco, California. Respondent collided with a DeSoto cab driven by its employee, Reno Bassi, in which Allison Craig-Casey and Linda Wysocki were passengers.

Respondent brought an action against appellant and Bassi in small claims court (Code Civ. Proc., §§ 116.110-116.950) to recover damages relating to the repair of his vehicle. On April 16, 1992, judgment was entered in favor of respondent in the amount of $1,297.99, plus costs. Appellant appealed the judgment to superior court pursuant to Code of Civil Procedure section 116.710, subdivision (b).[1] The trial de novo was held on October 14, 1992. Respondent again prevailed against appellant for property damage to his vehicle and this time was awarded damages in the sum of $1,897.99, plus costs. On November 20, 1992, appellant paid the judgment. It does not appear that appellant filed a cross-complaint or counterclaim alleging comparative negligence in either the original or the de novo proceeding.

*1050 Subsequently, the passengers in the cab at the time of the accident commenced superior court actions against respondent and appellant. In both actions, which were eventually consolidated, respondent and appellant cross-complained for equitable and comparative indemnity. Respondent then moved for summary judgment in his favor on both cross-complaints on the ground that appellant was collaterally estopped from relitigating the issues raised in the cross-complaints by virtue of the prior small claims judgment.

The court granted summary judgment, agreeing that the issue of respondent's negligence had been fully litigated in the small claims proceeding heard de novo in the superior court. Appellant's motion for reconsideration was denied. Judgment was entered on April 8, 1994. This timely appeal followed.

DISCUSSION

Standard of Review

(1) We review the trial court's ruling on respondent's motion for summary judgment under the independent review standard. An appellate court must independently determine the construction and effect of the facts presented to the trial judge as a matter of law. (*See Stratton* v. *First Nat. Life Ins. Co.* (1989) 210 Cal. App.3d 1071, 1083 [258 Cal. Rptr. 721]; *Bonus-Built, Inc.* v. *United Grocers, Ltd.* (1982) 136 Cal. App.3d 429, 442 [186 Cal. Rptr. 357].) Though there are a few cases suggesting that the abuse of discretion standard is applicable (*see Domingue v. Presley of Southern California* (1988) 197 Cal. App.3d 1060, 1063 [243 Cal. Rptr. 312]; *Perry* v. *Medina* (1987) 192 Cal. App.3d 603, 606 [237 Cal. Rptr. 532]), the more recent and we think better reasoned cases repudiate that view. (*See Saldana* v. *Globe-Weis Systems Co.* (1991) 233 Cal. App.3d 1505, 1511-1515 [285 Cal. Rptr. 385]; *Sosinsky* v. *Grant* (1992) 6 Cal. App.4th 1548, 1555 [8 Cal. Rptr.2d 552]; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1994) ¶ 8:167, p. 8-64.) The determination of the trial court was not primarily factual. If it erred, its error is one of law, not of discretion.

Collateral Estoppel

(2a) Appellant contends summary judgment was granted erroneously because respondent failed to establish that the issue of respondent's comparative negligence was litigated and adjudicated in the prior action. Appellant argues it therefore should not be collaterally estopped from raising that issue in its cross-complaints in the underlying action. We believe collateral estoppel does not apply to small claims judgments, even those of the superior court, but for a more fundamental reason than that urged by appellant.

*1051 (3) Collateral estoppel or, as it is sometimes known, issue preclusion, bars relitigation of an issue if it was necessarily decided at a previous proceeding, which resulted in a final judgment on the merits, and the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. (*Mueller* v. *J.C. Penney Co.* (1985) 173 Cal. App.3d 713, 718-719 [219 Cal. Rptr. 272].) (2b) The question whether small claims judgments may be given collateral estoppel effect has been addressed by our Supreme Court in two principal cases.

In *Sanderson* v. *Niemann* (1941) 17 Cal.2d 563 [110 P.2d 1025], the plaintiff and her husband instituted a small claims action against the defendant and were awarded damages for injuries sustained in an automobile accident. Thereafter plaintiff commenced a superior court action against the same defendant, seeking damages for injuries sustained in the same accident. The plaintiff claimed, as does respondent here, that the issues of negligence and contributory negligence were conclusively determined in the former action in small claims court and therefore could not be raised in the superior court. The Supreme Court rejected this argument. Acknowledging that the doctrine of collateral estoppel has been applied to inferior courts, such as justices' and municipal tribunals, the court emphasized that "a small claims court is not a typical inferior court" (*id.*, at p. 575) due to "its peculiarly informal character." (*Id.*, at p. 574.)

As *Sanderson* explains, the small claims court "was established in order to offer a means of obtaining speedy settlement of claims of small amounts. The theory behind its organization is that only by escaping from the complexity and delay of the normal course of litigation could anything be gained in a legal proceeding which may involve a small sum. Consequently, the small claims court functions informally and expeditiously. The chief characteristics of its proceedings are that there are no attorneys, no pleadings and no legal rules of evidence; there are no juries, and no formal findings are made on the issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards although made in accordance with substantive law are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings." (17 Cal.2d at p. 573.)

Considering these informalities, the Supreme Court reasonably assumed "that in an action [in small claims court] arising out of an automobile collision, such as the case here involved, the technical aspects of proximate cause, contributory negligence, imputed negligence and the doctrine of last clear chance, of necessity have not been fully presented or considered." (17 Cal.2d at p. 574.) Accordingly, the court concluded that the prior judgment *1052 which was rendered in the small claims court "cannot be said to be determinative of the issues of negligence and contributory negligence here involved." (*Id.*, at p. 575.)

Nearly 40 years after *Sanderson* the Supreme Court decided *Perez* v. *City of San Bruno* (1980) 27 Cal.3d 875 [168 Cal. Rptr. 114, 616 P.2d 1287]. In *Perez,* the court drew a distinction between original proceedings in the small claims court such as those discussed in *Sanderson* and de novo proceedings in the superior court. The court held that the doctrine of collateral estoppel applies "when a losing defendant in a small claims action invokes his right of appeal to the superior court, and when that court, ... conducts a trial de novo and enters judgment against such appealing defendant." (*Id.,* at p. 885.) Finding the rationale of *Sanderson* inapplicable because of the greater formality of de novo hearings in the superior court, the *Perez* court cited former rule 155 of the California Rules of Court, which provided that such de novo proceedings must be "`conducted pursuant to law and rules in all respects as other trials in the superior court except that no written findings of fact or conclusions of law shall be required.'" (*Ibid.*)

California Rules of Court, rule 155 was repealed as of July 1, 1991, however, after the Legislature amended the Small Claims Act by providing that the de novo hearing on an appeal to the superior court "shall be conducted informally." (§ 116.770, subd. (b).) Except for the fact that attorneys may participate (§ 116.770, subd. (c)), de novo hearings are now virtually indistinguishable from original proceedings in the small claims court. Pretrial discovery is not permitted, there is no right to a jury, and no tentative decision or statement of decision is required. (§ 116.770, subd. (b).) Indeed, the informal procedures prescribed in the act with respect to hearings in the small claims court (§ 116.510 et seq.) are now specifically made applicable "in hearings on appeal in the superior court, except that attorneys may participate." (§ 116.770, subd. (c); *Houghtaling* v. *Superior Court* (1993) 17 Cal. App.4th 1128, 1139 [21 Cal. Rptr.2d 855].) Additionally, because the judgment of a superior court in a de novo small claims proceedings "is final and not appealable" (§ 116.780, subd. (a)), there is no reason to transcribe the proceedings and this ordinarily is not done. For this reason, and because even the superior court provides no statement of decision in a small claims matter (§ 116.770, subd. (b)), it will ordinarily be impossible to reliably determine whether particular issues were actually litigated and decided, as must be established in order to accord a prior judgment collateral estoppel effect.

As the premise of *Perez* has been undermined, its holding is no longer sound. The rationale of *Sanderson* is now as pertinent to de novo as to original proceedings.

*1053 For the foregoing reasons, we hold that collateral estoppel effect may not be accorded the judgment of a small claims court or a superior court in an action arising under the Small Claims Act. Accordingly, the judgment is reversed.

Smith, J., and Haerle, J., concurred.

JUSTIA

Isabel Clark, Plaintiff-appellee, ve Bear Stearns & Co,, Inc., a Delaware Corporation; Morganolmstead, Kennedy & Gardner Incorporated, a Californiacorporation; Gary Hankins, an Individual; and Does Ithrough 50, Inclusive, Defendants-appellants, 966 F.2d 1318 (9th Cir. 1992)

U.S. Court of Appeals for the Ninth Circuit - 966 F.2d 1318 (9th Cir. 1992)

Argued and Submitted Feb. 7, 1992. Decided June 12, 1992

Stephen Young, Keesal, Young & Logan, Long Beach, Cal., for defendants-appellants.

John Hiskamp, Duke, Gerstel, Shearer & Bregante, San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before: ALARCON, BEEZER and RYMER, Circuit Judges.

BEEZER, Circuit Judge:

An arbitration panel dismissed state negligence and fraud claims brought against Bear Stearns & Co., Inc., as part of Isabel Clark's securities action. The district court concluded that the dismissal did not have preclusive effect on Clark's federal claims under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5. The court denied the defendants' motion for summary judgment. Bear Stearns & Co., Inc., and Gary W. Hankins, a former Bear Stearns broker, appeal. We have jurisdiction pursuant to 28 U.S.C. 1292(b) and we affirm.

* Arbitration provides a speedy and efficient method for the resolution of disputes. At least that is the theory. In practice, a dispute submitted for arbitration often drones on in the manner of Jarndyce v. Jarndyce, becoming so convoluted in the course of time that no man or woman alive could hope to sort it out.

On January 9, 1988, more than four years ago, Isabel Clark brought a securities fraud action against Bear Stearns & Co., Inc., Morgan Olmstead Kennedy & Gardner, Inc., and Gary W. Hankins. Clark's complaint alleged violations of federal securities laws, fraud, breach of fiduciary duty, negligence and conversion. Clark did not specify under the laws of which state the common law violations allegedly occurred.

The district court ordered arbitration of all claims except Clark's federal claims arising under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Those claims were stayed by the district court pending resolution of the arbitrable claims.

At the conclusion of the arbitration, the panel submitted a written decision and award. The panel found Morgan Olmstead Kennedy & Gardner, Inc., and Gary W. Hankins jointly and severally liable in the amount of $301,265. The award also stated with commendable clarity--but with no elaboration--that " [a]ll claims against Respondent Bear Stearns & Co., Inc. are dismissed. "

On August 30, 1990, defendants Bear Stearns and Gary W. Hankins filed a motion for summary judgment in the district court. They contended that the arbitration award precluded Clark's claims under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Specifically, they argued that Clark's federal claims were barred by the doctrines of res judicata and collateral estoppel.

After denying defendants' motion for summary judgment, the district court granted defendants' motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We granted defendants' petition to appeal from the district court's denial of their motion for summary judgment and defendants timely filed their notice of appeal.

Because Clark settled her federal claims against Morgan Olmstead, Bear Stearns and Hankins are the sole defendants-appellants.

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We review de novo a district court's grant or denial of a motion for summary judgment. Lockary v. Kayfetz, 917 F.2d 1150, 1153 (9th Cir. 1990). Res judicata and collateral estoppel questions are also reviewed de novo. A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411, 1414 (9th Cir.), cert. denied, 476 U.S. 1117, 106 S. Ct. 2008, 90 L. Ed. 2d 659 (1986).

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Res judicata, or claim preclusion, prevents the relitigation of a claim previously tried and decided. Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 4402 (1981).

Res judicata bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action. McClain v. Apodaca, 793 F.2d 1031, 1033 (9th Cir. 1986). In determining whether successive lawsuits involve the same cause of action, we consider: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087, 74 L. Ed. 2d 932 (1982).

To foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985).

An arbitration decision can have res judicata or collateral estoppel effect even if the underlying claim involves the federal securities laws. C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987). In applying res judicata and collateral estoppel to an arbitration proceeding, we make an examination of the record, if one exists, including any findings of the arbitrators. See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569, 71 S. Ct. 408, 414, 95 L. Ed. 534 (1950). We must decide whether a rational

factfinder could have reached a conclusion based upon an issue other than that which the defendant seeks to foreclose. See Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970). When the issue for which preclusion is sought is the only rational one the factfinder could have found, then that issue is considered foreclosed, even if no explicit finding of that issue has been made. Id.

The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. United States v. Lasky, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405 (1979). "It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." Id. Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal. Id. See also Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980).

By definition, res judicata bars only those grounds for recovery which could have been asserted in the prior litigation. McClain v. Apodaca, 793 F.2d at 1033. If a claim could not have been asserted in prior litigation, no interests are served by precluding that claim in later litigation. Another way of stating the same principle is that a claim is not barred by res judicata if the forum in which the first action was brought lacked subject matter jurisdiction to adjudicate that claim. See Restatement (Second) of Judgments 26(1) (c); Cullen v. Margiotta, 811 F.2d 698, 732 (2d Cir.), cert. denied, 483 U.S. 1021, 107 S. Ct. 3266, 97 L. Ed. 2d 764 (1987).

Here, pursuant to the terms of Bear Stearns' agreement with Clark, the district court refused to compel arbitration of Clark's federal securities claims, and, in the process, retained jurisdiction for itself. See, e.g., Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 n. 6, 105 S. Ct. 1238, 1242 n. 6, 84 L. Ed. 2d 158 (1985) (explaining that enforcing agreement to arbitrate ousts court from its jurisdiction). Because the arbitration panel did not have subject matter jurisdiction over Clark's federal claims, Clark could not have brought those claims in the prior proceeding. Consequently, they are not barred by res judicata.

The Supreme Court foreshadowed the second issue that we must address in Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). There, after holding that arbitration of state-law claims is appropriate even when a complaint also raises nonarbitrable federal securities claims, the Court stated that " [t]he collateralestoppel effect of

an arbitration proceeding is at issue only after arbitration is completed ... and we therefore have no need to consider [it] now...." Id. at 223, 105 S. Ct. at 1244. Here, by contrast, the arbitration is complete and we cannot avoid the issue.

The defendants contend that Clark's failure to prevail at arbitration on her common law negligence and fraud claims necessarily precludes her from proving a section 10(b) claim based upon fraud. Resolving this issue on appeal is more analogous to peering the wrong way through a telescope than peering the right way through a microscope. We reduce the universe of relevant inquiry to one simple question: Can the defendants meet their burden of showing with clarity and certainty what issues were determined in the arbitration? We believe that they cannot.

The first obstacle faced by the defendants involves the choice of law selected by the arbitrators, which is never mentioned in the award. The actions complained of took place in California, which is where the lawsuit was filed and where the arbitration was conducted.
At oral argument counsel assumed that California law applied to Clark's state law claims. Bear Stearns' customer agreement, however, states that New York law applies to any controversy arising out of Clark's account. This discrepancy would be of no moment if New York and California common law were identical, but they are not. They are as different as the Atlantic and the Pacific.

Here, if the arbitration panel applied California law, the defendants' alleged negligence need not have been addressed by the arbitrators at all. The arbitration panel need only have found merit in Bear Stearns' and Hankins' defense that Clark's common law negligence claim was barred by California's two-year statute of limitations. See Cal.Civ.Proc.Code §339 (West); Robuck v. Dean Witter & Co., Inc., 649 F.2d 641, 644 (9th Cir. 1980). In comparison, claims litigated under section 10(b) and Rule lob-5 must be filed within one year after the discovery of the facts constituting the violation, but in no event later than three years after the violation. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___U.S. - -, 111 S. Ct. 2773, 2782, 115 L. Ed. 2d 321 (1991). Before Lampf, California's threeyear statute of limitations applied. Davis v. Birr, Wilson & Co., Inc., 839 F.2d 1369, 1369-70 (9th Cir. 1988). Clark's failure to prevail on a California negligence claim would not necessarily preclude her from proving a federal securities claim, which has a different, and in some instances longer, limitations period.

If the arbitration panel applied New York law, a different problem arises. Under New York law, the burden of proof for common law fraud requires clear and convincing evidence, a more stringent standard than the preponderance of the evidence standard applicable to fraud claims brought under section 10(b) and Rule 10b-5. See Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970-71 (2d Cir. 1987). Because collateral estoppel does not preclude

claims that have a different burden of proof than previously decided claims, a failure to prevail on a fraud claim under New York law would not preclude a fraud claim under federal law. See U.S. Aluminum Corp./Texas v. Alumax, Inc., 831 F.2d 878, 879-80 (9th Cir. 1987), cert. denied, 488 U.S. 822, 109 S. Ct. 68, 102 L. Ed. 2d 45 (1988).

No transcript of the arbitration was filed with the district court and no evidence submitted to the arbitration panel became part of the district court record. In the final analysis, the defendants did not show with clarity and certainty what issues were determined in the arbitration. Because the defendants did not introduce a sufficient record of the arbitration to enable the trial court to pinpoint the exact issues previously determined, defendants have failed to meet their burden. Hernandez v. City of Los Angeles, 624 F.2d at 937. Consequently, Clark's federal claims are not barred by collateral estoppel.

We hold that the arbitration award does not preclude Clark's claims under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

AFFIRMED.

RYMER, Circuit Judge, concurring in the judgment:

I concur in the judgment on the ground that, in this case, Bear Stearns failed to carry its burden on summary judgment of producing an adequate record. However, because neither the statute of limitations, nor differences in the common law of fraud in New York and California, was briefed by the parties or is necessary to the decision, I cannot join the majority opinion.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why
C. Dickens, Bleak House 38 (E. Johnson ed. 1965) (London 1853).

The Court in Byrd was concerned with protecting federal rights from the collateral estoppel effects of arbitration. Two years later the Court decided that those very same rights were, themselves, arbitrable. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). Unlike McMahon, there is no dispute here that Bear Stearns' agreement with Clark explicitly reserved from arbitration Clark's federal claims. We enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. Volt Info. Sciences v. Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1988). Consequently, Byrd, but not McMahon, is relevant to this case

Hankins argues that he "prevailed with respect to the claims against him relating to the time when he was employed by Bear Stearns since all charges against Bear Stearns were dismissed. "

Such a result could have been avoided if the arbitration panel had made specific findings of fact and conclusions of law similar to those required of the district court under Fed. R. Civ. P. 52(a)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KHALIL JANJUA, *Plaintiff-Appellant*, v. DONALD NEUFELD, Associate Director, USCIS Nebraska Service Center; KENNETH T. CUCCINELLI, Acting Director, USCIS; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE; KEVIN K. MCALEENAN, Acting Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; WILLIAM P. BARR, U.S. Attorney General, *Defendants-Appellees.*	No. 17-16558 D.C. No. 15-05475 EMC OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted March 14, 2019
San Francisco, California

Filed August 9, 2019

Before: J. Clifford Wallace, A. Wallace Tashima, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Tashima

SUMMARY*

Immigration

Affirming the district court's grant of summary judgment in favor of United States Citizenship and Immigration Service ("USCIS") and related defendants, the panel held that (1) for purposes of issue preclusion, an issue was "actually litigated" only if it was raised, contested, and submitted for determination in a prior adjudication, and (2) the issue of whether Khalil Janjua was inadmissible on terrorism-related grounds was not actually litigated in his asylum proceedings and, therefore, issue preclusion did not apply to his adjustment of status proceedings.

Janjua, a native and citizen of Pakistan, was granted asylum and then applied for adjustment of status. USCIS denied his application on the ground that he was inadmissible for having supported a Tier III terrorist organization in connection with his involvement with the Muhajir Qaumi Movement in Pakistan.

Janjua sought review of USCIS's decision in the district court. Because the same terrorism-related grounds for

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

inadmissibility that bar asylum also bar adjustment of status, Janjua argued that issue preclusion prevented the government from raising terrorism-related inadmissibility in the adjustment of status proceedings because the immigration judge had necessarily concluded that Janjua was not inadmissible on these grounds when he granted Janjua asylum. The district court concluded that issue preclusion did not apply and granted the government's motion for summary judgment.

Issue preclusion, also known as collateral estoppel, bars the relitigation of an issue where four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits. Here, the central question was whether Janjua's inadmissibility for supporting a Tier III terrorist organization was "actually litigated" in his asylum proceeding.

Assuming without deciding that issue preclusion applies in immigration adjustment of status proceedings, the panel held, consistent with the Restatement (Second) of Judgments and this court's sister circuits, that an issue is "actually litigated" when an issue is raised, contested, and submitted for determination. The panel rejected Janjua's argument that an issue should be considered actually litigated if it was *implicitly* raised or if the parties had a full and fair opportunity to raise it, explaining that such a standard would conflate the separate requirements that an issue be actually decided in the prior proceedings and necessary to decide the merits.

Because the issue of whether Janjua was inadmissible on terrorism-related grounds was not raised, contested, and submitted for determination at his asylum proceeding, the panel concluded that the issue was not actually litigated and, thus, issue preclusion did not apply.

COUNSEL

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Kathrine J. Shinners (argued) and Brian C. Ward, Senior Litigation Counsel; Gisela A. Westwater, Assistant Director; William C. Peachey, Director; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

OPINION

TASHIMA, Circuit Judge:

In this case we address, as a matter of first impression in our Circuit, the standard for determining whether an issue was "actually litigated" in a previous adjudication for purposes of issue preclusion, also known as collateral estoppel. We hold that an issue was actually litigated only if it was raised, contested, and submitted for determination in the prior adjudication.

Khalil Janjua ("Janjua"), a noncitizen, was granted asylum in the United States. Shortly thereafter, he applied for

adjustment of status, which was denied on the ground that he was inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i) for having supported a Tier III terrorist organization. To be eligible for asylum, an applicant must not be inadmissible under § 1182(a)(3)(B). Adjustment of status imposes the same requirements. Janjua thus argues that because he was granted asylum—and therefore was necessarily *not* found inadmissible on account of terrorism-related activities under § 1182(a)(3)(B)(i) —issue preclusion bars the government from now denying his adjustment of status application on that ground. The question of whether Janjua was inadmissible on terrorism-related grounds was never raised, contested, or submitted for determination at Janjua's asylum proceeding. Janjua's work for the relevant organization, however, was discussed at length. Assuming without deciding that issue preclusion applies in adjustment of status proceedings, the central question before us is whether the issue of terrorism-related inadmissibility was actually litigated at Janjua's asylum proceeding for purposes of issue preclusion. Because that issue was not raised, contested, or submitted for determination at Janjua's asylum proceeding, it was not actually litigated. Issue preclusion does not bar the government from disputing that issue in Janjua's adjustment of status proceeding. We therefore affirm.

BACKGROUND

I. Factual Background

Janjua is a native and citizen of Pakistan. As a Muhajir[1] living in Pakistan, Janjua joined the Muhajir Qaumi

[1] Muhajir refers to those people who are or are descended from Muslim immigrants from India to Pakistan.

Movement ("MQM"), a political group. Janjua worked on behalf of the MQM, "attending . . . meetings, organizing . . . rallies, distributing . . . flyers," and advocating for the group's message during elections. As a result of his affiliation with and work for the MQM, Janjua was arrested and beaten by the police and by members of the opposition party numerous times while in Pakistan. Janjua eventually fled Pakistan in July 1998, entering the United States without inspection in Arizona on January 17, 1999.

II. Procedural Background

In November 1999, Janjua applied for asylum with the legacy Immigration and Naturalization Service. In January 2000, Janjua's application was rejected, and the government served Janjua with a Notice to Appear ("NTA") in removal proceedings, charging him with inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. The NTA did not charge him with inadmissibility under any terrorism-related inadmissibility grounds.

Janjua conceded removability, but submitted applications for asylum, withholding of removal, and relief under Article 3 of the Convention Against Torture ("CAT") predicated on his fear of persecution on the basis of his membership in the MQM. At Janjua's merits hearing, the immigration judge ("IJ") admitted into evidence Janjua's written statement regarding his participation in MQM activities and meetings, and Janjua testified at length about what he did as a member of the MQM and the abuse he suffered as a result of his membership. At one point, the government attorney focused on the MQM's reputation for violence, noting that "the Country Reports on Pakistan put out by the Department of

State for the United States Government suggests that the MQM has demonstrated its willingness to use violence and intimidation to further its objectives" and asking whether Janjua had ever "used violence and intimidation to further the goals of the MQM," to which Janjua responded, "Never." Neither Janjua's written statement nor his oral testimony discussed whether Janjua collected funds or donations on behalf of the MQM, although he did at one point briefly discuss the annual donation his father would make to the MQM. At no point in the hearing was the issue of whether MQM would qualify as a terrorist organization ever raised or discussed. Then, as remains the case today, asylum was prohibited if an applicant was inadmissible for engaging in terrorist activity, which included knowingly providing material support to or soliciting funds on behalf of a designated terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc), (VI)(cc).

The IJ denied Janjua's applications for asylum, withholding of removal, and protection under CAT, but the Board of Immigration Appeals ("BIA") reversed and remanded on the issue of Janjua's credibility. On remand, the IJ eventually granted Janjua's application for asylum in April 2007, without a written opinion. By that time, Congress had expanded terrorism-related inadmissibility to also cover so-called Tier III terrorist organizations, "group[s] of two or more individuals, whether organized or not, which engage[] in, or has a subgroup which engages in" certain terrorist activities. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc), (VI)(dd).

In December 2008, Janjua filed a Form I-485, applying for adjustment of status to permanent residency pursuant to 8 U.S.C. § 1159. After waiting years without adjudication of his application, Janjua filed a petition for a writ of mandamus

in the United States District Court for the Northern District of California, alleging unlawful delay by the government and asking the court compel the United States Citizenship and Immigration Service ("USCIS") adjudicate his adjustment of status application. USCIS responded by requesting additional evidence from Janjua regarding his activities with MQM, which he provided.

USCIS denied Janjua's application on August 2, 2016, on the ground that he was inadmissible under § 1182(a)(3)(B)(i)(I) because he "afford[ed] material support [to]" and "solicit[ed] funds" for MQM. which qualified as a Tier III terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc), (VI)(dd). Thus, USCIS concluded that Janjua was inadmissible under § 1182(a)(3)(B)(i)(I)—and therefore barred from receiving adjustment of status—because he had engaged in terrorist activity by supporting the MQM.

Following this, Janjua amended his complaint to challenge USCIS' denial of his application. Because the same terrorism-related grounds for inadmissibiliaty that bar asylum also bar adjustment of status, s*ee* 8 U.S.C. § 1158(b)(2)(A)(v) (asylum); § 1159(b)(5), (c) (adjustment of status), Janjua argued that issue preclusion prevented the government from raising terrorism-related inadmissibility in the adjustment of status proceedings because the IJ had necessarily concluded that Janjua was not inadmissible on these grounds when he granted Janjua asylum. Janjua moved for summary judgment on the same basis. The government filed a cross-motion for summary judgment, arguing that issue preclusion did not apply to Janjua's adjustment application and, even if it did, the issue was not identical, previously litigated, or decided.

On July 6, 2017, the district court denied Janjua's motion and granted the government's. The district court first held that issue preclusion does apply in adjustment of status proceedings governed by the Immigration and Nationality Act ("INA"). The district court agreed with the government, however, that the elements of issue preclusion were not met here because the issue had not been "actually litigated" in Janjua's asylum proceedings because it was not explicitly raised and contested. Accordingly, the district court granted the government's motion for summary judgment.[2] Janjua timely appealed.

STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's decision to grant summary judgment, *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018), and its application of collateral estoppel, *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

DISCUSSION

Issue preclusion, also known as collateral estoppel, "bars the relitigation of issues actually adjudicated in previous litigation." *Id.* For issue preclusion to apply, four conditions must be met: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair

[2] The court further explained that the only remaining issue was whether USCIS had acted arbitrarily or capriciously in recognizing the MQM as a Tier III terrorist organization, which Janjua had not contested and therefore waived.

opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), *as amended* (May 3, 2012); *see also Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017) (reciting the four conditions). Here, the central question is whether Janjua's inadmissibility for supporting a Tier III terrorist organization was actually litigated in the prior adjudication.[3] Assuming without deciding that issue preclusion applies in immigration adjustment of status proceedings, we hold that Janjua's inadmissibility on terrorism-related grounds was not actually litigated, because the issue was not in fact raised, contested, or submitted to the IJ for determination in Janjua's asylum proceeding.

Unlike claim preclusion, also known as res judicata, issue preclusion requires that an issue must have been "actually and necessarily determined by a court of competent jurisdiction" to be conclusive in a subsequent suit. *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, issue preclusion does not apply to those issues that could have been raised, but were not: "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points *controverted*, upon the determination of which the finding or verdict was rendered.'" *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 593 (1974) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948) (in turn, quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876))) (emphasis added),

[3] Janjua does not dispute that he aided MQM, nor does he appear to dispute MQM's characterization by USCIS as a Tier III terrorist organization.

superseded on other grounds by statute as stated in Miles v. Apex Marine Corp., 498 U.S. 19, 30 n.1 (1990).

Accordingly, when applying issue preclusion, we have consistently looked to the record of the prior proceeding to determine whether an issue was in fact raised, contested, and submitted for determination. *See Oyeniran*, 672 F.3d at 804, 806 (explaining that the question of whether petitioner's father was tortured in Nigeria was "actually litigated" because petitioner presented evidence on the issue, the IJ specifically found so, and the government challenged that claim "[a]t every stage of the administrative proceedings"); *Disimone v. Browner*, 121 F.3d 1262, 1268 (9th Cir. 1997) (explaining that the issue was actually litigated, even though the prior court did not explicitly address it in its decision, because the parties had raised and contested the issue and the district court had necessarily decided the issue by reaching its decision); *see also Montana*, 440 U.S. at 156–58 (applying issue preclusion and explaining that "[a] review of the record in [the first adjudication] dispels any doubt that the plaintiff there raised and the Montana Supreme Court there decided the precise constitutional claim that the United States advances here" and therefore "the 'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' adversely to the Government in state court") (internal citation omitted).

Thus, consistent with the Restatement (Second) of Judgments and our sister circuits, we hold that an issue is actually litigated when an issue is raised, contested, and submitted for determination. Restatement (Second) of Judgments § 27, cmt. (d) (1982) ("When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination and is determined, the issue is actually litigated

. . . ."); *Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264, 272 (5th Cir. 2005) ("The requirement that an issue be 'actually litigated' for collateral estoppel purposes simply requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined."); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 561 (4th Cir. 1987) ("Collateral estoppel is appropriate where the identical issue was 'actually litigated, that is, contested by the parties and submitted for determination by the court . . . .'" (citation omitted)), *abrogated on other grounds as recognized by Mikels v. City of Durham, N.C.*, 183 F.3d 323 (4th Cir. 1999); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) ("First, the same issue 'must have been actually litigated, that is, contested by the parties and submitted for determination by the court.'" (citation omitted)); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 132.03(2)(a) (2018) ("The 'actually litigated' requirement simply requires the issue to have been raised, contested by the parties, submitted for determination by the court, and determined.").[4] Under this standard, neither an issue that could have, but was not, asserted (such as an affirmative defense) nor an issue that was raised but admitted was "actually litigated." *See* Restatement (Second) of Judgments § 27, cmt. (e) (1982) ("A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action . . . . An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted

[4] Our Circuit's test for issue preclusion already requires that an issue be "decided in the prior proceedings," *Oyeniran*, 572 F.3d at 806, so there is no need to require that an issue was "determined" for it to have been "actually litigated."

(explicitly or by virtue of a failure to deny) in a responsive pleading.").

Janjua argues, however, that an issue should be considered actually litigated if it was *implicitly* raised or if the parties had a full and fair opportunity to raise it. But such a standard would conflate the separate requirements that an issue be "actually . . . decided in the prior proceedings" and "necessary to decide the merits." *Oyeniran*, 672 F.3d at 806. Issues that are necessarily decided include all issues that must have been decided for a judgment to stand—when asylum is granted, the IJ necessarily decides that none of the grounds for inadmissibility that automatically bar relief applies—regardless of whether they were explicitly raised or contested. *See Clark*, 966 F.2d at 1321. Even if an issue is not explicitly raised, if it is necessary to the ultimate determination, it is "necessarily decided." But if an issue is actually litigated if it was implicitly raised, the requirement of actually litigated is rendered meaningless.

Further, the standard urged by Janjua—that an issue is actually litigated if it was implicitly raised—would expand the province of issue preclusion and encroach upon the province of claim preclusion. Both claim preclusion and issue preclusion are meant to preserve judicial resources, minimize inconsistent decisions, and prevent superfluous suits. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980). But one of the key distinctions between claim preclusion and issue preclusion is that the former bars relitigation of any and all matters that were or could have been raised at that adjudication, *see id.* at 94, while the latter precludes relitigation of only those issues that were "actually and necessarily determined," *Montana*, 440 U.S. at 153, *i.e.*, those that were raised, contested, submitted for determination, and

determined. The standard urged by Janjua would allow much broader preclusion, including of issues implicitly—but not in fact—raised. And precluding an issue that was not actually litigated—*i.e.*, not raised, contested. and submitted for determination—does not conserve judicial resources or facilitate reliance on the earlier judgment because resources were not expended on the issue in the first place. To the extent that Janjua argues that the issue should be foreclosed because it was *implied* or *ought* to have been raised by the government, that is precisely the sort of preclusion reserved for *claim* preclusion, not issue preclusion.

Janjua also makes the alternative—and ultimately unpersuasive—argument that an issue was "actually litigated" so long as there was a "fair opportunity" to litigate the issue. But our precedent clearly lays out "actually litigated" and a "full and fair opportunity" to litigate as separate requirements, each of which must be met for issue preclusion to apply. *See Oyeniran*, 672 F.3d at 806. And although we have at least once characterized the necessity that a party have had a "full and fair" opportunity to litigate the issue as part of the "actually litigated" consideration, *see Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003), this was not to say that an issue was actually litigated *so long as* there was a full and fair opportunity to do so; rather, we explained that issue preclusion is "inappropriate where the parties have not had a full and fair opportunity to litigate the merits of an issue." *Id.* (citing *Allen*, 449 U.S. at 94–95). A full and fair opportunity was (and remains) a necessary condition for issue preclusion, but we never suggested that it was *sufficient* to satisfy the actually litigated requirement. We have since clarified that the full and fair opportunity requirement is a separate step of the issue preclusion analysis. *See Oyeniran*, 672 F.3d at 806; *Howard*, 871 F.3d at 1041 (quoting and

applying *Oyeniran*'s test); *Medina-Lara v. Holder*, 771 F.3d 1106, 1118 (9th Cir. 2014) (same). We reject Janjua's proposed rule because it conflates two distinct elements of the issue preclusion test.

Having determined that an issue was actually litigated if it was raised, contested, and submitted for determination by the parties, we now turn to the question of whether Janjua's terrorism-related inadmissibility was actually litigated here. Neither the question of whether MQM qualifies as a terrorist organization nor whether Janjua engaged in terrorist activity and was inadmissible as a result was raised, contested, or submitted for determination in Janjua's asylum proceedings.

To be sure, Janjua's membership in and work for the MQM were discussed at length at the merits hearing, including whether he had ever used violence or intimidation to further the organization's goals. Yet, these topics were explored for their relevance to Janjua's purported basis for persecution; no one raised, or even hinted at, these topics as potential grounds for inadmissibility under § 1182(a)(3)(B)(i). Neither party ever addressed whether the MQM was a Tier III terrorist group—this category did not exist at the time of the merits hearing, and no further argument was presented to the IJ after the statutory amendment. And neither party addressed whether Janjua's support for the MQM would make him inadmissible—which makes sense for the same reasons. While Janjua's work for the MQM was addressed in the asylum proceedings, the specific issue of whether he was inadmissible based on that work was not raised, contested, or submitted for determination. It was not actually litigated in Janjua's asylum proceeding, and issue preclusion does not apply.

Janjua's reliance on *Paulo v. Holder*, 669 F.3d 911 (9th Cir. 2011), is misplaced. There, the petitioner's eligibility for INA § 212(c) relief from removal was raised, contested, and submitted for determination in the first proceeding; in the second, the government advanced a new *argument* as to why he was ineligible. *See id.* at 917. Issue preclusion applied because "[t]he fact that a particular *argument* against Paulo's eligibility was not made by the government and not addressed by the district court does not mean that the *issue* of Paulo's eligibility for § 212(c) relief was not decided." *Id.* (emphases added). Here, however, the government's challenge to Janjua's admissibility in the adjustment of status proceeding is not merely a new *argument*; rather, the *issue* of terrorism-related inadmissibility was never disputed in the asylum proceeding. Thus, it was not actually litigated and issue preclusion cannot apply.

CONCLUSION

For the foregoing reasons, we hold that an issue is "actually litigated" for purposes of issue preclusion when it is raised, contested by the parties, and submitted for determination in the prior proceeding. Because the issue of whether Janjua was inadmissible on terrorism-related grounds was not raised, contested, and submitted for determination at his asylum proceeding, it was not actually litigated. Issue preclusion does not apply.

AFFIRMED.

HARRIS v. JACOBS

No. 78-3635.

621 F.2d 341 (1980)

Arnold Maxwell HARRIS, Plaintiff-Appellant, v. George JACOBS et al., Defendants-Appellees.

United States Court of Appeals, Ninth Circuit.

June 11, 1980.

Attorney(s) appearing for the Case

Arnold Maxwell Harris, pro se.

Michael A. Lehner, Portland, Or., for defendants-appellees.

Before BROWNING and PREGERSON, Circuit Judges, and TAKASUGI, District Judge.

[621 F.2d 342]

PER CURIAM:

Arnold Harris, an inmate at the Oregon State Penitentiary, brought a pro se civil rights action alleging he was denied adequate medical care while incarcerated, in violation of the Eighth Amendment's proscription against cruel and unusual punishment and the Due Process Clause of the Fourteenth Amendment. The district court entered summary judgment for defendants and Harris appealed. We affirm in part and remand for further proceedings.

I

Harris's pro se complaint alleges that he suffers from a salt-related disease and has an intolerance for salt; that he suffers from severe headaches, nausea and deteriorating

vision caused by ingestion of ordinary amounts of salt; that he sought but was denied treatment for his illness by prison medical personnel; that requests made by him and his son to have a private nonprison medical doctor examine and treat him were ignored by prison officials; and that as a result, he was subjected to cruel and unusual punishment and denied due process.

While his civil rights action was pending Harris filed a petition in state court for a writ of habeas corpus. His state habeas petition alleged an inadequate medical care claim similar to that in the federal civil rights complaint but did not distinctly allege that he had been wrongly denied access to private nonprison medical care. After a hearing on the merits, the state court denied Harris's petition on the ground that "respondent [Superintendent of the State Prison] has provided petitioner with adequate medical treatment and care." Thereafter, the district court entered summary judgment in Harris's civil rights action. The district court held that the state habeas judgment was res judicata; and, alternatively, that Harris had received constitutionally adequate medical care from prison doctors.

II

Construing Harris's pro se civil rights complaint liberally, as we must, *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972), he has alleged two distinct claims. The first is that he received inadequate medical treatment from prison medical personnel. This claim was fully adjudicated on the merits in Harris's state habeas proceeding. The state court found Harris was receiving adequate prison medical care. Harris is collaterally estopped by this finding. Relief premised on Harris's first claim was properly denied.

However, Harris alleged a second and distinct claim that he has a qualified right to obtain his own medical care from a private nonprison medical professional at his own expense, and that prison officials wrongly denied his request for access to such outside medical care. Based upon the record before us, we cannot say this claim is frivolous, either legally or factually.

III

State-granted liberty or property rights of prison inmates are entitled to protection under the Due Process Clause against arbitrary state abrogation. *See Vitek v. Jones*, ____ U.S. ____, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Meachum v. Fano*, 427 U.S. 215, 225-27, 96 S.Ct. 2532, 2538-40, 49 L.Ed.2d 451 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76, 41 L.Ed.2d 935 (1974). An arguable claim can be made that Oregon law accords prison inmates a qualified right of access to medical care outside the prison facility at the inmate's expense.[1] This interpretation is

[621 F.2d 343]

supported by a letter in the record from the Governor of Oregon to Harris apparently acknowledging such an access right.[2] There is also uncontradicted evidence in the record that Harris sought either a temporary medical leave from the institution or permission to have a doctor come in to examine him, but that his requests were ignored by prison officials without any statement of reasons. If Harris's requests were simply ignored and denied without a statement of reasons, he may have been denied due process. *Cf. Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980) (en banc).

IV

Harris's access-to-medical-care claim is not barred by the prior state adjudication under principles of collateral estoppel or res judicata.

A party asserting the defense of collateral estoppel has the burden of showing that the issue for which an estoppel is claimed was actually adjudicated in a prior proceeding. *McNellis v. First Federal Savings & Loan Ass'n*, 364 F.2d 251, 257 n.8 (2d Cir. 1966); *In re Merrill*, 594 F.2d 1064, 1067 (5th Cir. 1979). If there is doubt on this score, collateral estoppel will not be applied. *McNellis v. First Federal Savings & Loan Ass'n, supra*, 364 F.2d at 257.

Harris's access claim was not distinctly alleged in his state habeas petition. Moreover, the state court's sole finding was that Harris received constitutionally adequate medical care from prison doctors. The court made no finding pertaining to a claim of improper or arbitrary denial of Harris's request for access to nonprison medical care. Therefore, the claim is not barred by the prior state court judgment under the doctrine of collateral estoppel.

Nor is Harris's access claim barred by the doctrine of res judicata. Res judicata preclusion extends only to claims that arise out of the same "cause of action" asserted in the prior action. *Lawlor v. National Screen Service*, 349 U.S. 322, 329, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955); *Munoz v. County of Imperial*, 604 F.2d 1174, 1177 (9th Cir. 1979) *cert. granted*, ____ U.S. ____, 100 S.Ct. 1077-78, 63 L.Ed.2d 318 (1980). What constitutes a "cause of action" for purposes of res judicata "cannot be defined with precision," 1B Moore's *Federal Practice & Procedure*, ¶ 0.410[1] at 1154, or "determined precisely by mechanistic application of a simple test." *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979).

There are various criteria for determining whether the same cause of action is involved in the two suits: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *See Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977); 1B Moore's Federal Practice & Procedure, ¶ 0.410[1] at 1157-58. "The crucial element underlying all of the standards is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action . . ." *Expert Electric, Inc. v. Levine, supra*, 554 F.2d at 1234.

Harris's prosecution of his access claim would not impair or undermine the prior state judgment that the penitentiary's medical care satisfied minimal constitutional standards. The theory underlying Harris's access claim is that even if he received constitutionally adequate medical care from prison authorities under the standard established

in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), he nonetheless has a state-granted access right that permits him to obtain care, including specialized or supplemental care, from the nonprison medical professional of his choice, so long as he himself and not the institution bears the cost.

Similarly, the evidentiary facts underlying the claim focus on whether Harris's request for access to nonprison medical care was properly made and whether prison authorities fairly considered and denied the request in compliance with the requirements of Oregon

law and due process. Thus, the relevant evidentiary facts clearly differ from those involved in the prior state habeas proceeding. Finally, a res judicata bar is not indicated under the "same right" test. Harris's prior claim of having received inadequate medical care from prison doctors is founded on the Eighth Amendment, *see Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), whereas a claim of improper denial of a state-granted liberty or property right is premised on the Due Process Clause of the Fourteenth Amendment. *See Vitek v. Jones, supra,* _____ U.S. _____, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Harris's claim that he was improperly denied access to nonprison medical care is not barred by res judicata.[3]

Appellant's access claim is a novel one and we express no opinion on either the legal or factual issues underlying it. We simply find that given the record before us and our obligation to liberally construe pro se pleadings, Harris has a colorable due process claim based upon the manner in which prison authorities denied his request for access to nonprison medical care, and that the issues underlying this claim merit further consideration.

Affirmed in part and remanded for further consideration in light of this opinion.

FootNotes

* The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

1. Under Oregon law, felons retain all political, civil and other rights, with certain exceptions not relevant here, although the exercise of those rights is subject to reasonable regulation by prison authorities. *See* Or.Rev.Stat. §§ 137.275, 137.280, 137.285. Or.Rev.Stat. § 421.165 provides for temporary leaves from prison for the specific purpose of "obtaining medical services not otherwise available" in the institution. The statute also requires the adoption of rules and regulations for temporary leaves indicating that the leave program is to be administered with some procedural regularity. Or.Rev.Stat. § 179.479 also provides for conveyance of prisoners to care facilities outside the prison when medical care cannot satisfactorily be provided at the institution.

2. The Governor's letter to Harris states:If you do not believe you are receiving proper care, however, you do have the right to seek medical assistance from the practitioner

of your choice at your own expense. I am sure that the Penitentiary Staff will make the institution's facilities available, and will give full cooperation to any licensed medical practitioner you choose.

3. Our conclusion would be no different were we to apply the Oregon law of res judicata under the full faith and credit statute, 28 U.S.C. § 1738. Traditional claim preclusion is applied in that jurisdiction, *see McAllister v. Charter First Mortgage, Inc.*, 279 Or. 279, 285, 567 P.2d 539, 542 (1977); *Waxwing Cedar Prods., Ltd. v. Koennecke*, 278 Or. 603, 610-11, 564 P.2d 1061, 1064-65 (1977). Under Oregon law an "aggregate of operative facts" test is used to define "cause of action" for purposes of res judicata. *Troutman v. Erlandson*, 287 Or. 187, 202-03, 598 P.2d 1211, 1219 (1979).

Frederick Bates
1235 Muirkirk Ct
Folsom, Ca. 95630
February 3, 2006
Home (916) 984-1466
Cell (408) 472-4387

Honorable Alden E. Danner
Presiding Judge
Superior Court of California, County of Santa Clara
191 North First Street
San Jose, Ca. 95113

The reason I'm writing this letter is to bring to your attention some concerns I have regarding my recent *Small Claims* case that was adjudicated on 1/30/06 in Commissioner Saldivar's courtroom.

The facts in my case are that I retired from the San Jose Police Department on a medical disability on 4-1-04. After I retired, the Department denied me authorization to carry a concealed weapon (CCW) without granting me a hearing. The Department stated that my retirement was based on a "psychological disability." This conclusion was reached based on a work restriction by one of the doctors that evaluated me during the retirement process. The restriction stated that I should be excluded from "psycho-emotional stress." Penal Code Section 12027.1(e) was given as the authority for the denial.

My disability retirement was, in fact, based strictly on medical reasons. (heart and blood pressure problems) This fact is documented in several medical reports and was discussed in detail at my retirement hearing. A member from the Police Department's personnel unit was present at that hearing. As a matter of fact, I was on disability because of my blood pressure and heart problems at the time of my retirement. The Police Department and City Attorney's Office were well aware of my medical condition and knew that there has never been a question regarding my mental status.

The department was contacted on three occasions, two by me and once by a Police Union representative requesting an appeal of the denial or a hearing which was required by 12027.1 PC. I also submitted a letter to the Department from the doctor that had written the work restriction in question. The doctor stated that the term "psycho-emotional stress" was a "term of arts" frequently used to describe work-related disability. The doctor further stated that I should have no problem carrying a concealed weapon. This same doctor had recommended that same work restriction for me in 2001 during an evaluation for my worker's compensation claim. He stated at that time I could continue to work as a police officer. The Department did not express any reservations about me continuing to work. I continued to work without any restrictions on my authorization to

Exhibit K

carry a firearm. I decided to retire in 2004 because my blood pressure problems had gotten worse.

The Department unequivocally denied each of my requests for an appeal or a hearing. They ignored all of the following; the "due process" requirements of 12027.1 PC, the medical reports and letter indicating I had no psychological problems, my exemplary performance evaluations, my appeal to their sense of fairness; and they rejected my offer to have a psychological evaluation done and to pay for it with my own money.

After making every reasonable effort to resolve this matter, I obtained legal representation. Upon the advice of my attorney, I filed a complaint with Department of Fair Employment and Housing. A demand letter was also sent to the Department and City Attorney. Approximately one week after Fair Employment and Housing informed me that they would investigate my complaint, I received a call from the Department advising me that they had reversed the decision to deny me authorization to carry a concealed weapon. They refused to give me an explanation for the sudden reversal.

The fees for my legal representation were $1,500.00. I filed a claim with the City in an attempt to recover my attorney fees, but my claim was denied. I then filed the Small Claims action seeking damages which were the fees I paid for an attorney. It is clear that the actions by the Police Department were punitive and discriminatory, and they violated applicable law. They were done with the intent to cause me emotional pain and suffering. It is also very clear that the Department and City only changed their decision after it became apparent that an investigation by Fair Employment and Housing and a lawsuit were imminent.

[When Commissioner Saldivar called my case, he never gave me the opportunity to present it. Instead, he said that there were problems with my case. He stated that, "we don't award attorney fees in this court." He asked me what other court costs I was seeking. I am aware that attorney fees are not normally awarded for legal assistance that is obtained to assist one in preparing and filing a small claims action. Since I was seeking to recover the money I paid for legal assistance that was necessary in forcing the Police Department and City to grant me my rights to "due process," I believed this to be quite different from an attempt to recover costs for legal fees associated with filing my case. I also believed that Small Claims Court would be the quickest and least expensive way to recover my monetary loss due to the Police Department's illegal conduct.]

Commissioner Saldivar asked me if this issue was covered by "Collective Bargaining." I explained to him that I was retired and that this matter was not covered by any "Collective Bargaining" agreement. He then stated that I had no "constitutional right" to a CCW permit and that I would get nothing from the court. I am well aware that there is no constitutional right to carry a concealed weapon. However, it is a right that is guaranteed to retired police officers under state law, 12027.1 PC. It can not be denied by

EXHIBIT K

a police department without a showing of "good cause." "Good cause" can only be determined by a hearing board. Therefore, I believe that I had a constitutional right to "due process" in this matter.

[One of my concerns is that I was not given the opportunity to "have my day in court." If Small Claims Court was not the appropriate court to hear this type of case, I feel that I should have been advised of this fact at the time I filed it. I also feel that Commissioner Saldivar could have informed me of the appropriate court where I could file my case.]

My other concern is that two witnesses (Assistant Chief of Police Charles Younis and City Attorney Carl Mitchell) failed to appear in court after being properly subpoenaed by me. I was informed by court personnel that the subpoenas would compel attendance by witnesses as in any other court. I was never notified by the above witnesses or the Small Claims Court that they would not appear. This was the second time that Chief Younis had failed to appear for my case after being properly subpoenaed. His first failure to appear resulted in a continuance of my case that was originally scheduled to be heard on 12/13/05 at 1:00PM. This issue was never addressed by Commissioner Saldivar. The Police Department and City have taken a position that they are above the law; first in their failure to follow the requirements of 12027.1 PC, and now by ignoring orders to appear in court.

This whole process has been time consuming, emotionally draining, and somewhat costly. A response by you to my concerns outlined above either in writing or by phone would be greatly appreciated. I am well aware that I have no right to appeal the decision in my case since I was the plaintiff.

Respectfully,

Frederick Bates

[cc: Jim Brennan, San Jose City Attorney's Office]

EXHIBIT K

Superior Court of California
County of Santa Clara

191 North First Street
San Jose, California 95113
(408) 882-2700

Chambers of
HON. ALDEN E. DANNER, Presiding Judge

March 8, 2006

Mr. Frederick Bates
1235 Muirkirk Court
Folsom, CA 95630

Dear Mr. Bates:

This will acknowledge receipt of your letter dated February 3, 2006, concerning your experience in Small Claims Court and Commissioner Saldivar.

Please note that the complaint process does not allow me to undertake an independent evaluation of the decision-making process of the commissioner who is the subject of the complaint. Rather, it provides a mechanism for me to evaluate concerns about such issues as inappropriate demeanor, unreasonable delay in deciding matters before the court, and bias.

I am satisfied that there was no judicial misconduct on the commissioner's part and that he acted within his permissible exercise of judicial discretion. From the description in your letter, Commissioner Saldivar found that, under the circumstances of your case, attorneys fees and related costs are not recoverable in a civil action. While he spoke of Small Claims Court, he implied that the same was true for all civil courts. As you observed in your letter, a decision against a Small Claims plaintiff is not appealable to the Appellate Division of the Superior Court; hence, the correctness of the commissioner's ruling cannot be legally tested in that manner. By not addressing the issue of the subpoenaed witnesses who failed to appear, he was impliedly finding that their presence would not have affected his decision that your claim could not be granted.

I'm sorry that this experience was a disappointment to you, but based upon the foregoing, I am closing my investigation into this matter without taking further action.

If you are dissatisfied with the court's action on your complaint, you have the right to request the Commission on Judicial Performance to review this matter under its discretionary jurisdiction to oversee the discipline of subordinate judicial officers. No further action will be taken on your complaint unless the commission receives your

Exhibit L

written request within 30 days after the date this notice was mailed. The commission's telephone number is 415-557-1200, and its address is:

Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660

Very truly yours,

Alden E. Danner
Presiding Judge

cc: Commissioner Saldivar

EXHIBIT L

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARINO SCAFIDI,
Plaintiff-Appellant,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political subdivision on behalf of State of Nevada; FCH1, LLC, DBA Palms Casino Resort; PALMS PLACE, LLC; UNIVERSITY MEDICAL CENTER; D. MCGRATH, LT.; S. COMISKEY, SGT.; K. POOL, DET.; R. BEZA, DET.; A. CHRISTENSEN, DET.; K. GRAMMAS, CSI; JERI DERMANELIAN; FP HOLDINGS, L.P.,
Defendants-Appellees.

No. 18-16229

D.C. No.
2:14-cv-01933-
RCJ-GWF

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted January 22, 2020
San Francisco, California

Filed July 23, 2020

Before: William A. Fletcher and Ryan D. Nelson, Circuit Judges, and Donald W. Molloy,* District Judge.

Opinion by Judge W. Fletcher

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment, and remanded, in an action alleging (1) that plaintiff was arrested without probable cause for sexual assault; and (2) that the police defendants (a) misrepresented the results of the alleged victim's sexual assault exam on a warrant affidavit, (b) manipulated the crime scene to make it look like plaintiff had drugged the alleged victim, and (c) falsely accused plaintiff in the police report of having drugged her.

The panel first held that the district court erred by concluding that the probable cause determination made by the Nevada justice of the peace at the preliminary hearing precluded plaintiff from asserting in his federal suit that the defendants lacked probable cause to arrest and detain him. The panel held that plaintiff's allegations that defendants fabricated evidence or undertook other wrongful conduct in

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

bad faith created a triable issue of material fact as to probable cause, pursuant to the Nevada Supreme Court's decision in *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 48–49 (Nev. 2005), *overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670 (Nev. 2008), and this Court's decision in *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004). Accordingly, the panel reversed the district court's order as to plaintiff's claims under 42 U.S.C. § 1983.

Addressing plaintiff's state-law claims, the panel declined to consider, for the first time on appeal, plaintiff's argument that Nev. Rev. Stat. § 41.036(2) is invalid and unenforceable under the Nevada Supreme Court's decision in *Turner v. Staggs*, 510 P.2d 879 (Nev. 1973). The panel therefore affirmed the district court's ruling that plaintiff's state-law claims against the Las Vegas Metropolitan Police Department were barred under § 41.036(2). The panel further held that given the factual disputes, discretionary-act immunity did not bar plaintiff's state-law claims against the individual officers.

COUNSEL

Kirk T. Kennedy (argued), Las Vegas, Nevada; Gary A. Modaferri, Las Vegas, Nevada; for Plaintiff-Appellant.

Craig R. Anderson (argued) and Kathleen A. Wilde, Marquis Aurbach Coffing, Las Vegas, Nevada, for Defendants-Appellees Las Vegas Metropolitan Police Department, Lieutenant McGrath, Sergeant Comiskey, Detectives Pool, Beza, and Christensen, and Crime Scene Analyst Grammas.

Stephen B. Vogel (argued) and Jamie S. Hendrickson, Lewis Brisbois Bisgaard & Smith LLP, Las Vegas, Nevada, for Defendant-Appellee Jeri Dermanelian.

No appearance for Defendants-Appellees FCH1, LLC; Palms Place, LLC; University Medical Center; and FP Holdings, L.P.

OPINION

W. FLETCHER, Circuit Judge:

Marino Scafidi was criminally charged with three counts of sexual assault under Nevada law. During the proceedings that followed, state courts suppressed evidence seized pursuant to a search warrant, and determined that the police failed to preserve potentially exculpatory evidence. Ultimately, all charges were dismissed pursuant to a motion by the State.

Scafidi subsequently brought a federal civil rights claim and state tort claims against, as relevant here, the Las Vegas Metro Police Department ("LVMPD"), five officers, a crime scene investigator, and the nurse who performed a sexual assault exam on the alleged victim. He contends that the Las Vegas police officers staged an incriminating crime scene photo by moving his sleeping medications from the hotel bathroom drawer into a mint container by his clothes in the bedroom; falsely stated in a warrant application that the alleged victim's sexual assault exam revealed sexual assault when it in fact only revealed sexual intercourse; threatened him for asserting his constitutional rights; and made racially derogatory remarks to him.

The district court granted summary judgment to the defendants on the ground that Scafidi was precluded from relitigating the state justice of the peace's determination at a preliminary hearing that there was probable cause to believe that he had committed a crime. Alternatively, the district court concluded that Scafidi's state claims against the LVMPD were barred because he failed to comply with Nevada's administrative presentment statute, and that the individual officers were entitled to discretionary immunity. Scafidi timely appealed. We affirm the district court's grant of summary judgment to the LVMPD on Scafidi's state-law claims. We reverse and remand on the remaining claims.

I. Legal Standards

"We review a grant of summary judgment de novo." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*; Fed R. Civ. P. 56(a).

When we adjudicate a state-law claim, our task "is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum. In doing so, federal courts are bound by the pronouncements of the state's highest court on applicable state law." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (internal quotation marks and citations omitted). On issues of state law, we are not bound by a prior opinion of our court where an intervening decision from a state court of last resort has "undercut the theory or reasoning underlying the prior circuit

precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

II. Discussion

A. Preclusive Effect of Probable Cause Determination at Preliminary Hearing

The district court concluded that the probable cause determination made by the Nevada justice of the peace at the preliminary hearing precluded Scafidi from asserting in his federal suit that the defendants lacked probable cause to arrest and detain him. In the court's view, the existence of probable cause necessarily meant that Scafidi's federal and state-law causes of action all failed. Because controlling Nevada state precedent expressly rejects the view that a probable cause determination at a preliminary hearing precludes later relitigation of that question, we reverse.

"[F]ederal courts must 'give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1130 (9th Cir. 2019) (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)); *see Allen v. McCurry*, 449 U.S. 90, 96 (1980); 28 U.S.C. § 1738. The preclusive effect of a judgment includes both claim preclusion and issue preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Issue preclusion, or collateral estoppel, "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Rodriguez*, 930 F.3d at 1130 (quoting *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012)). As long as a

litigant had a full and fair opportunity to litigate the issue, collateral estoppel under 28 U.S.C. § 1738 based on state-court criminal proceedings applies to subsequent civil litigation under 42 U.S.C. § 1983. *See Allen*, 449 U.S. at 101, 104–05.

A panel of this court previously held that under Nevada law, a probable cause determination in a preliminary hearing has preclusive effect in a subsequent suit. *Haupt v. Dillard*, 17 F.3d 285, 288–89 (9th Cir. 1994). Relying on our decision in *Haupt*, the district court concluded that Scafidi was collaterally estopped from relitigating whether there was probable cause for his arrest, detention, and prosecution.

After *Haupt* was decided, but before the district court issued its order, the Nevada Supreme Court recognized that a probable cause determination in a preliminary hearing does not preclude a plaintiff from litigating that issue in a subsequent suit. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 48–49 (Nev. 2005), *overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670 (Nev. 2008). Under *Jordan*, the preliminary hearing probable cause determination is only prima facie evidence of probable cause, which can be overcome in a later proceeding with evidence of "false testimony or suppressed facts." *Id.* at 49 & n.65. In *Jordan*, the plaintiff raised a triable issue on the question of probable cause by introducing evidence that the police report was insufficient to justify an arrest, and that the officer had lied in the report and at the probable cause hearing. *See id.* at 38, 47, 49, 52.

The standard articulated in *Jordan* accords with the standard under California law, which we have previously

considered. In *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004), we held that under California law, when the plaintiff in the later proceeding alleges "fabricated evidence" or "other wrongful conduct by state or local officials," an earlier determination of probable cause in a California preliminary hearing does not preclude a plaintiff from contesting the issue of probable cause in a later proceeding. *Id.* at 1068. In so holding, we noted that "in virtually every other jurisdiction, it is a long-standing principle of common law that a decision by a judge or magistrate to hold a defendant to answer after a preliminary hearing constitutes *prima facie*—but not *conclusive*—evidence of probable cause [in a subsequent tort suit]." *Id.* at 1067; *see also* Restatement (Second) of Torts § 663 (1977); *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 473 (Nev. 1998) (Nevada's issue preclusion test identical to California's).

Here, Scafidi contended in the district court that the police defendants misrepresented the results of the alleged victim's sexual assault exam on a warrant affidavit, manipulated the crime scene to make it look like he had drugged the alleged victim, and falsely accused him in the police report of having drugged her. Under *Jordan*, Scafidi's allegations of "fabricated evidence, or other wrongful conduct undertaken in bad faith" create a triable issue of material fact as to probable cause. *Jordan*, 110 P.3d at 49 n.65 (2005) (quoting *Awabdy*, 368 F.3d at 1067)).

The district court refused to consider Scafidi's contentions. Instead, it relied on *Haupt* to determine that Scafidi was precluded as a matter of law from contesting probable cause for both his federal and state-law claims. Because *Jordan*, not *Haupt*, controls this appeal, we reverse

the district court's order as to Scafidi's claims under § 1983. *See Gammie*, 335 F.3d at 900.

B. State-Law Claims

The district court granted summary judgment on the state-law claims on two alternative grounds. Therefore, our decision under *Jordan* that the probable cause determination at the preliminary hearing is not preclusive does not automatically result in reversal as to those claims. For the reasons that follow, we affirm the district court's holding as to the LVMPD. We reverse the district court's holdings as to the remaining defendants.

1. Nevada's Administrative Claim Statute

Scafidi argues that Nev. Rev. Stat. § 41.036(2) is invalid and unenforceable under the Nevada Supreme Court's decision in *Turner v. Staggs*, 510 P.2d 879 (Nev. 1973). However, he did not present this argument to the district court. "Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). This case does not present exceptional circumstances and we decline to exercise our discretion to consider his argument under *Turner*. We therefore affirm the district court's ruling that Scafidi's state-law claims against the LVMPD are barred under § 41.036(2).

2. Discretionary-Act Immunity

The claim statute bars claims against "political subdivision[s] of the State" only. *See* Nev. Rev. Stat.

§ 41.036(2). It does not bar Scafidi's claims against the individual defendants, who do not offer any reason why the administrative claim statute applies to claims against defendants sued in their individual capacity. *Cf. Cavalieri v. Las Vegas Metro. Police Dep't*, No. 2:11-CV-00351-ECR, 2012 WL 846466, at *5 (D. Nev. Mar. 13, 2012). The district court concluded that the officers sued in their individual capacity were shielded by Nevada's discretionary-act immunity.

Nevada discretionary-act immunity bars actions under state law against employees of political subdivisions of the state that are "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved is abused." Nev. Rev. Stat. § 41.032.

A police officer's decision to arrest and detain is a discretionary act generally covered by § 41.032. *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 878 (9th Cir. 2002) (citing *Ortega v. Reyna*, 953 P.2d 18, 18 (Nev. 1998)); *see also Gonzalez v. Las Vegas Metro. Police Dep't*, No. 61120, 2013 WL 7158415, at *3 (Nev. Nov. 21, 2013) (unpublished); *Fox v. State ex rel. its Dep't of Corr.*, 373 P.3d 915 (Nev. 2011) (table).

However, discretionary-act immunity does not apply to bad-faith conduct. *See Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991). "[Nevada Revised Statute] § 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, 'by definition, [cannot] be within the actor's discretion.'" *Franchise Tax Bd. of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017) (alteration in original) (quoting *Falline*, 823 P.2d at 891–92),

rev'd on other grounds, 139 S. Ct. 1485 (2019). "[W]here an officer arrests a citizen in an abusive manner not as the result of the exercise of poor judgment as to the force required to make an arrest, but instead because of hostility toward a suspect or a particular class of suspects . . . or because of a willful or deliberate disregard for the rights of a particular citizen or citizens, the officer's actions are the result of bad faith and he is not immune from suit." *Davis v. City of Las Vegas*, 478 F.3d 1048, 1060 (9th Cir. 2007) (citing *Falline*, 823 P.2d at 892 n.3).

The district court concluded that there was no "evidence that would permit a jury to find that [the LVMPD] acted with malice in investigating and prosecuting Plaintiff, even if their evidence collection and preservation might be described as incomplete." In so doing, the district court ignored evidence of bad-faith misconduct in the record. If credited, Scafidi's affidavit establishes several acts of affirmative misconduct that could cause a reasonable juror to conclude that the police defendants acted in bad faith. According to Scafidi, police defendants staged an incriminating crime-scene photograph; misrepresented the results of the alleged victim's sexual assault exam in a warrant affidavit; threatened Scafidi with extrajudicial violence in retaliation for asserting his constitutional rights; and made racially derogatory remarks about Scafidi.

In their motion for summary judgment, the police defendants did not offer any evidence that negated the evidence in Scafidi's sworn statement. Because Scafidi's statements create a genuine dispute on the issue of bad faith, the district court erred in determining on summary judgment that discretionary-act immunity applied.

Conclusion

We do not, of course, rule on the truth of Scafidi's evidence. We decide only that the justice of the peace's probable cause determination at the preliminary hearing does not, as a matter of law, preclude him from litigating his federal or state-law claims; and that, given the factual disputes, discretionary-act immunity does nor bar his state-law claims against the individual officers. On those claims, we reverse and remand for further proceedings consistent with this opinion. We affirm, however, the district court's grant of summary judgment to the LVMPD on Scafidi's state-law claims.

Each side shall bear its own costs.

AFFIRMED in part; REVERSED in part; REMANDED.

U.S. Supreme Court

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)
Marshall v. Jerrico, Inc.
No. 79-253.
Argued March 19, 1980
Decided April 28, 1980
446 U.S. 238
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Syllabus
Under § 16(e) of the Fair Labor Standards Act (Act), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. An Assistant Regional Administrator determined that violations of child labor provisions of the Act had occurred at restaurants managed by appellee and assessed a fine against appellee, including an amount for willful violation. After appellee filed exceptions to the Assistant Regional Administrator's determination and assessment, a hearing was held before an Administrative Law Judge, who accepted the Assistant Regional Administrator's contention that violations had occurred, but found that the violations were not willful, and reduced the total assessment accordingly. Appellee then filed suit in Federal District Court, contending that § 16(e) violated the Due Process Clause of the Fifth Amendment. The District Court granted summary judgment for appellee, holding that the reimbursement provision of § 16(e) created an impermissible risk of bias on the part of the Assistant Regional Administrator because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, and thus § 16(e) could distort the Assistant Regional Administrator's objectivity in assessing penalties.
Held: The reimbursement provision of § 16(e) does not violate the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration. Pp. 446 U. S. 242-252.
(a) Strict due process requirements as to the neutrality of officials performing judicial or quasi-judicial functions, *cf. Tumey v. Ohio,* 273 U. S. 510; *Ward v. Monroeville,* 409 U. S. 57, are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. In an adversary system, prosecutors are permitted to be zealous in their

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enforcement of the law. Although traditions of prosecutorial discretion do not immunize from judicial scrutiny enforcement decisions that are contrary to law, rigid standards of neutrality cannot be the same for administrative prosecutor as for judges. Pp. 446 U. S. 242-250.

(b) It is unnecessary in this case to determine with precision what limit there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of child labor provisions; there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts; and ESA's administration of the Act has minimized any potential for bias. On this record, the possibility that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions. Pp. 446 U. S. 250-252.

Reversed and remanded. MARSHALL, J., delivered the pinion for a unanimous Court.

MR JUSTICE MARSHALL delivered the opinion of the Court.

Under § 16(e) of the Fair Labor Standards Act, 29 U.S.C. § 216(e), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The question for decision is whether this provision violates the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration.

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I

The child labor provisions of federal law are primarily contained in § 12 of the Fair Labor Standards Act, 52 Stat. 1067, as amended, 29 U.S.C. § 212. The Secretary of Labor has designated the ESA as the agency responsible for enforcing these provisions, 36 Fed.Reg. 8755 (1971). The ESA, in turn, carries out its responsibilities through regional offices, and the assistant regional administrator of each office has been charged with the duty of determining violations and assessing penalties.

Appellee Jerrico, Inc., is a Delaware corporation that manages approximately 40 restaurants in Kentucky, Indiana, Tennessee, Georgia, and Florida. In a series of investigations from 1969 to 1975, the ESA uncovered over 150 violations of the

child labor provisions at appellee's various establishments. After considering the factors designated by statute and regulations, [Footnote 1] the ESA Assistant Regional Administrator in the Atlanta office assessed a total fine of $103,000 in civil penalties for the various violations. That figure included a supplemental assessment of $84,500 because of his conclusion that the violations were willful. Appellee filed exceptions to the determination and assessment of the Assistant Regional Administrator, and, pursuant to 29 U.S.C. § 216(e), a hearing was held before an Administrative Law Judge. Witnesses included employees of appellee and representatives of the Department of Labor. The Administrative Law Judge accepted the Assistant Regional Administrator's

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contention that violations had occurred, concluding that the record showed "a course of violations" for which "[r]espondent's responsibility cannot be disputed." At the same time, he was persuaded by appellee's witnesses and by a review of the evidence that the violations were not willful. Accordingly, he reduced the total assessment to $18,500.

Appellee did not seek judicial review of the decision of the Administrative Law Judge. Instead, it brought suit in Federal District Court, challenging the civil penalty provisions of the Act on constitutional grounds and seeking declaratory and injunctive relief against their continued enforcement. Appellee accepted the determination of the Administrative Law Judge, and alleged no unfairness in the proceedings before him. Nonetheless, it contended that § 16(e) of the Act violated the Due Process Clause of the Fifth Amendment by providing that civil penalties must be returned to the ESA as reimbursement for enforcement expenses and by allowing the ESA to allocate such fines to its various regional offices. According to appellee, this provision created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties.

After the parties engaged in discovery with respect to the administration of § 16(e), appellee moved for summary judgment. The District Court granted the motion. It acknowledged that the Office of Administrative Law Judges was unaffected by the total amount of the civil penalties. At the same time, the court concluded that the reimbursement provision created an impermissible risk of bias on the part of the assistant regional administrator. Citing *Tumey v. Ohio,* 273 U. S. 510 (1927), and *Ward v. Village of Monroeville,* 409 U. S. 57 (1972), the court found that, because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, § 16(e) could distort the assistant regional administrator's objectivity in assessing penalties

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for violations of the child labor provisions of the Act. We noted probable jurisdiction, 444 U.S. 949 (1979), and now reverse.

II

A

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U. S. 247, 435 U. S. 259-262, 435 U. S. 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U. S. 319, 424 U. S. 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 341 U. S. 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

The requirement of neutrality has been jealously guarded by this Court. In *Tumey v. Ohio, supra*, the Court reversed convictions rendered by the mayor of a town when the mayor's salary was paid in part by fees and costs levied by him acting in a judicial capacity. The Court stated that the Due Process Clause would not permit any

"procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."

273 U.S. at 273 U. S. 532. *Tumey* was applied in *Ward v. Village of Monroeville, supra,*

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to invalidate a procedure by which sums produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums. The forbidden "possible temptation," we concluded, is also present

"when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."

409 U.S. at 409 U. S. 60. We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair

adjudicative procedure. [Footnote 2] Indeed, "justice must satisfy the appearance of justice," *Offutt v. United States,* 348 U. S. 11, 348 U. S. 14 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," *In re Murchison,* 349 U. S. 133, 349 U. S. 136 (1955). *See also Taylor v. Hayes,* 418 U. S. 488 (1974).

Appellee contends that these principles compel the conclusion that the reimbursement provision of the Act violates the Due Process Clause. We conclude, however, that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. The biasing influence that appellee discerns in § 16(e) is, we believe, too remote and insubstantial to violate the constitutional constraints applicable to the decisions

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of an administrator performing prosecutorial functions. To explain our conclusion, we turn to the relevant sections of the Act.

As noted above, the major portions of the federal child labor provisions appear in 29 U.S.C. § 212, which outlaws the employment in interstate commerce of "oppressive child labor," as that term is defined in 29 U.S.C. § 203(1) and implementing regulations. These provisions demonstrate a firm federal policy of "protect[ing] the safety, health, wellbeing, and opportunities for schooling of youthful workers." 29 CFR § 570.101 (1979). *See also* H.R.Rep. No. 1452, 75th Cong., 1st Sess., 6 (1937); S.Rep. No. 884, 75th Cong., 1st Sess., 2, 6 (1937).

Before 1974, the Secretary of Labor enforced the child labor provisions primarily through actions for injunctive relief, *see* 29 U.S.C. §§ 212(b), 217, and for criminal sanctions, *see* 29 U.S.C. §§ 216(a), 215(a)(4). Having found such relief to be an inadequate or insufficiently flexible remedy for violations of the law, *cf.* H.R.Rep. No. 93-913, p. 15 (1974), Congress in 1974 authorized the Secretary to assess a civil penalty not to exceed $1,000 for each violation of § 212. 29 U.S.C. § 216(e). Under this provision for the assessment of civil penalties, the Secretary's determination of the existence of a violation and of the amount of the penalty is not final if the person charged with a violation enters an exception within 15 days of receiving notice. In the event that such an exception is entered, the final determination is made in an administrative hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554. The administrative law judge "may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or . . . may find that no violations occurred, and shall order

payment of a penalty in the amount originally assessed or in a lesser amount . . . or order that respondent pay no penalty, as appropriate."
29 CFR § 580.32(a) (1979). He is directed to consider the same factors considered by the assistant regional
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administrator [Footnote 3] in making his original assessment. *Ibid.* Under the natural construction of this regulation, the administrative law judge is required to conduct a *de novo* review of all factual and legal issues. [Footnote 4]
The provision whose constitutionality is at issue in this case is a part of 29 U.S.C. § 216(e), the civil penalty section of the Act. That provision states that civil penalties collected for violations of the child labor law
"shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title."
Section 9a, 29 U.S.C. § 9a, added in 1934, provides, in turn, that all sums
"received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States. [Footnote 5]"
The record developed in the District Court permits a detailed description of the administration of the reimbursement provision in the years 1976, 1977, and 1978. It is plain that no official's salary is affected by the levels of the penalties. In all three years, the sums collected as child labor penalties amounted to substantially less than 1% of the ESA's budget. [Footnote 6]
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And in each of those years, the ESA did not spend the full amount appropriated to it, and the sums that were not spent were returned to the Treasury. The amounts returned to the Treasury in that fashion substantially exceeded the sums collected under § 16(e) in all three years. [Footnote 7] The challenged provisions have not, therefore, resulted in any increase in the funds available to the ESA over the amount appropriated by Congress.
Civil penalties for child labor violations are allocated by the national office of the ESA, subject to the approval of the Secretary of Labor. In 1976, the sums collected were allocated to and retained by the ESA national office; in 1977, they were allocated to the national office, to the Office of the Solicitor of Labor, and to the various regional offices in proportion to the amounts expended on enforcement of

the child labor provisions; [Footnote 8] and in 1978, the penalties were held in the Treasury. Civil penalties have never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices.

The District Court concluded that, in these circumstances, the challenged provision violated the Due Process Clause under the principles set forth in *Tumey* and *Ward*. It noted that, as the 1977 practice demonstrated, the ESA has discretion to return sums collected as civil penalties to the regional offices in proportion to the amounts expended on enforcement efforts. Increased enforcement costs could thus lead to a

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larger share of reimbursements. According to the court, an assistant regional administrator would therefore be inclined to maximize the total expenditures on enforcement of the child labor provisions of the Act, and those increased expenditures would result in an increase in the number and amount of penalties assessed. The court concluded that this possibility created an unconstitutional risk of bias in the assistant regional administrator's enforcement decisions. We disagree.

The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts to a penalty -- as he has a statutory right to do -- he is entitled to a *de novo* hearing before an administrative law judge. [Footnote 9] In that hearing, the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 CFR 580.21(a) (1979). Indeed,

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the Secretary's regulations state that the notice of penalty assessment and the employer's exception "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." 29 CFR § 580.3(b) (1979). It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations. As the District Court found, the reimbursement provision of § 16(e) is inapplicable to the Office of Administrative Law Judges. [Footnote 10]

The rigid requirements of *Tumey* and *Ward,* designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, *see Linda R.S. v. Richard D.,* 410 U. S. 614 (1973), and similar considerations have been found applicable to

administrative prosecutors as well, *see Moog Industries, Inc. v. FTC,* 355 U. S. 411, 355 U. S. 414 (1958); *Vaca v. Sipes,* 386 U. S. 171, 386 U. S. 182 (1967). Prosecutors need not be entirely "neutral and detached," *cf. Ward v. Village of Monroeville,* 409 U.S. at 409 U. S. 62. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for

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securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey,* 273 U.S. at 273 U. S. 535, where the Court noted that a state legislature

"may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people."

See also Hortonville School Dist. v. Hortonville Ed. Assn., 426 U. S. 482, 426 U. S. 495 (1976).

We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger v. United States,* 295 U. S. 78, 295 U. S. 88 (193). In appropriate circumstances, the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. *See Dunlop v. Bachowski,* 421 U. S. 560, 421 U. S. 567, n. 7, 421 U. S. 568-574 (1975); *Rochester Telephone Corp. v. United States,* 307 U. S. 125 (1939). [Footnote 11] Moreover, the decision to enforce -- or not to enforce -- may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. *Cf.* 2 K. Davis, Administrative Law Treatise 215-256 (2d ed.1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision, and, in some

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contexts, raise serious constitutional questions. *See Bordenkircher v. Hayes,* 434 U. S. 357, 434 U. S. 365 (1978); *cf.* 28 U.S.C. § 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision

and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.

B

In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, [Footnote 12] for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law. 5 U.S.C. § 5332 (1976 ed. and Supp. III). The pressures relied on in such cases as *Tumey v. Ohio, supra; Gibson v. Berryhill,* 411 U. S. 564, 411 U. S. 579 (1973); and *Connally v. Georgia,* 429 U. S. 245, 429 U. S. 250 (1977) (per curiam), are entirely absent here.

Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts. As we have noted, the civil penalties collected under § 16(e) represent substantially less than 1% of the budget of the ESA. [Footnote 13] In each of the relevant years, the amount of the ESA's

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budget that was returned to the Treasury was substantially greater than the amount collected as civil penalties. Unlike in *Ward* and *Tumey,* it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all. *See Dugan v. Ohio,* 277 U. S. 61 (1928).

Moreover, the ESA's administration of the Act has minimized any potential for bias. In the only year in which the ESA elected to allocate part of the civil penalties to the regional offices, it did so in proportion to the expenses incurred in investigating and prosecuting child labor violations, not on the basis of the amounts of penalties collected. Thus, even if an assistant regional administrator were to act on the assumption that civil penalties would be returned to his office in any given year, his decision to assess an unjustifiably large penalty in a particular case would be of no benefit to his office, since that decision would not produce an increase in the level of expenses.

The District Court's conclusion that the reimbursement provision violated the Due Process Clause was evidently premised on its perception that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office. This increase in enforcement effort, the

court suggested, might incline the assistant regional administrator to assess an unjustified number of penalties, and to make those penalties unduly high. But in light of the factors discussed above, it is clear that this possibility is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like

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functions. [Footnote 14] In order to produce the predicted result, the ESA would be required to decide to allocate civil penalties to regional offices; the sums allocated to the particular regional office would have to exceed any amount of that office's budget returned to the Treasury at the end of the fiscal year; the assistant regional administrator would have to receive authorization from his superiors to expend additional funds to increase his enforcement expenditures to the desired level; the increased expenditures would have to result in an increase in penalties; and the administrative law judge and reviewing courts would have to accept or ratify the assistant regional administrator's assessments. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Withrow v. Larkin,* 421 U. S. 35, 421 U. S. 47 (1975), it is exceedingly improbable that the assistant regional administrator's enforcement decisions would be distorted by some expectation that all of these contingencies would simultaneously come to fruition. We are thus unable to accept appellee's contention that, on this record and as presently administered, the reimbursement provision violates standards of procedural fairness embodied in the Due Process Clause.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[Footnote 1]

Those factors include

"any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours."

29 CFR § 579.5(c) (1979).

[Footnote 2]

For example, we have invalidated a system in which justices of the peace were paid for issuance, but not for nonissuance, of search warrants, *Connally v. Georgia,* 429 U. S. 245 (1977) (per curiam); prohibited the trial of a defendant before a judge who

has previously held the defendant in contempt, *Taylor v. Hayes,* 418 U. S. 488 (1974); *Mayberry v. Pennsylvania,* 400 U. S. 455 (1971); forbidden a state administrative board consisting of optometrists in private practice from hearing charges filed against licensed optometrists competing with board members, *Gibson v Berryhill,* 411 U. S. 564, 411 U. S. 578-579 (1973); and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey v. Brewer,* 408 U. S. 471, 408 U. S. 485-486 (1972).

[Footnote 3]

See n 1, *supra.*

[Footnote 4]

See n 9, *infra,* and accompanying text.

[Footnote 5]

The section was originally designed "[t]o authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes." *See* 48 Stat. 582; S.Rep. No. 322, 73d Cong., 2d Sess. (1934).

[Footnote 6]

In 1976, the ESA collected about $151,000 in child labor penalties; in 1977, $650,000; and in 1978, $592,000. By comparison, $87,407,000 was appropriated to the ESA in 1976; $98,992,000 in 1977; and $119,632,000 in 1978. *See* Budget of the United States Government, Fiscal Year 1980 -- Appendix 652; Budget of the United States Government, Fiscal Year 1979 -- Appendix 623-624; Budget of the United States Government, Fiscal Year 1978 -- Appendix 510.

[Footnote 7]

The record indicates that, in 1976, the ESA returned $981,000 to the Treasury; $870,000 was returned in 1977; and $4,600,000 in 1978.

[Footnote 8]

In that year, a total of $559,800 was allotted, including $194,800 to the national office. The Chicago office received $44,300, the highest allotment of any regional office; the Denver office received the lowest, $4,900.

[Footnote 9]

Appellee claims that the hearing before the administrative law judge is not truly *de novo,* because the judge has the authority only to determine the existence of the violation, not to assess the reasonableness of the penalty. We are unable to discern any such limitation on the administrative law judge's authority. Under federal regulations, the administrative law judge is expressly empowered to review the amount of the penalty, and is required to consider precisely those factors considered by the assistant regional administrator in making his assessment. *See* 29 CFR § 579.5 (1979). Indeed, in this very case, the Administrative Law Judge carefully

reviewed the Assistant Regional Administrator's assessment, and reduced it by over 80%.

Appellee correctly points out that, in *Ward v. Village of Monroeville,* 409 U. S. 57 (1972), we held that the availability of a trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired. A litigant, we said, "is entitled to a neutral and detached judge in the first instance." *Id.* at 409 U. S. 61-62. *Ward* does not aid appellee in this case, however, for the administrative law judge presides over the initial adjudication.

[Footnote 10]

Appellee errs in suggesting that the Office of Administrative Law Judges is also entitled to reimbursement under § 16(e). When read in conjunction with 29 U.S.C. § 9(a), that section allows reimbursement to offices that "supervised [the] work" of "determining the violations and assessing and collecting [the] penalties." The Office of Administrative Law Judges does not "supervise" that work. Indeed, the Administrative Procedure Act expressly forbids such supervision. 5 U.S.C. § 554(d). The Office of Administrative Law Judges maintains an administrative section within the Department of Labor entirely separate from that of the supervising body, the ESA, and the Office has a separate budget.

[Footnote 11]

Cf., e.g., Adams v. Richardson, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973); *Environmental Defense Fund, Inc. v. Ruckelshaus,* 142 U.S.App.D.C. 74, 439 F.2d 584 (1971); *Medical Comm. for Human Rights v. SEC,* 139 U.S.App.D.C. 226, 432 F.2d 659 (1970), *vacated as moot,* 404 U. S. 403 (1972); *Perez v. Boston Housing Authority,* 379 Mass. 703, ___, 400 N.E.2d 1231, 1247, 1252-1253 (1980). *See* Stewart, The Reformation of American Administrative Law, 88 Harv.L.Rev. 1667, 1752-1756 (1975); Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L.Rev. 485 (1940).

[Footnote 12]

In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process.

[Footnote 13]

Even if the ESA received a considerable amount in civil penalties in a particular year, of course, it is possible that Congress would decide to appropriate a correspondingly lower amount from the Treasury.

[Footnote 14]

We need not, of course, say whether the alleged biasing influence is too remote to raise constitutional objections even under the standards of *Ward* and *Tumey.*

U.S. Supreme Court

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)Pembaur v. City of Cincinnati
No. 84-1160
Argued December 2, 1985
Decided March 25, 1986
475 U.S. 469
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Syllabus
Petitioner, a physician and the proprietor of a clinic in Cincinnati, Ohio, that provided medical services primarily to welfare recipients, was indicted by a grand jury for fraudulently accepting payments from state welfare agencies. During the grand jury investigation, subpoenas were issued for the appearance of two of petitioner's employees. When the employees failed to appear, the Assistant County Prosecutor obtained capiases for their detention. But when two County Deputy Sheriffs attempted to serve the capiases at petitioner's clinic, he barred the door and refused to let them enter the part of the clinic where the employees presumably were located. Thereafter, Cincinnati police officers, whom petitioner had called, appeared and told petitioner to allow the Deputy Sheriffs to enter. Petitioner continued to refuse. The Deputy Sheriffs then called their superior, who told them to call the County Prosecutor's Office and to follow his instructions. The Deputy Sheriffs spoke to the Assistant Prosecutor assigned to the case. He in turn conferred with the County Prosecutor, who told him to instruct the Deputy Sheriffs to "go in and get" the employees. The Assistant Prosecutor relayed these instructions to the Deputy Sheriffs. After the Deputy Sheriffs tried unsuccessfully to force the door, city police officers obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic, but were unable to locate the employees sought. Although petitioner was acquitted of the fraud charges, he was indicted and convicted for obstructing police in the performance of an authorized act. His conviction was upheld by the Ohio Supreme Court. Petitioner then filed a damages action in Federal District Court under 42 U.S.C. § 1983 against the county, among other defendants, alleging that the county had violated his rights under the Fourth and Fourteenth Amendments. The District Court dismissed the claim against the county on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell v. New York City Dept. of Social Services,* 436 U. S. 658. The Court of Appeals affirmed, holding that petitioner had failed to prove the existence of a county policy because he had shown nothing more than that, on "this one

occasion," the Prosecutor and the Sheriff decided to force entry into petitioner's clinic.

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Held: The judgment is reversed, and the case is remanded. 746 F.2d 337, reversed and remanded.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II-A, and II-C, concluding that:

1. The "official policy" requirement of *Monell* was intended to distinguish acts of the *municipality* from acts of the municipality's *employees,* and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible. *Monell* held that recovery from a municipality is limited to acts that are, properly speaking, "of the municipality," *i.e.,* acts that the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Pp. 475 U. S. 477-481.

2. It was error to dismiss petitioner's claim against the county. Ohio law authorizes the County Sheriff to obtain instructions from the County Prosecutor. The Sheriff followed the practice of delegating certain decisions to the Prosecutor where appropriate. In this case, the Deputy Sheriffs received instructions from the Sheriff's Office to follow the orders of the County Prosecutor, who made a considered decision based on his understanding of the law and commanded the Deputy Sheriffs to enter petitioner's clinic. That decision directly caused a violation of petitioner's Fourth Amendment rights. In ordering the Deputy Sheriffs to enter petitioner's clinic to serve the capiases on the employees, the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983. Pp. 475 U. S. 484-485.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded in Part II-B that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. The fact that a particular official has discretion in the exercise of particular functions does not give rise to municipal liability based on an exercise of that discretion unless the official is also responsible, under state law, for establishing final governmental policy respecting such activity. Municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. Pp. 475 U. S. 481-484.

BRENNAN, J., delivered the opinion of the Court with respect to Parts I, II-A, and II-C, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and
Page 475 U. S. 471
O'CONNOR (except for Part II-C), JJ., joined, and an opinion with respect to Part II-B, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. 475 U. S. 485. STEVENS, J., *post,* p. 475 U. S. 487, and O'CONNOR, J., *post,* p. 475 U. S. 491, filed opinions concurring in part and concurring in the judgment. POWELL, J., filed a dissenting opinion, in which BURGER, C.J., and REHNQUIST, J., joined, *post,* p. 475 U. S. 492.

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II-B.

In *Monell v. New York City Dept. of Social Services,* 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U.S.C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature. . . ." *Id.* at 436 U. S. 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen.
Page 475 U. S. 472
In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When these employees failed to appear as directed, the Prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County. [Footnote 1]

On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur's clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist's window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall.

Returning to the receptionist's window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases, and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door,

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the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to "go in and get [the witnesses]." Whalen in turn passed these instructions along to the Deputy Sheriffs.

After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor's instructions to "go in and get" the witnesses, obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

After this incident, the Prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State v. Pembaur,* No. C-790380 (Hamilton County Court of Appeals, Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State v. Pembaur,* 9 Ohio St.3d 136, 459 N.E.2d 217, *cert. denied,* 467 U.S. 1219 (1984). The Supreme Court held that the state law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later in a civil action for damages. 9 Ohio St.3d at 138, 459 N.E.2d at 219.

On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the County of Hamilton,

Page 475 U. S. 474

the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen, and nine city and county police officers. [Footnote 2] Pembaur sought damages under 42 U.S.C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant, even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald v. United States,* 451 U. S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought $10 million in actual and $10 million in punitive damages, plus costs and attorney's fees.

Much of the testimony at the 4-day trial concerned the practices of the Hamilton County Police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a capias and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons, and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in

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which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for instructions under appropriate circumstances, and that "it was the proper thing to do" in this case.

The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald, supra,* but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because it construed the law in the Sixth Circuit in 1977 to permit law enforcement officials to enter the premises of a third person to serve a capias, the District Court held that the individual municipal officials were all immune under *Harlow v. Fitzgerald,* 457 U. S. 800 (1982).

The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell.* With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County *per se,*" because "[t]he Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff."

With respect to the city of Cincinnati, the court found that "the only policy or custom followed . . . was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cincinnati.

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The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F.2d 337 (1984). [Footnote 3]

The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.* at 340-341. Based upon its examination of Ohio law, the Court of Appeals found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.* at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

"We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. . . . That single, discrete decision is insufficient,

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by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy."
Ibid. (footnote omitted) (emphasis in original).
Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals, [Footnote 4] and we granted the petition to resolve the conflict. 472 U.S. 1016 (1985). We reverse.

II

A

Our analysis must begin with the proposition that
"Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."
Monell v. New York City Dept. of Social Services, 436 U.S. at 436 U. S. 691. [Footnote 5]
As we read its opinion, the Court of Appeals held that a single decision to
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take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by Monell as a predicate to municipal liability under § 1983. [Footnote 6] The Court of Appeals reached this conclusion without referring to *Monell* -- indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.
Monell is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape,* 365 U. S. 167 (1961). In the second part of the opinion, we recognized a limitation on this liability, and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior. See Monell,* 436 U.S. at 463 U. S. 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language
"cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."
Id. at 463 U. S. 692. Primarily,
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however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct

of *others. Id.* at 463 U. S. 665-683. [Footnote 7] We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of *respondeat superior,* we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.* at 463 U. S. 692-694, and n. 57.

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. [Footnote 8]

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Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" -- that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body -- whether or not that body had taken similar action in the past or intended to do so in the future -- because even a single decision by such a body unquestionably constitutes an act of official government policy. *See, e.g., Owen v. City of Independence,* 445 U. S. 622 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport v. Fact Concerts, Inc.,* 453 U. S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra,* at 436 U. S. 694, and whose decisions therefore may give rise to municipal liability under § 1983.

Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings -- often but not always committed to writing -- that are intended to, and do, establish fixed plans of action to be followed under similar circumstances

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consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport,* a government frequently chooses a course of action tailored to a particular situation,

and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. [Footnote 9] More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

B

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. [Footnote 10] The fact that a particular official -- even a policymaking

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official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. *See, e.g., Oklahoma City v. Tuttle,* 471 U.S. at 471 U. S. 822-824. [Footnote 11] The official

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must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. [Footnote 12] Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than was holding the municipalities liable for the decisions of the City Councils in *Owen* and *Newport.* In each case, municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

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See Tuttle, supra, at 471 U. S. 823 (*"policy' generally implies a course of action consciously chosen from among various alternatives").*

C

Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the county. The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law, and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.

Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering "legal advice" when he ordered the Deputy Sheriffs to "go in and get" the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner's clinic was not pursuant to a properly established municipal policy.

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here. [Footnote 13] Ohio Rev.Code Ann. § 309.09(A) (1979)

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provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's Office referred this matter to the Prosecutor, and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances, and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic, the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK BATES, Plaintiff - Appellant, v. CITY OF SAN JOSE; ROBERT DAVIS, City of San Jose Chief of Police; ADONNA AMOROSO, City of San Jose Police Deputy Chief of Police; TUCK YOUNIS, City of San Jose Police Captain, Defendants - Appellees.	No. 08-16757 D.C. No. 5:06-cv-05302-RMW MEMORANDUM [*]

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted November 6, 2009
San Francisco, California

Before: NOONAN and W. FLETCHER, Circuit Judges, and DUFFY, [**] District Judge.

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

[**] The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

Plaintiff Frederick Bates filed this § 1983 action against the City of San Jose ("the City") and several officers of the San Jose Police Department. Bates appeals the district court's order granting summary judgment for the defendants. We affirm.

We review the grant of a motion for summary judgment *de novo*. *Dreiling v. America Online Inc.*, 578 F.3d 995, 1000 (9th Cir. 2009).

The district court found that the failure to provide Bates a good cause hearing before denying him a concealed weapons permit deprived him of a property interest without due process of law in violation of the Fourteenth Amendment. We hold that Bates's suit is properly dismissed on the basis of collateral estoppel as to the City, and qualified immunity as to the individual officers. Therefore, we need not reach this constitutional question. *See Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (holding that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

The City raised its collateral estoppel claim in its motion for summary judgment and therefore did not waive it. *Compare Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984) (recognizing that the court has "liberally treated

an attempt to raise the defense [after the pleadings] as if it were a motion for leave to file a supplemental answer") *with Kern Oil & Rfg. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988) (explaining that the liberal treatment in *Harbeson* requires that the defense "be raised before trial").

Qualified immunity protects government officials from liability so long as "a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful." *Saucier v. Katz*, 533 U.S. 194, 194 (2001). Although the general right to a hearing before denial of a permit under § 12027.1 may have been clearly established at the time Deputy Chief Amoroso made her determination, the full contours of the right in circumstances such as Bates's were not. In *Unland v. Block*, 59 Cal. App. 4th 1537 (Ct. App. 1997), a California Court of Appeal determined that the requirement of a hearing prior to denial of a concealed weapons permit under § 12027.1 does not apply when an officer has retired because of a psychological disability under § 12027.1(e). The court's decision in *Unland* demonstrates that it was reasonable for Amoroso to believe that she was not required to grant a hearing to an officer retiring because of psychological disability.

The legislature did not define "psychological disability" in § 12027.1. *See Unland*, 59 Cal. App. 4th at 1546. There is no established case law defining what

constitutes a "psychological disability," or the process the official must utilize to make that determination. It is possible that an objectively reasonable official in Amoroso's position may have misunderstood the reason for Bates's retirement as fitting within § 12027.1(e). Given the lack of established standards over how to determine when retirement is due to psychological disability, Amoroso's mistake of fact is insufficient to deny her qualified immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER
MAGISTRATE JUDGE PATRICIA V. TRUMBULL
Date 3/16/07

ERO _____ Clerk _____

Case No. C-06-5302 RMW Case Title Bates v. City of San Jose

Appearances for Plaintiff(s): Stuart D. Kirchick

Appearances for Defendant(s): Michael J. Dudson

PROCEEDINGS

Pretrial Conferences: [ ] Initial [X] Settlement [ ] Other _____ [ ] Status [ ] Final [ ] Discovery

MOTIONS

Plf.	Def.		check if case dispositive
[ ]	[ ]	1. _____	[ ]
[ ]	[ ]	2. _____	[ ]
[ ]	[ ]	3. _____	[ ]
[ ]	[ ]	4. _____	[ ]

DISPOSITION

[ ] Granted
[ ] Denied
[ ] Granted in part, denied in part
[ ] Submitted
[ ] Briefs to be filed (See schedule)
[ ] Settled
[X] Not Settled Δ needs to make a motion
[ ] Off Calendar

Briefing Schedule: Opening _____ Reply _____ Answer _____

[ ] Continued to _____ for _____

ORDER TO BE PREPARED BY

[ ] Plaintiff [ ] Defendant [ ] Court [ ] Court w/opinion

NOTES: 2 hrs

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List of legal abbreviations

This is a list of abbreviations used in law and legal documents. It is common practice in legal documents to cite other publications by using standard abbreviations for the title of each source. Abbreviations may also be found for common words or legal phrases. Such citations and abbreviations are found in court decisions, statutes, regulations, journal articles, books, and other documents. Below is a basic list of very common abbreviations. Because publishers adopt different practices regarding how abbreviations are printed, one may find abbreviations with or without periods for each letter. For example, the *Code of Federal Regulations* may appear abbreviated as "C.F.R." or just as "CFR".

Symbol

- © or [Copr.] or C — Copyright (meaning someone claims ownership of the text, book, music, software, etc.)
- ® — Registered Trademark (typically a word or phrase identifying a company or product, e.g. Coca-Cola)
- ™ — Trademark (interim symbol used after an application for Trademark protection has been filed with the appropriate trademark office (in U.S. - USPTO), but before it has been approved)
- ¶ (Pilcrow) — Paragraph
- ¶¶ — Multiple Paragraphs
- § — section
- §§ — Multiple Sections
- Π (Greek letter Pi) or P — Plaintiff
- Δ (Greek letter delta) or D — Defendant
- ¢ — Claim

0–9

- 1A First Amendment

through

- 27A Twenty-Seventh Amendment to the United States Constitution

A

- A. — Atlantic Reporter
- A.2d — Atlantic Reporter, 2nd Series
- a/a/o — as assignee of
- AAS — *Acta Apostolicae Sedis*
- ABA — American Bar Association
- AC — Appeal Cases (United Kingdom law report)
- ACC — Association of Corporate Counsel

5:06-cv-05302-RMW Bates v. City of San Jose et al
Ronald M. Whyte, presiding
Patricia V. Trumbull, referral
Date filed: 08/29/2006
Date terminated: 07/07/2008
Date of last filing: 06/30/2017

History

Doc. No.	Dates	Description
	Filed & Entered: 08/29/2006	Summons Issued
	Docket Text: Summons Issued as to City of San Jose. (dhm, COURT STAFF) (Filed on 8/29/2006)	
	Filed & Entered: 08/29/2006	Case Referred to ECF
	Docket Text: CASE DESIGNATED for Electronic Filing. (dhm, COURT STAFF) (Filed on 8/29/2006)	
1	*Filed & Entered:* 08/29/2006	Complaint
	Docket Text: COMPLAINT against City of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis; Summons issued. (Filing fee $ 350, receipt number 5515234). Filed by Frederick Bates. (dhm, COURT STAFF) (Filed on 8/29/2006) (dhm, COURT STAFF). (Additional attachment(s) added on 6/27/2013: # (1) complaint) (srm, COURT STAFF).	
2	*Filed & Entered:* 08/29/2006	Initial Case Management Scheduling Order with ADR Deadlines
	Docket Text: ADR SCHEDULING ORDER: Case Management Statement due by 12/1/2006. Case Management Conference set for 12/8/2006 10:30 AM. (Attachments: # (1) Standing Order)(dhm, COURT STAFF) (Filed on 8/29/2006) (Additional attachment(s) added on 6/27/2013: # (2) motion) (srm, COURT STAFF).	
3	*Filed & Entered:* 10/18/2006	ADR Certification (ADR L.R. 3-5 b)of discussion of ADR options
	Docket Text: ADR Certification (ADR L.R. 3-5b) of discussion of ADR options (Kirchick, Stuart) (Filed on 10/18/2006)	
4	*Filed & Entered:* 11/20/2006	Notice of need of ADR Phone Conference (ADR L.R. 3-5 d)
	Docket Text: NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Dodson, Michael) (Filed on 11/20/2006)	
5	*Filed & Entered:* 11/27/2006	ADR Clerk's Notice Setting ADR Phone Conference
	Docket Text: ADR Clerks Notice Setting ADR Phone Conference on 12/1/06 at 10:30 a.m. Please take notet that plaintiff's counsel initiates the call to all parties. (tjs, COURT STAFF) (Filed on 11/27/2006)	
6	*Filed & Entered:* 11/27/2006	Answer to Complaint
	Docket Text: ANSWER to Complaint with Jury Demand byCity of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis. (Dodson, Michael) (Filed on 11/27/2006)	
	Filed & Entered: 11/28/2006	ADR Remark
	Docket Text: ADR Remark: The ADR Phone Conference has been rescheduled to 12/4/06 at 2:30 p.m. (tjs, COURT STAFF) (Filed on 11/28/2006)	
7	*Filed & Entered:* 12/01/2006	Joint Case Management Statement

	Docket Text: JOINT CASE MANAGEMENT STATEMENT *AND [PROPOSED] ORDER* filed by Frederick Bates, City of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis. (Dodson, Michael) (Filed on 12/1/2006)		
	Filed & Entered:	12/04/2006	ADR Phone Conference held
	Docket Text: ADR Remark: ADR Phone Conference conducted 12/4/06 by DB. (tjs, COURT STAFF) (Filed on 12/4/2006)		
8	*Filed & Entered:*	12/05/2006	Clerk's Notice
	Docket Text: CLERK'S NOTICE OF CONTINUANCE: Case Management Conference set for 1/5/2007 10:30 AM. (jg, COURT STAFF) (Filed on 12/5/2006)		
9	*Filed & Entered:*	12/12/2006	Stipulation
	Docket Text: STIPULATION *TO CONTINUE CASE MANAGEMENT CONFERENCE* by Frederick Bates. (Kirchick, Stuart) (Filed on 12/12/2006)		
10	*Filed & Entered:*	12/18/2006	Stipulation and Order
	Docket Text: STIPULATION AND ORDER To Continue Case Management Conference. Case Management Conference set for 1/26/2007 10:30 AM. Signed by Judge Ronald M. Whyte on 12/18/06. (cm, COURT STAFF) (Filed on 12/18/2006)		
11	*Filed:* *Entered:*	01/26/2007 01/30/2007	Set Hearings
	Docket Text: Minute Entry: Initial Case Management Conference held on 1/26/2007 before Ronald M. Whyte (Date Filed: 1/26/2007). Jury Trial set for 11/19/2007 01:30 PM in Courtroom 6, 4th Floor, San Jose. Motion Hearing set for 9/7/2007 09:00 AM in Courtroom 6, 4th Floor, San Jose. Pretrial Conference set for 11/8/2007 02:00 PM in Courtroom 6, 4th Floor, San Jose. Discovery cutoff 7/13/07. Referred to Magistrate Judge Trumbull for an early settlement conference to completed within 60 days.(Court Reporter Not Reported.) (jg, COURT STAFF) (Date Filed: 1/26/2007)		
12	*Filed & Entered:*	01/30/2007	Proposed Order
	Docket Text: Proposed Order *Following Case Management Conference* by City of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis. (Dodson, Michael) (Filed on 1/30/2007)		
13	*Filed & Entered:*	02/06/2007	Case Management Scheduling Order
	Docket Text: CASE MANAGEMENT SCHEDULING ORDER: Discovery cutoff by 8/1/2007. Jury Trial set for 11/19/2007 01:30 PM in Courtroom 6, 4th Floor, San Jose. Motion Hearing set for 9/7/2007 09:00 AM in Courtroom 6, 4th Floor, San Jose. Pretrial Conference set for 11/8/2007 02:00 PM in Courtroom 6, 4th Floor, San Jose. Settlement Conference with Judge Trumbull within 60 days. Signed by Judge Ronald M. Whyte on 2/6/07. (jg, COURT STAFF) (Filed on 2/6/2007)		
14	*Filed & Entered:*	02/22/2007	Clerk's Notice
	Docket Text: CLERK'S NOTICE Scheduling Settlement Conference set for 3/16/2007 10:00 AM before Magistrate Patricia V. Trumbull (cm, COURT STAFF) (Filed on 2/22/2007)		
15	*Filed:* *Entered:*	03/16/2007 03/19/2007	Settlement Conference
	Docket Text: Minute Entry: Settlement Conference; not settled (Date Filed: 3/16/2007). () (cm, COURT STAFF) (Date Filed: 3/16/2007)		
16	*Filed & Entered:*	08/03/2007	Stipulation
	Docket Text: STIPULATION *of Dismissal as to Defendant Tuck Younis* by Frederick Bates, City of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis. (Dodson, Michael) (Filed on 8/3/2007)		
17	*Filed & Entered:*	08/03/2007	Stipulation
	Docket Text: STIPULATION *to Modify Order following Case Management Conference* by Frederick Bates, City of San Jose, Robert Davis, Adonna Amoroso, Tuck Younis. (Dodson, Michael) (Filed on 8/3/2007)		

18	*Filed & Entered:*	10/11/2007	Stipulation and Order
	Docket Text: STIPULATION AND ORDER [17] to Modify Order Following Case Management Conference: Jury Trial set for 12/10/2007 01:30 PM in Courtroom 6, 4th Floor, San Jose. Motion Hearing set for 11/9/2007 09:00 AM in Courtroom 6, 4th Floor, San Jose. Pretrial Conference set for 12/6/2007 02:00 PM in Courtroom 6, 4th Floor, San Jose. Signed by Judge Ronald M. Whyte on 10/11/07. (jg, COURT STAFF) (Filed on 10/11/2007)		
19	*Filed & Entered:* *Terminated:*	10/12/2007 07/07/2008	Motion for Summary Judgment
	Docket Text: NOTICE OF MOTION AND MOTION for Summary Judgment or Partial Summary Judgment filed by City of San Jose, Robert Davis, Adonna Amoroso. Motion Hearing set for 11/9/2007 09:00 AM in Courtroom 6, 4th Floor, San Jose. (Dodson, Michael) (Filed on 10/12/2007) Modified text on 10/17/2007 (dhm, COURT STAFF).		
20	*Filed & Entered:*	10/12/2007	Declaration in Support
	Docket Text: Declaration of Michael J. Dodson in Support of [19] MOTION for Summary Judgment *or Partial Summary Judgment and Notice of Motion* filed byCity of San Jose, Robert Davis, Adonna Amoroso. (Attachments: # (1) Exhibit Exhibit A)(Related document(s)[19]) (Dodson, Michael) (Filed on 10/12/2007)		
21	*Filed & Entered:*	10/12/2007	Declaration in Support
	Docket Text: Declaration of James Brennan in Support of [19] MOTION for Summary Judgment *or Partial Summary Judgment and Notice of Motion* filed byCity of San Jose, Robert Davis, Adonna Amoroso. (Attachments: # (1) Exhibit Exhibit A# (2) Exhibit Exhibit B)(Related document(s)[19]) (Dodson, Michael) (Filed on 10/12/2007)		
22	*Filed & Entered:*	10/12/2007	Declaration in Support
	Docket Text: Declaration of Tuck Younis in Support of [19] MOTION for Summary Judgment *or Partial Summary Judgment and Notice of Motion* filed byCity of San Jose, Robert Davis, Adonna Amoroso. (Related document(s)[19]) (Dodson, Michael) (Filed on 10/12/2007)		
23	*Filed & Entered:*	10/12/2007	Stipulation
	Docket Text: STIPULATION *for Hearing on Defendants' Motion for Summary Judgment on Shortened Notice* by Frederick Bates, City of San Jose, Robert Davis, Adonna Amoroso. (Dodson, Michael) (Filed on 10/12/2007)		
24	*Filed & Entered:*	10/29/2007	Memorandum in Opposition
	Docket Text: Memorandum in Opposition to [19] Motion for Summary Judgement filed by Frederick Bates. (Kirchick, Stuart) (Filed on 10/29/2007) Modified on 11/29/2007 to link entry to document #19 (dhm, COURT STAFF).		
25	*Filed & Entered:*	10/29/2007	Exhibits
	Docket Text: EXHIBITS *Notice of Manual Filing* filed byFrederick Bates. (Kirchick, Stuart) (Filed on 10/29/2007)		
26	*Filed & Entered:*	10/30/2007	Exhibits
	Docket Text: EXHIBITS in support of [24] Plaintiff's Opposition to Summary Judgment filed by Frederick Bates. (Related document(s)[24]) (dhm, COURT STAFF) (Filed on 10/30/2007) (Additional attachment(s) added on 9/24/2009: # (1) Exhibits B, C and D, # (2) Exhibits E thru K) (dhm, COURT STAFF).		
27	*Filed & Entered:*	11/01/2007	Reply to Opposition
	Docket Text: Reply to Opposition re [19] MOTION for Summary Judgment *or Partial Summary Judgment and Notice of Motion* filed byCity of San Jose, Robert Davis, Adonna Amoroso. (Dodson, Michael) (Filed on 11/1/2007)		
28	*Filed & Entered:*	11/09/2007	Motion Hearing

	Docket Text: Minute Entry:Motion Hearing held on 11/9/2007 before Ronald M. Whyte; Matter Submitted. (Date Filed: 11/9/2007) re [19] MOTION for Summary Judgment *or Partial Summary Judgment and Notice of Motion* filed by Adonna Amoroso, Robert Davis, City of San Jose. (Court Reporter L. Shortridge.) (cm, COURT STAFF) (Date Filed: 11/9/2007)		
29	*Filed & Entered:*	12/04/2007	Order Cancelling Deadline
	Docket Text: ORDER Vacating Pretrial Dates and Deadlines and Trial Date. Signed by Judge Whyte on 12/4/07. (rmwlc2, COURT STAFF) (Filed on 12/4/2007)		
30	*Filed & Entered:*	07/07/2008	Order on Motion for Summary Judgment
	Docket Text: ORDER by Judge Whyte granting [19] Defendants' Motion for Summary Judgment (rmwlc2, COURT STAFF) (Filed on 7/7/2008)		
31	*Filed & Entered:*	07/07/2008	Judgment
	Docket Text: JUDGMENT. Signed by Judge Whyte on 6/25/08. (rmwlc2, COURT STAFF) (Filed on 7/7/2008)		
32	*Filed & Entered:*	07/14/2008	Bill of Costs
	Docket Text: BILL OF COSTS by City of San Jose, Robert Davis, Adonna Amoroso. (Dodson, Michael) (Filed on 7/14/2008)		
33	*Filed & Entered:*	07/14/2008	Declaration in Support
	Docket Text: Declaration of Michael J. Dodson in Support of [32] Bill of Costs *with Exhibits A and B* filed byCity of San Jose, Robert Davis, Adonna Amoroso. (Related document(s)[32]) (Dodson, Michael) (Filed on 7/14/2008)		
34	*Filed:* *Entered:* *Terminated:*	07/29/2008 07/30/2008 11/20/2009	Notice of Appeal to the Ninth Circuit
	Docket Text: NOTICE OF APPEAL as to [31] Judgment by Frederick Bates. Filing fee paid $ 455., receipt #54611003631 Appeal Record due by 8/28/2008. (dhm, COURT STAFF) (Filed on 7/29/2008)		
35	*Filed & Entered:* *Terminated:*	07/30/2008 11/20/2009	Transmission of Notice of Appeal and Docket Sheet to USCA
	Docket Text: Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re [34] Notice of Appeal (dhm, COURT STAFF) (Filed on 7/30/2008) (dhm, COURT STAFF).		
	Filed: *Entered:* *Terminated:*	08/06/2008 04/26/2009 11/20/2009	USCA Case Number
	Docket Text: USCA Case Number 08-16757 Ninth Circuit for [34] Notice of Appeal filed by Frederick Bates. (dhm, COURT STAFF) (Filed on 8/6/2008)		
36	*Filed & Entered:*	08/06/2008	Costs Taxed
	Docket Text: Costs Taxed in amount of $ $621.95 against Plaintiff, Frederick Bates. (srm, COURT STAFF) (Filed on 8/6/2008)		
37	*Filed & Entered:*	08/21/2008	Transcript
	Docket Text: Transcript of Proceedings held on 11/09/07, before Judge Ronald M. Whyte. Court Reporter/Transcriber Lee-Anne Shortridge, Telephone number 408-287-4580. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 11/17/2008. (las,) (Filed on 8/21/2008)		
38	*Filed & Entered:*	11/20/2009	USCA Order

	Terminated:	12/14/2009	
	Docket Text: MEMORANDUM DISPOSITION of USCA as to [34] Notice of Appeal filed by Frederick Bates. U.S. District Court Decision AFFIRMED. (dhm, COURT STAFF) (Filed on 11/20/2009)		
39	*Filed & Entered:* *Terminated:*	12/14/2009 06/06/2017	USCA Mandate
	Docket Text: MANDATE of USCA Issued as to [34] Notice of Appeal filed by Frederick Bates (dhm, COURT STAFF) (Filed on 12/14/2009)		
40	*Filed & Entered:* *Terminated:*	12/14/2009 06/06/2017	Clerk's Letter Spreading Mandate
	Docket Text: CLERKS Letter Spreading Mandate to Counsel (dhm, COURT STAFF) (Filed on 12/14/2009)		
41	*Filed & Entered:*	02/04/2010	Letter
	Docket Text: Letter dated 2/1/2010 from Fred Bates regarding documents sent to the Ninth Circuit Court of Appeals. (dhm, COURT STAFF) (Filed on 2/4/2010)		
42	*Filed & Entered:* *Terminated:*	02/16/2010 06/06/2017	USCA Order
	Docket Text: ORDER of USCA as to [34] Notice of Appeal filed by Frederick Bates. The court has received a letter from plaintiff-appellant Frederick Bates, dated February 1, 2010. On February 5, the clerks office stamped the letter received rather than filed. So far as appears from the letter, Bates has not attempted to serve a copy on defendants-appellees. summary judgment in favor of the City of San Jose based on the collateral estoppel effect of a small claims court judgment. Among other things, Bates contends that the merits of his claim were not litigated or even mentioned in small claims court. This argument was not made to our panel when Batess appeal was before us. Bates attaches to his letter a number of documents and excerpts of transcripts, only some of which are in the district court record of his case. The panels memorandum disposition in Batess appeal was filed on November 20, 2009. Bates had fourteen days from this date to file a petition of panel hearing or for rehearing en banc. 9th Cir. R. 40(a)(1). Even if Bates had served his letter on defendants-appellees, and even if we were to construe it as a petition for rehearing, it would be untimely. The panel therefore takes no action in response to Batess letter. No further filings will be accepted in this closed case. (dhm, COURT STAFF) (Filed on 2/16/2010)		
43	*Filed:* *Entered:* *Terminated:*	02/21/2013 02/22/2013 04/26/2013	Motion for Miscellaneous Relief
	Docket Text: Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] filed by Frederick Bates. Motion Hearing set for 3/29/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 3/7/2013. Replies due by 3/14/2013. (bwS, COURT STAFF) (Filed on 2/21/2013)		
44	*Filed:* *Entered:*	02/21/2013 02/22/2013	Declaration in Support
	Docket Text: Declaration of Frederick Bates in Support of Plaintiff's Rule 60 Motion for Relief from Judgment re [43] filed by Frederick Bates. (Attachments: # (1) Exhibits: A - Z) (bwS, COURT STAFF) (Filed on 2/21/2013)		
45	*Filed:* *Entered:*	02/21/2013 02/22/2013	Received Document
	Docket Text: (Proposed) Order Granting Motion for Relief from Judgment Pursuant to FRCP Rule 60 re [43] by Frederick Bates. (bwS, COURT STAFF) (Filed on 2/21/2013)		
46	*Filed:* *Entered:*	02/21/2013 02/22/2013	Received Document
	Docket Text: Letter to the Court regarding his scheduling of Motion dates, etc by Frederick Bates. (bwS, COURT STAFF) (Filed on 2/21/2013)		

47	*Filed & Entered:* *Terminated:*	03/05/2013 03/18/2013	Stipulation
	Docket Text: STIPULATION AND [PROPOSED] ORDER CONTINUING HEARING DATE AND SETTING BRIEFING SCHEDULE ON PLAINTIFFS RULE 60 MOTION FOR RELIEF FROM JUDGMENT filed by Adonna Amoroso, City of San Jose, Robert Davis. (North, Richard) (Filed on 3/5/2013) Modified on 3/6/2013 (bwS, COURT STAFF).		
48	*Filed & Entered:* *Terminated:*	03/05/2013 03/06/2013	Stipulation
	Docket Text: DECLARATION OF RICHARD D. NORTH IN SUPPORT OF THE PARTIES STIPULATION TO CONTINUE HEARING DATE AND SET BRIEFING SCHEDULE ON PLAINTIFFS RULE 60 MOTION FOR RELIEF FROM JUDGMENT re [47] filed by Adonna Amoroso, City of San Jose, Robert Davis. (North, Richard) (Filed on 3/5/2013) Text modified on 3/6/2013 conforming to posted document caption; **incorrect event type used when posting document </b (bwS, COURT STAFF).**		
49	*Filed & Entered:*	03/08/2013	Letter
	Docket Text: Letter requesting copy of Stipulation of Dismissal re [16] frp, Frederick Bates. (bwS, COURT STAFF) (Filed on 3/8/2013) **clerk mailed copy of docket [16] in Self addressed, stamped envelope.**		
50	*Filed & Entered:*	03/18/2013	Stipulation and Order
	Docket Text: STIPULATION AND ORDER [47] Continuing Hearing Date and Setting Briefing Schedule on Plaintiff's Rue 60 Motion for Relief From Judgment. Set/Reset Deadlines as to [43] MOTION Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] Costs Taxed. Motion Hearing set for 4/26/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Signed by Judge Ronald M. Whyte on 3/18/13. (jg, COURT STAFF) (Filed on 3/18/2013)		
51	*Filed & Entered:*	04/02/2013	Opposition/Response to Motion
	Docket Text: OPPOSITION TO PLAINTIFFS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP 60(b)(4) AND (d)(3) re [43] filed by Adonna Amoroso, City of San Jose, Robert Davis. (North, Richard) (Filed on 4/2/2013) Modified on 4/3/2013 (bwS, COURT STAFF).		
52	*Filed & Entered:*	04/02/2013	Declaration in Support
	Docket Text: Declaration of Richard D. North in Support of OPPOSITION TO PLAINTIFFS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP 60(b)(4) AND (d)(3 re [51] filed by Adonna Amoroso, City of San Jose, Robert Davis. (Attachments: # (1) Exhibit A, # (2) Exhibit B, # (3) Exhibit C, # (4) Exhibit D, # (5) Exhibit E, # (6) Exhibit F, # (7) Exhibit G) (North, Richard) (Filed on 4/2/2013) Modified on 4/3/2013 (bwS, COURT STAFF).		
53	*Filed & Entered:*	04/12/2013	Opposition/Response to Motion
	Docket Text: Reply Brief in Support of Plaintiff's Motion for Relief from Judgment Pursuant to Rule 60(B)(4) and Rule 60(d)(3) re [43] filed by Frederick Bates. (bw, COURT STAFF) (Filed on 4/12/2013)		
54	*Filed & Entered:*	04/12/2013	Declaration in Support
	Docket Text: DECLARATION OF FREDERICK BATES IN SUPPORT OF PLAINTIFF'S REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP RULE 60(b)(4) and RULE 60(d)(3) [53] filed by Frederick Bates. (Attachments: # (1) Exhibits to Declaration of Frederick Bates) (bw, COURT STAFF) (Filed on 4/12/2013)		
55	*Filed & Entered:*	04/26/2013	Order on Motion for Miscellaneous Relief
	Docket Text: **Order by Hon. Ronald M. Whyte denying [43] Motion for Relief from Judgment. (rmwlc2, COURT STAFF) (Filed on 4/26/2013)**		
56	*Filed:* *Entered:*	04/26/2013 05/01/2013	Motion Hearing

	Docket Text: Minute Entry: Motion Hearing held on 4/26/2013 before Ronald M. Whyte (Date Filed: 4/26/2013) re [43] MOTION Notice of Motion; Motion for Relief from Judgment Pursuant to FRCP Rule 60(b)(4) and Rule 60(d)(3) re [36] Costs Taxed filed by Frederick Bates. (Court Reporter Lee-Anne Shortridge.) (jg, COURT STAFF) (Date Filed: 4/26/2013)		
57	*Filed:* *Entered:* *Terminated:*	06/24/2013 06/25/2013 07/01/2013	Motion for Leave to Appeal
	Docket Text: MOTION to reopen the time to file an appeal pursuant to FRAP Rule 4 filed by Frederick Bates. Motion Hearing set for 8/2/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 7/8/2013. Replies due by 7/15/2013. (srm, COURT STAFF) (Filed on 6/24/2013)		
58	*Filed:* *Entered:*	06/26/2013 06/27/2013	Docket Annotation
	Docket Text: Duplicate of ([57]) Motion to Reopen the Time to file an Appeal Pursuant to FRAP Rule 4. (srm, COURT STAFF) (Filed on 6/26/2013)		
59	*Filed & Entered:*	07/01/2013	Order on Motion for Leave to Appeal
	Docket Text: **Order by Hon. Ronald M. Whyte granting [57] Motion to Reopen Time to File an Appeal. (rmwlc2, COURT STAFF) (Filed on 7/1/2013)**		
60	*Filed & Entered:*	07/01/2013	Certificate of Service
	Docket Text: CERTIFICATE OF SERVICE re [59] Order on Motion for Leave to Appeal. (jg, COURT STAFF) (Filed on 7/1/2013)		
61	*Filed & Entered:*	07/03/2013	Letter
	Docket Text: Letter from Frederick Bates. (srmS, COURT STAFF) (Filed on 7/3/2013)		
62	*Filed & Entered:* *Terminated:*	07/10/2013 06/06/2017	Notice of Appeal to the Ninth Circuit
	Docket Text: NOTICE OF APPEAL to the 9th CCA Frederick Bates. Appeal of Order on Motion for Miscellaneous Relief[55] (Appeal fee FEE NOT PAID.) (Attachments: # (1) Envelope) (bwS, COURT STAFF) (Filed on 7/10/2013)		
63	*Filed & Entered:* *Terminated:*	07/10/2013 06/06/2017	Appeal Fee Payment Request
	Docket Text: Mailed request for payment of docket fee to appellant re [62] c to USCA) (bwS, COURT STAFF) (Filed on 7/10/2013)		
64	*Filed & Entered:*	07/10/2013	Order
	Docket Text: **ORDER for withdrawal of counsel and leave to proceed pro se. Signed by Judge Whyte on 7/10/2013. (rmwlc2, COURT STAFF) (Filed on 7/10/2013)**		
65	*Filed & Entered:* *Terminated:*	07/11/2013 06/06/2017	USCA Scheduling Order
	Docket Text: USCA Scheduling Order as to [62] Notice of Appeal. The schedule is set as follows: Fee due from Appellant Frederick Bates on 07/10/2013. Transcript ordered by 08/09/2013. Transcript due 09/09/2013. Appellant Frederick Bates opening brief due 10/18/2013. Appellees Adonna Amoroso, City of San Jose and Robert Davis answering brief due 11/18/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. (bwS, COURT STAFF) (Filed on 7/11/2013)		
	Filed & Entered: *Terminated:*	07/12/2013 06/06/2017	USCA Case Number
	Docket Text: USCA Case Number 13-16397 USDC for [62] Notice of Appeal filed by Frederick Bates. (bwS, COURT STAFF) (Filed on 7/12/2013)		

66	*Filed & Entered:* *Terminated:*	07/12/2013 06/06/2017	USCA Order
	Docket Text: ORDER of USCA as to [62] Notice of Appeal. A review of the district court docket reflects that appellant has not paid the docketing and filing fees for this appeal. Within 21 days from the date of entry of this order, appellant shall: (1) file a motion with this court to proceed in forma pauperis; (2) pay $455.00 to the district court as the docketing and filing fees for this appeal and provide proof of payment to this court; or (3) otherwise show cause why the appeal should not be dismissed for failure to prosecute. If appellant fails to comply with this order, the appeal will be dismissed automatically by the Clerk under Ninth Circuit Rule (bwS, COURT STAFF) (Filed on 7/12/2013)		
67	*Filed & Entered:* *Terminated:*	07/15/2013 06/06/2017	USCA Appeal Fees
	Docket Text: USCA Appeal Fees received $ 455 receipt number 54611013911 re [62] Notice of Appeal filed by Frederick Bates (bw, COURT STAFF) (Filed on 7/15/2013)		
68	*Filed:* *Entered:*	08/05/2013 08/06/2013	Letter
	Docket Text: Letter to the Court regarding failure to appear from Frederick Bates (bwS, COURT STAFF) (Filed on 8/5/2013)		
69	*Filed & Entered:*	08/12/2013	Order
	Docket Text: **Response to plaintiff's letter. Signed by Judge Whyte on 8/12/2013. (rmwlc2, COURT STAFF) (Filed on 8/12/2013) Text Modified on 8/13/2013 (bwS, COURT STAFF).**		
70	*Filed & Entered:*	08/12/2013	Certificate of Service
	Docket Text: CERTIFICATE OF SERVICE re [69] Order.(jg, COURT STAFF) (Filed on 8/12/2013)		
71	*Filed & Entered:*	08/15/2013	Transcript
	Docket Text: Transcript of Proceedings held on 4-26-13, before Judge Ronald M. Whyte. Court Reporter/Transcriber Lee-Anne Shortridge, Telephone number 408-287-4580 email: lee-anne_shortridge@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 11/13/2013. (las,) (Filed on 8/15/2013)		
72	*Filed:* *Entered:* *Terminated:*	09/16/2013 09/17/2013 12/11/2013	Motion for Miscellaneous Relief
	Docket Text: Notice of Motion; Motion for Relief from Judgment of Dismissal Pursuant to FRCP Rule 60 filed by Frederick Bates. Motion Hearing set for 11/15/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 9/30/2013. Replies due by 10/7/2013. (bwS, COURT STAFF) (Filed on 9/16/2013)		
73	*Filed:* *Entered:*	09/16/2013 09/17/2013	Declaration in Support
	Docket Text: Declaration of Frederick Bates in Support of Rule 60 Motion for Relief from Judgment of Dismissal re [72] filed by Frederick Bates. (bwS, COURT STAFF) (Filed on 9/16/2013)		
74	*Filed:* *Entered:*	09/16/2013 09/17/2013	Received Document
	Docket Text: (Proposed) Motion Granting Motion for Relief from Judgment of Dismissal Pursuant to FRCP Rule 60 re [72] by Frederick Bates. (bwS, COURT STAFF) (Filed on 9/16/2013)		
75	*Filed:*	09/16/2013	Notice of Change of Address

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630
Phone Number: (408) 472-4387
E-mail Address: mrb10364evr@aol.com

Pro Se

ORIGINAL
FILED
FEB 21 2013
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Frederick Bates Plaintiff, vs. City of San Jose; Robert Davis, City of San Jose Chief of Police; Adonna Amoroso, City of San Jose Deputy Chief of Police Defendants	Case Number: C06-05302 RMW Plaintiff's Notice of Motion; Motion for Relief From Judgment Pursuant to FRCP Rule 60 (b)(4) and Rule 60 (d)(3) Date: March 29, 2013 Time: 9:00 a.m. Room: Courtroom 6 – 4th Floor Judge: Hon. Ronald M. Whyte

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NOTICE OF MOTION

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on March 29, 2013 at 9:00 a.m. or on a date and time to be determined by the court, located at 280 South First Street, San Jose, California, Plaintiff (*Pro Se*) will move, and hereby move, pursuant to Federal Rules of Civil Procedure ("FRCP") 60(b)(4) and (d)(3) for relief from judgment.

Plaintiff seeks relief from judgment pursuant to FRCP 60(b)(4) on the following grounds: (1) The decision of this court granting Defendants' motion on the basis of collateral estoppel relies on a "constitutionally infirm" state court judgment; and (2) Plaintiff was deprived of an impartial and disinterested tribunal during the hearing on Defendants' summary judgment motion. Plaintiff seeks relief from judgment pursuant to FRCP 60(d)(3) on the grounds that the decision of this court granting qualified immunity to Defendants Amoroso and Davis was induced by "fraud on the court." Plaintiff is entitled to relief from judgment as a matter of law because the judgment of this court is a "void judgment" and is unenforceable, and due to the manifest injustice of the result.

This motion is based on the Notice of Motion, the Memorandum of Points and Authorities and attached exhibits, and the record before this court. Non-record Exhibits C, D, K, L, S, T, X and Z are submitted in order to impeach Defendants' claims. Plaintiff respectfully request that the court take "judicial notice" of Exhibit L, an official letter from the Santa Clara County Superior Court, dated March 8, 2006.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Plaintiff Frederick Bates ("Bates") retired from the San Jose Police Department on a medical disability in April 2004. Bates was denied a CCW (carrying a concealed weapon) permit

by Deputy Chief Adonna Amoroso ("Amoroso") because of Bates' work restriction to "avoid psychological stress." Amoroso based her decision on the automatic denial rule of California Penal Code Section 12027.1(e). Section 12027.1(e) prohibits the issuance of a CCW permit to an officer that retires on a psychological disability. However, under Section 12027.1(b)(1), a hearing before a three-member hearing board is required when a retiring officer is denied a CCW permit for other than a psychological disability.

In August 2004, Bates asked Captain Tuck Younis ("Younis") in Police Personnel to reopen his CCW case. Bates' physician, Dr. Jonathan Ng, submitted a letter to Younis, on or about August 25, 2004, explaining that Bates' work restriction should not preclude him from carrying a concealed weapon. With that clarifying information, the Police Department denied Bates' CCW privileges twice more without a hearing in September 2004. Bates was ultimately granted a CCW permit in December 2004, several months after notifying the City of his intent to take legal action.

Subsequently, Bates sued the City in Small Claims Court seeking to recover the retainer he paid an attorney to assist him in securing his CCW permit. Judgment was entered in favor of the City on January 30, 2006. The Small Claims Court made an instant ruling, without any litigation, that attorney fees are not awarded in Small Claims Court, implying that the court lacked jurisdiction to hear the case, or that Bates' complaint was defective. No final judgment was made on Bates' claim that the City had violated his civil rights. Bates then filed the underlying complaint. On July 7, 2008, this court granted the City's "Motion for Summary Judgment." Bates appealed the judgment of this court and it was affirmed by the Ninth Circuit Court of Appeals on November 20, 2009.

II. LEGAL ARGUMENT

A. THE COURT HAS AUTHORITY TO ENTERTAIN THIS MOTION PURSUANT TO FRCP RULE 60

Bates filed a notice of appeal in this matter to the Ninth Circuit Court of Appeals on July 29, 2008. It was argued and submitted on November 6, 2009. The mandate issued on November 20, 2009 affirming this court's grant of summary judgment to the City of San Jose and the individual defendants. The mandate was filed in this court on December 14, 2009.

Once the mandate issued, this court reacquired jurisdiction, allowing it to consider a motion for relief from judgment pursuant to FRCP Rule 60. The United States Supreme Court approved of this procedure in *Standard Oil Co. of California v. United States,* 429 U.S. 17. The Ninth Circuit Court of Appeals has adopted this procedure as well (See *Gould v. Mutual Life Insurance of New York,* 729 F.2d 769).

The relevant portions of Rule 60 that Bates seek relief from judgment under are (b)(4) and (d)(3):

(b)(4)

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (4) the judgment is void.

(d)(3)

> (d) Other Powers to Grant Relief. This rule does not limit a court's power to:
>
> (3) set aside a judgment for fraud on the court.

Not only does this court have power to grant relief from judgment under Rule 60, the United States Supreme Court has held that a court has the inherent power and obligation to set aside judgments that are induced by fraud. The Supreme Court stated that the finality of a

judgment serves a societal purpose, but equity requires that a judgment, even though final, must be vacated if based upon fraud. *Hazel-Atlas Co. v. Hartford-Empire Co.,* 322 U.S. 238, 245-46.

The Ninth Circuit in *Dixon v. C. I. R.,* 316 F.3d 1041 (9th Cir.2003) citing *Toscano v. CIR,* 441 F.2d 930, 933 (9th Cir.1971) stated that the power to vacate or amend a judgment is narrowly construed, applying to fraud that defiles the court or is perpetrated by officers of the court. When it is concluded that the fraud rises to a level of "an unconscionable plan or scheme which is designed to improperly influence the court in its decisions," not only can the court act, it should. *England v. Doyle,* 281, F.2d at 309; *Levander v. Prober*, 180 F3d 1114, 1119 (9th Cir.1999); *Intermagnetics Am., Inc. v. China Int'l Trust and Inv. Corp.,* 926 F.2d 912, 916-17 (9th Cir. 1991)

By necessary implication, federal courts have the same inherent power to vacate void judgments as they do judgments procured by fraud. Judgments procured by fraud on the court are, in essence, "void judgments." "A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside" (*Watts v. Pickney* 752 F2d 406*)*. See also *V.T.A., v. Airco Inc.,* 597 F.2d at 224 which holds when Rule 60(b)(4) is applicable, "relief is not a discretionary matter, it is mandatory."

It is well settled that there are no time limitations on challenging a "void judgment" under Rule 60(b)(4). (*Orner v. Shalala,* 30 F3d 1307). There is also no time limit for challenging judgments procured by fraud on the court under FRCP Rule 60(d)(3).

In considering Bates' Rule 60 motion, he would like the court to take note that many *pro se* litigants lack familiarity with the formalities of pleading requirements. Because of this, courts must construe *pro se* pleadings (applies to other papers as well) liberally, applying a more flexible standard to evaluate their sufficiency than they would when reviewing pleadings submitted by attorneys. See *Taylor v. Vermont Dep't of Edcu.,* 313 F3d 768, 776 (2d Cir. 2002).

B. ATTORNEYS FOR THE CITY CONCOCTED AN UNCONSCIONABLE PLAN DESIGNED TO IMPROPERLY INFLUENCE THIS COURT IN ITS DECISION

1. The City made false claims that Deputy Chief Amoroso lacked authority to read Bates' medical records; therefore, she misinterpreted his work restriction to mean he had a psychological disability.

It is clear that attorneys for the City, Richard Doyle ("Doyle"), Nora Frimann ("Frimann") and Michael Dodson ("Dodson") are officers of the court. Doyle, Frimann and Dodson perpetrated fraud on the court by devising and executing an unconscionable plan that improperly influenced this court in its decision on the City's summary judgment motion. The ill-conceived plan by Doyle, Frimann and Dodson was based, in part, on making false claims that Deputy Chief Amoroso was not "privy" to Bates' medical records. Therefore, Amoroso misinterpreted Bates' work restriction to avoid psychological stress to mean he had a psychological disability. Amoroso then denied Bates a CCW permit pursuant to Section 12027.1(e) of the Penal Code upon his disability retirement in April 2004. Doyle, Frimann and Dodson argued that Amoroso was entitled to "**qualified immunity**" because of her alleged misunderstanding of Bates' work restriction due to her lack of authority to read Bates' medical records.

The discussion of the false claims relative to Amoroso is not meant to argue that the court's decision to grant her qualified immunity was erroneous, but to show their relationship in the broader context of Doyle, Frimann and Dodson's scheme to defraud this court.

It is unquestionable that Amoroso had authority to read Bates' medical records. As a part of his application for retirement, Bates signed a consent form that grants Police and City officials access to all of his medical and psychiatric records. The consent form also states that Bates' disability was "injury to heart and cardiovascular system" (Exhibit T). California law also grants

police administrators the authority to review confidential medical and psychiatric records when making decisions regarding CCW permits.

In *Unland v. Block*, 59 Cal App.4th 1537 (Ct. App. 1997) the court found that in 1988, San Jose Police Chief Joseph McNamara's stated policy was to review each CCW application on a case by case basis, review all available medical and psychiatric evidence, and offer a hearing before himself or his designated representative on any denial. Unland also held that, "**section 12027.1 did not on its face remove the law enforcement agency's preexisting authority to examine medical and psychiatric records for evidence of a psychological disability in denying a CCW endorsement.**" The City has refused to state the policy of Defendant Chief of Police Rob Davis.

Bates medical records clearly show that his disability was medical related and not based on a psychological disability. The medical nature of Bates' disability and work restriction to avoid psychological stress is fully explained in a memo completed by the City's Medical Director, Rajiv Das MD, as a part of the retirement process. The very first section of the memo states:

> **"Identification**
> Mr. Frederick Bates is a 48 year old male employed as a police sergeant by the City of San Jose who is applying for a service connected disability retirement for **injuries suffered to his heart."**

The memo details Bates' medical history and medical reports which do not include any mention of psychological problems or issues. It focuses primarily on Bates history of hypertension due to work-related psychoemotional stress. At the end of the memo it states:

> "The following restriction is provided in order to decrease Mr. Bates' perceived stress that may help control his blood pressure. Hypertension is a risk factor for strokes.
>
> 1. He should avoid psychologically or physically stressful work." (Exhibit R).

Bates' confidential medical records and work restriction was summarized by Dr. Das in Bates' retirement board hearing on April 1, 2004. Dr. Das made it clear that Bates' retirement was due to injuries to his heart. No psychological issues were mentioned. It should be noted that retirement board hearings are open to the public. The minutes from retirement board hearings are available to the public. A representative from the Police Personnel Unit was present at the retirement board hearing. In her deposition, Amoroso said she consulted with that representative after Bates called her and insisted that his disability was medical related (Amoroso deposition, page 32, lines 9-21). It is indefensible that Amoroso and the City would maintain the position that Amoroso misinterpreted Bates work restriction to mean he had a psychological disability because she lacked access to his confidential medical information. (See Exhibit Z)

The medical nature of Bates' disability is also documented in a letter to the City from Bates' heart specialist, Dr. John Smith, dated 12/18/03. The letter concerns Bates' "work related stress." The letter is directed to: "TO WHOM IT MAY CONCERN." The letter states that it would benefit Bates to consider early retirement because of Bates' "significant high blood pressure" that was difficult to control (Exhibit V).

Documents Amoroso completed and statements she made during her deposition further discredits her claim that she was not "privy" to Bates' confidential medical information and that she misunderstood Bates' work restriction. A memo that Amoroso completed, dated February 20, 2004, directed to Ed Overton of the Police Personnel Board, states that Bates had submitted an application for retirement and a copy of "California's Report of Occupational Injury or Illness" relating to Bates' disability was attached. Under illness or injury, it states: "Cumulative – Heart /Cardiovascular (Exhibit U).

In a letter Amoroso wrote to retired officer Rey Dominguez, dated August 26, 1999, she acknowledged that she reviewed his doctor's assertions and the submitted medical evidence

(Exhibit E of Bates' opposition to the City's motion for summary judgment). The letter is proof that Amoroso knew she was not being truthful when she claimed to not have access to an officer's confidential medical information.

Amoroso also stated in her deposition that her subordinates read confidential medical records and worked closely with the City's Medical Director to ensure that there are no misunderstandings about an officer's work restriction. It's absurd for Amoroso and the City to claim she was not authorized to review confidential medical information just as her subordinates, to whom she delegated that authority (See Exhibit E; page 15, lines 5-9; page 17, lines 18- 25 and page 18, lines 1-3).

It should also be noted that as the Deputy Chief of the Bureau of Administration, Amoroso was custodian of confidential personnel, as well as, medical and psychiatric records of employees of the Police Department (See Exhibit X).

When asked in her deposition what she would do generally when an officer put in an application for disability retirement, Amoroso stated: "**Review the medical**...," and quickly stopped herself. She continued to state that she would review the bottom line of the City's physician in terms of an officer's work restriction. It should be clear from this response by Amoroso that she reviewed medical records and the false claims she made in her deposition that she did not were rehearsed. (See Exhibit F; page 9, line 25; page 10, lines 1-9)

When Amoroso was asked in her deposition what her independent recollection was regarding the nature of Bates' disability, her reply was: "That he had a situation with his heart that was affected by psychological stress, heart condition of some type" (Amoroso deposition, page 13, lines 18-25; and page 14, lines 1 and 2; See Exhibit G). It is beyond commonsense and logic for Amoroso and the City to say that Amoroso misunderstood Bates' work restriction to

avoid psychological stress to mean he had a psychological disability, as opposed to a medical disability, after she knew Bates had a heart condition affected by psychological stress.

Not only did Amoroso not avail herself of Bates' confidential medical records which she was entitled to, she failed to review Bates' performance appraisals and documented work assignments which are not considered confidential medical information. Performance appraisals and work assignments can provide a great deal of insight into an officer's psychological status.

Relevant portions of Bates' performance appraisal that was accepted by the Chief of Police approximately two weeks prior to his retirement dispel any notion that Bates had a psychological disability. In regards to "Job Expertise," Bates' rating was "Exceptional." The rater states: "I don't usually rate a new supervisor exceptional in this area, but I'd like to recognize your accomplishments in getting to know a new unit, a new team, and a new job very quickly and effectively." In the "Judgment" category of Bates' performance appraisal, he was rated "Above Standard." Relevant portions of the "Judgment" category states: "You anticipate and handle routine and emergency issues quickly and effectively. **Your decisions are logical and appropriate.**" A relevant portion of the "Initiative and Reliability" category state: "Your performance under pressure was above the expectations for this position. **You are a very conscientious and productive supervisor**." Clearly, Bates performance ratings would not be consistent for someone with a psychological disability (Exhibit S).

Bates' job assignments also dispel any notion that Bates had a psychological disability. Leading up to his retirement, Bates worked for three years with the work restriction to **avoid psychological stress**. He worked for one full year in Internal Affairs and then transferred to patrol as a supervisor in order to reduce his perceived stress, in order to help control his blood pressure. Certainly, police officials would not place Bates in a supervisory position where he had

to make split-second decisions under life and death emergency conditions if they believed that Bates had a psychological disability.

Bates later became manager of the School Safety Unit, supervising five full-time employees and approximately 180 part-time School Crossing Guards. The above work assignments of Bates all required a great deal of responsibility and the ability to make sound decisions under pressure. These assignments were facilitated by the Police Personnel Unit which was under Deputy Chief Amoroso's command. (See Exhibit R, page 2) At no time during the above assignments did Amoroso or the Police Department question Bates' suitability to carry a firearm either on duty or off-duty concealed.

It should also be noted that at the same time Amoroso denied Bates a CCW permit because of her stated belief that he had a psychological disability, Bates was transferred control of several large capacity pistol magazines that were used in his official duties. Bates was informed in a letter that the "large capacity ammunition feeding devices" are for your exclusive use only. Amoroso told Bates he could also possess firearms in his home, but she would not authorize him to carry a concealed weapon. At the time that Bates was transferred control of the high capacity magazines, it was illegal for the general public to possess such devices. However, private citizens could obtain CCW permits from law enforcement agencies. (See Exhibit I)

It should be sufficiently clear to this court that the facts and evidence do not support Amoroso's claims that she misunderstood Bates' work restriction, and that she was not "privy" to his medical records. The facts and evidence support a finding that Amoroso knowingly and intentionally violated Bates rights to due process by denying him a CCW permit, without a hearing, and that she was not acting in good faith.

Further evidence that Amoroso knowingly and intentionally violated Bates rights to due process is the fact that she disregarded the Police Department's very own policy that was crafted

in a way to prevent administrators from reaching the wrong conclusions about an officer's work restriction(s). The policy specifically state police administrators should clear any questions or confusion about work restrictions with the City Medical Director. This policy apparently was not disclosed by the City during discovery. The policy also states: **"Until such time as any questions or confusion are resolved by the City Medical Director, all assignments decisions will be made consistent with the conditions stated by the employee."** In other words, police officials should make decisions about work restrictions based on what the employee says instead of relying on their own interpretation. Yet, when Bates contacted Amoroso and explained that his disability was medical related, she never contacted the City's Medical Director to clarify Bates' work restriction (See exhibit D). Amoroso said in her deposition that she knew she was not supposed to interpret work restrictions as to whether someone has a psychological condition or a medical condition. Yet, she did so knowing that her actions violated departmental policy. (Amoroso deposition, page 24, lines 14-24; See Exhibit J)

Amoroso also stated in her deposition that she was not aware of Bates ever having a mental fitness evaluation. Even though Amoroso was steadfast in her claim that Bates' work restriction meant he had a psychological disability, she never required Bates to submit to or volunteer to take a psychological evaluation. Amoroso also did not offer Bates post-employment psychotherapy, even though the police department's psychological services was under her command (See Exhibit X, page 3). Amoroso told Bates he would not get a CCW permit or a hearing, and she stated that her decision was final.

The clear intent of Doyle, Frimann and Dodson in presenting the false claim that Amoroso misunderstood Bates' work restriction was to improperly influence this court in its decision by hiding the fact that Amoroso denied Bates a CCW permit, without a hearing,

knowing that her decision was unlawful and violated departmental policy. This is a clear case of "fraud on the court."

2. The City made false claims that the decision by Amoroso to deny Bates a CCW permit was reversed upon receipt of a letter from Bates' physician clarifying his work restriction.

The City's plan to defraud this court did not end with the false claims that Amoroso was not "privy" to Bates' confidential medical records and she therefore misunderstood his work restriction to avoid psychological stress. The City deliberately misled this court as to the events that occurred months later after the initial decision by Amoroso to deny Bates a CCW permit in April 2004.

On or about August 25, 2004, four months after Amoroso denied Bates' CCW permit, Captain Tuck Younis received a letter from Bates physician, Dr. Jonathan Ng, clarifying Bates' work restriction to avoid psychological stress. The letter states that Bates' work restriction of "preclusion from psychoemotional stress" is a term of arts frequently used in assessing work-related disability. The letter further states: **"I do not think Mr. Bates has any problem or difficulty in carrying a concealed weapon just because of the labeling of his disability using the term "Preclusion from Psychoemotional Stress."** (See Exhibit A)

When Captain Tuck Younis received the letter from Dr. Ng in August 2004, any guess work about the nature of Bates' disability retirement was eliminated. It was clear that Bates retired due to a medical disability. Younis and City officials knew, without a doubt, Bates did not have a psychological disability. The City makes this fact very clear in their summary judgment motion. In the factual background the City declares:

> "Several months after the initial denial, the San Jose Police Department received clarifying information from Bates' physician which essentially stated that Bates did not have a psychological disability and was an appropriate candidate to carry a concealed

weapon." (See Exhibit N, lines 19-22)

In the summary judgment hearing, the City argued:

"**As Mr. Kirchick says, it's crystal clear that the evidence shows that he didn't have a psychological disability**."

The full contours of Bates' right to a hearing under Section 12027.1(b)(1) of the Penal Code were established at the time the letter was received by Younis. Yet, **Younis and City officials denied Bates a CCW permit, without a hearing, knowing with absolute certainty that Bates did not have a psychological disability; and that he was an appropriate candidate to carry a concealed weapon.** Section 12027.1(b)(1) requires a hearing before a three-member hearing board on any denial of a CCW permit to a retiring officer, except for psychological disability. This court found that the hearing requirement of Section 12027.1(b)(1) implicates a constitutionally protected interest.

On page 4, lines 17-21, of the City's reply to Bates' opposition to the City's Motion for Summary Judgment or Partial Summary Judgment, the City makes it clear that City officials were aware of the hearing requirement of California Penal Code Section 12027.1. The City states: "As noted by the court in *Unland v. Block* (1997) 59 Cal.App.4th 1537, the 1988 amendments to Penal Code section to 12027.1 changed the law regarding CCW endorsements in two ways. It simultaneously created an **automatic denial rule** for Officers who retired because of **psychological disabilities** and, at the same time, provided a new noticed hearing procedure for **all other denial** or revocation cases." (See Exhibit O)

Doyle, Frimann and Dodson deliberately misled this court in the factual background of its summary judgment motion by making the following false claim that the decision to deny Bates a CCW permit was reversed upon receipt of the clarifying letter from Dr. Ng. The City alleged the following:

"It is undisputed that upon receipt of this clarifying information from Bates' physician the Police Department reversed its earlier decision and granted Bates the right to carry a concealed weapon." (See Exhibit N, lines 22-24)

This claim by Doyle, Frimann and Dodson is absolutely false. As explained above, Younis, and City officials refused to grant Bates a CCW permit, without a hearing, upon receipt of the clarifying information. The City's very own admissions in its initial responses to Bates' lawsuit (Complaint for Damages) contradicts the above claim the City now makes that the Police Department reversed the earlier decision upon receipt of the clarifying information. In the City's responses to claims in Bates' complaint listed under "First Cause Of Action Against Individual Defendants," relevant paragraphs 8, 9 and 11, the City admitted that Captain Younis received the letter from Bates' doctor on or about August 25, 2004. The City admitted that on or about September 24, 2004, Younis advised a director of the police union that Bates did not have the right to appeal the denial of his CCW authorization. Also in that response, the City admitted that **"Toward the end of December 2004, defendant Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff"** (See Exhibit B). During his deposition, Bates informed the City that he had notes indicating that Captain Younis called him on December 14, 2004 and informed him the decision to deny him a CCW permit had been reversed. (Bates deposition, page 58, lines 3-7, Exhibit Q). On the other hand, Younis stated in his deposition he had no recollection when the decision was changed (Younis deposition, page 31, lines 14-23). The City's position now that the decision was changed in August 2004 is ludicrous and is intentional fraud.

Bates submits the "demand letter" that he sent to Chief of Police Rob Davis, dated October 5, 2004, as further proof that the Police Department did not reverse its earlier decision and grant Bates a CCW permit in August 2004, upon receipt of the clarifying letter from Dr. Ng.

The demand letter is date-stamped as being received in Chief Davis' office on October 7, 2004. The demand letter states that a copy of the letter from Dr. Ng to Captain Younis dated, August 25, 2004, clarifying Bates' work restriction was included. The demand letter states that Bates was denied his CCW permit, without a hearing, on or about September 10, 2004; and Bates was again denied a CCW permit, without a hearing, about two weeks later. The demand letter establishes that as of October 5, 2004, Bates had not been authorized to carry a concealed weapon. The demand letter also documents the hearing requirements of Penal Code Section 12027.1(d) (Exhibit C).

The demand letter discredits Captain Younis' claim in his sworn declaration that Chief Davis played no role whatsoever in either denying Bates a permit or in later reversing that decision and granting it to him (See Exhibit Y). A copy of the demand letter was sent to City Attorney Richard Doyle (See Exhibit C, end of page 3).

The evidence is indisputable that Captain Younis, Chief Davis and City Attorney Richard Doyle each received a copy of the letter from Dr. Ng that clarifies that Bates did not have a psychological disability. The evidence is also clear that Younis, Davis and Doyle each failed to grant Bates a CCW permit, without a hearing, after receiving Dr. Ng's letter. This is a violation of the hearing requirement of Penal Code Section 12027.1(b)(1). Doyle, Frimann, and Dodson used this scheme to hide this key fact from this court. It is impossible to believe that this court would have granted Younis, Davis and Doyle qualified immunity just as it granted Amoroso for claiming she misunderstood Bates' work restriction to mean he had a psychological disability. The evidence proves that Younis, Davis and Doyle knew Bates did not have a psychological disability, but denied him a CCW permit, without a hearing, anyway. "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law" (*Malley v. Briggs*, 475 U.S. 335, 341 (1986).

England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960) held that courts exercise the power to vacate judgments for fraud on the court when the fraud is established by clear and convincing evidence. The evidence is clear and convincing that Doyle, Frimann and Dodson perpetuated fraud on this court by presenting the false claims by Amoroso that she misunderstood Bates' work restriction because she was not "privy" to his confidential medical records; then falsely stating that Amoroso's decision was reversed by Younis upon receipt of the clarifying letter from Dr. Ng.

It is unquestionable that the fraud perpetrated by Doyle, Frimann and Dodson was directed at this court. It is also unquestionable that this court was improperly influenced in its decision by that fraud. In its finding of fact, the court simply restates the City's false claim that the decision to deny Bates a CCW permit was reversed by the City upon receipt of Dr. Ng's clarifying letter in August 2004. The court also granted Amoroso qualified immunity based on the false claims presented by Doyle, Frimann and Dodson.

C. BATES' COUNSEL SOLD OUT HIS INTERESTS IN VIOLATION OF UNITES STATES v. THROCKMORTON

The Supreme Court held in *United States v. Throckmorton* that a suit could be resurrected in a case where the attorney regularly employed corruptly sells out his client's interest to the other side. In such a case, "there has never been a real contest in the trial or hearing of the case." (See *United States v. Stonehill* No. 10-35789; D.C. No.3:65-cv-00127-PA)

Bates' counsel, Stuart Kirchick, was complicit in the City's fraud on the court. Kirchick entered a stipulation with the City to remove Captain Tuck Younis from Bates' lawsuit without any discussion with Bates and without Bates' permission. Bates only became aware of the stipulation after it had been filed with the court. The stipulation was made with the clear intent of shielding Younis from liability since Kirchick had argued in

Bates' "Complaint for Damages" that Younis denied Bates a CCW permit, without a hearing, after Younis received the letter from Dr. Ng. Kirchick argued in the "Plaintiff's Settlement Conference Statement" that Younis was one of the primary defendants who specifically violated California Penal Code Section 12027 and 12027.1. Kirchick also argued that the actions by Younis solidified Bates' *Monell* claim. It is unconscionable that Kirchick would enter into a stipulation with the City to remove Younis from Bates' lawsuit and not make the above arguments to this court in the summary judgment hearing. The facts are irrefutable that Younis violated Bates' constitutional rights to a due process hearing.

Relevant to the issue of collateral estoppel or issue preclusion, Kirchick failed to enter into the district court record a letter Bates sent to the Presiding Judge of the Superior Court and the judge's responding letter (Exhibits K and L). The letters clearly prove that Bates did not have a full and fair opportunity to litigate his small claims case. The letters also prove that no final judgment was made on the merits of Bates' claim that the City had violated his civil rights. Therefore, the small claims judgment has no preclusive effect under California preclusion law and is not entitled to the full faith and credit guaranteed by 28 USC Section 1738 (The Full Faith and Credit Act). The preclusion issue is addressed in the following section.

The actions by Kirchick were clearly meant to sell out Bates' interests to the City and undercut his chances of prevailing on the City's summary judgment motion. Kirchick actions are so contrary to the ethical obligations of an attorney to his client and the court; disciplinary sanctions are warranted. See ABA Model Rule 3.3(b). Rule 3.3(b) requires that an attorney disclose fraudulent conduct to the tribunal.

D. THE STATE COURT JUDGMENT RELIED UPON BY THE CITY FOR COLLATERAL ESTOPPEL IS "CONSTITUTIONALLY INFIRM" AND HAS NO PRECLUSIVE EFFECT UNDER 28 USC SECTION 1738 (FULL FAITH AND CREDIT ACT)

The Full Faith and Credit Act (28 USC Section 1738) commands a federal court to accept the rules of res judicata chosen by the state from which a judgment is taken (*See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883). The decision in Kremer establishes that procedures provided by a state must offer a full and fair opportunity to litigate the merits in order to be sufficient under the Due Process Clause of the Fourteenth Amendment. State proceedings must satisfy this minimum procedural requirement of the Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. The Supreme Court has repeatedly recognized 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. (*Allen v. McCurry,* 449 U.S. 90). The judgment rendered in a state proceeding in which a party was not offered a full and fair opportunity to litigate is "**constitutionally infirm**."

Under 28 USC Section 1738, as noted above, a federal court can only grant preclusive effect to a state court judgment if a court from the rendering state would also grant preclusive effect to that same judgment. In other words, federal courts must look to the preclusion law of the rendering state.

In asserting the defense of collateral estoppel, the City relies upon a judgment from the Small Claims Court of Santa Clara County that was rendered in the City's favor and against Bates. Bates filed the small claims action against the City in an attempt to recover the retainer he paid an attorney to assist him in securing his CCW permit. The judgment was entered on January 30, 2006.

Since the small claims judgment is from California, the preclusion law of California apply. California courts will only apply collateral estoppel if certain threshold requirements are met: (1) the issues must be identical; (2) the issue must have been actually litigated; (3) the issue must have been necessarily decided; (4) the decision must be final and on the merits; and (5) the parties must be the same from the prior proceeding, or in privity. After these threshold requirements are met, California public policy requires that a party must have been given a **full and fair opportunity to litigate** before collateral estoppel will apply. (See *Harmon v. Kobrin,* 9th Cir No. 00-15130; D.C. No. CV-99-00250-DFL)

California law also does not provide preclusive effect to a judgment rendered in Small Claims Court because of the informal nature of proceedings in Small Claims Court. There are no attorneys, no pleadings and no legal rules of evidence; there are no juries, no formal findings are made on the issues presented, and the proceedings are short (*Sanderson v. Nieman,* 17 Cal.2d 563). However, a small claims plaintiff, as was Bates, is collaterally estopped from relitigating the same issue if the record is "**sufficiently clear**" that the issue was litigated and decided against the plaintiff in the small claims action (*Pitzen v. The Superior Court of San Diego County* D043592; Super Ct. No. IC808974*)*.

Bates does not deny that the issue he seeks to litigate in the underlying case is similar to the issue he sought to litigate in the small claims proceeding, and that both Bates and the City were parties in that proceeding. However, Bates adamantly denies the City's assertion that there was actual litigation and a final judgment on the merits of his claim that his civil rights were violated.

The merits of Bates' claim that he was denied a due process hearing by the City was not litigated or even mentioned in the small claims proceeding. Bates was not allowed to testify, cross-examine any witnesses or present any evidence. **The proceeding lasted only about two**

minutes. The Commissioner made an immediate ruling, without any litigation, that implied the court lacked jurisdiction to hear the case or that Bates' complaint was defective. These assertions by Bates are corroborated in a letter from the Presiding Judge of the Santa Clara County Superior Court to Bates. The letter states: "From the description in your letter, Commissioner Saldivar found that, under the circumstances of your case, attorneys fees and related costs are not recoverable in a civil action" (See Exhibit L). Certainly this court can take judicial notice of the official letter from the Superior Court.

It is in the record; in Bates' opposition to the City's motion for summary judgment, that he made claims that no full hearing was held and that no testimony was allowed from witnesses or Bates (Exhibit P). The City is well aware that Bates did not receive a fair hearing. The City's legal adviser, Jim Brennan, was present. Bates informed the City in his deposition that he was not allowed to testify (Exhibit M). The City is well aware that Mr. Brennan also did not testify, and that witnesses Bates subpoenaed from the Police Department and City Attorney's Office refused to appear in court. City Attorney Richard Doyle, Defendant Chief of Police Rob Davis and Captain Tuck Younis were three of those witnesses. A copy of the letter Bates sent to the Presiding Judge of the Santa Clara County Superior Court expressing Bates' concerns about what happened in Small Claims Court was sent to the City Attorney's Office. The letter specifically states that Bates was not allowed to present his case, and that Bates did not **"have my day in court."** It's outrageous that the City would now claim a defense of collateral estoppel. (Exhibit K)

The City did not meet its burden to show from the record of the small claims proceeding that Bates' claim that he was denied a due process hearing was litigated and determined. See *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257-58. To support its defense of collateral estoppel, the City submitted two documents from the small claims hearing: A copy of the "NOTICE OF

ENTRY OF JUDGMENT" form from the Small Claims Court stating its finding that "Defendant does not owe plaintiff any money on plaintiff's claim." The other document is a copy of the complaint form that Bates submitted to the Small Claims Court that states his claim (See Exhibit W). No other evidence from the Small Claims Court was submitted by the City. In *Sons v. McManis;* CIV F 08-0840 AWI TAG, the court held that a complaint form and a "minute order form" from the Small Claims Court of Kern County, similar to the documents submitted by the City, could not be relied upon for collateral estoppel. The court held that the two forms did not comprise a record that was extensive enough to determine with some precision exactly what right was claimed and on what basis the small claims court made its decision. Even if the issue had been decided, the Sons court stated it would be disinclined to accord preclusive effect to the small claims judgment based on the thin record submitted. See also *Hernandez v. City of Los Angeles,* 624 F. 2d 935 (1980).

Under any reasonable analysis of the evidence presented by the City to support its issue preclusion claim, there is only doubt as to what transpired in the small claims proceeding. *Harris v. Jacobs,* 621 F.2d 341, 343, 9th Cir. 1980 states if there is doubt, however, collateral estoppel will not be applied. If the decision could have been rationally grounded upon an issue other than that which the defendant seeks to foreclose from consideration, collateral estoppel does not preclude relitigation of the asserted issue. See *Ashe v. Swenson,* 397 U.S. 436, 444, 90 S.Ct.1189, 1194, 25L.Ed. 2d 469 (1970.

The small claims judgment relied upon by the City for collateral estoppel would not be given preclusive effect by a court in California for the following reasons: (1) The record is not **sufficiently clear** as to what was litigated and decided and on what basis the Small Claims Court made its decision; There is no transcript, memorandum or a recording of the small claims proceeding; (2) The threshold requirements under

California preclusion law as discussed above were not completely met; There was no actual litigation in the small claims hearing; and there was no final judgment on the merits of Bates' claim that he was denied a due process hearing by Police officials; and (3) Bates was not given a **full and fair opportunity** to litigate his claim. Therefore, the judgment of the Small Claims Court is "constitutionally infirm," and it is a "void judgment." Since the small claims judgment would not be given preclusive effect by a court in California, it cannot be given preclusive effect by this court under the Full Faith and Credit Act. (*See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883). The judgment of this court holding that collateral estoppel is appropriate is a "void judgment" because it relies upon the "void judgment" from the Small Claims Court.

It is well settled that a judgment is **void** "if the court that considered it lacked jurisdiction of the subject matter, or if the parties or if [the court] acted in a manner inconsistent with due process of law" (*Watts v. Pickney* 752 F2d 406). There is absolutely no question that the Small Claims Court in Bates' case acted in a manner inconsistent with due process of law because Bates was not given an **opportunity to be heard**. The opportunity to be heard is one of the hallmarks of due process. *Watts v. Pickney* states that "A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside."

E. BATES WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO AN IMPARTIAL AND DISINTERESTED TRIBUNAL

The Due Process Clause entitles a party to an impartial and disinterested tribunal. This neutrality requirement preserves both the appearance and reality of fairness ensuring that a party can present his case before a court that is not predisposed to find against him. The Supreme Court stated "The requirement of neutrality has been

jealously guarded by this court." (*See Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980)

The impartial and disinterested tribunal that Bates is entitled to under the Due Process Clause did not exist during the hearing on the City's summary judgment motion. During the hearing, the court made the following inquiry: "Sort of unrelated to the motion, what are any damages in this case?" This question about damages was highly prejudicial to Bates, and as the court rightly pointed out, irrelevant to the City's summary judgment motion. The violation of ones right to procedural due process is actionable without proof of damages. However, Bates can prove he suffered significant damages. See *Haupt v. Dillard,* 17 F.3d 285.

The inquiry regarding damages reveals that this court was predisposed to find against Bates. At best, this inquiry shows that the court was not disinterested in the outcome of this case. At the worst, it demonstrates that the court was, in fact, biased and not the impartial tribunal Bates is entitled to under the Fifth Amendment Due Process Clause. This court seemed to do nothing more than bolster the City's case by giving credence to the City's false assertions. The City's Motion for Summary Judgment or Partial Summary Judgment is **wholly frivolous.** It is a total fabrication based, in part, on the perjured testimony of Amoroso and Younis; and on a collateral estoppel defense that has no legal basis. This is a clear violation of FRCP Rule 11 which forbids parties to file motions that have no legal basis or are based on too little investigation or on facts that are known to be false.

In *Beaty v .United States,* 937 F.2d 288 (6th Cir., 1991), the court stated: **"A central tenet of our republic---a characteristic that separates us from totalitarian regimes throughout the world--- is that the government and private citizens resolve disputes on an equal**

playing field in the courts. When citizens face the government in the federal courts, the job of the judge is to apply the law, not to bolster the government's case."

There can be no denying that the court's inquiry regarding damages is inconsistent with the neutrality requirement of the Due Process Clause of the Fifth Amendment. The judgment of this court is, therefore, a "void judgment."

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this court grant Plaintiff relief from judgment pursuant to FRCP Rule 60. Plaintiff respectfully request that this court deny Defendants' Motion for Summary Judgment or Partial Summary Judgment.

Respectfully submitted,

Date: FEBRUARY 19, 2013

Plaintiff Frederick Bates, Pro Se

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,	)	C-06-05302 RMW
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
VS.	)	APRIL 26, 2013
CITY OF SAN JOSE, ET AL.,	)	PAGES 1-2
DEFENDANTS.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: (NO APPEARANCE)

FOR THE DEFENDANT: OFFICE OF THE CITY ATTORNEY
BY: RICHARD D. NORTH
200 EAST SANTA CLARA STREET
SAN JOSE, CALIFORNIA 95110

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

SAN JOSE, CALIFORNIA APRIL 26, 2013

P R O C E E D I N G S

(COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: FIRST MATTER, C-6-5302, BATES VERSUS CITY OF SAN JOSE, ON FOR MOTION FOR RELIEF FROM JUDGMENT.

MR. NORTH: GOOD MORNING, YOUR HONOR. RICHARD NORTH FOR THE DEFENDANTS.

THE COURT: DO YOU HAVE ANY KNOWLEDGE AS TO WHETHER THE PLAINTIFF IS GOING TO SHOW?

MR. NORTH: I HAVE NO KNOWLEDGE, YOUR HONOR.

THE COURT: I'M GOING TO ASK YOU TO STAY ANOTHER FIVE MINUTES OR SO AND SEE IF HE COMES.

MR. NORTH: VERY WELL.

THE COURT: THANK YOU.

(A RECESS WAS TAKEN AND THE MATTER WAS RECALLED.)

THE CLERK: RECALLING THE BATES MATTER.

MR. NORTH: RICHARD NORTH FOR THE DEFENDANTS, YOUR HONOR.

THE COURT: ALL RIGHT. YOUR MOTION IS -- OR THE MOTION TO DISMISS IS GRANTED.

MR. NORTH: THANK YOU.

(THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-FILED

CIVIL MINUTES

DATE: April 26, 2013

Case No. C-06-05302-RMW **JUDGE: Ronald M. Whyte** **TIME IN: *5 mins.***

BATES **-V- CITY OF SAN JOSE, et al.**
Title

No Appearance **R. North**
Attorneys Present (Plaintiff) **Attorneys Present (Defendant)**

COURT CLERK: Jackie Garcia **COURT REPORTER: Lee-Anne Shortridge**

PROCEEDINGS

MOTION FOR RELIEF FROM JUDGMENT

ORDER AFTER HEARING

Hearing Held. No appearance from the plaintiff. The Court to deny the motion. Plaintiff's motion is untimely and he has failed to present adequate evidence supporting either of his theories for relief. The Court to issue a written ruling. The matter is deemed submitted.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FEDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE et al.,

Defendants.

Case No. C-06-05302-RMW

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

[Re Docket No. 43]

Frederick Bates moves for this court to vacate its previous judgment because, he argues, it is void and based upon fraud on the court. Pl.'s Br., Dkt. No. 43; *see* Fed. R. Civ. Proc. 60(b)(4), (d)(3). The court held a hearing on the matter on April 26, 2013. Bates did not appear. Having considered the papers, the court DENIES Bates' motion. His motion is untimely and he has failed to present adequate evidence supporting either of his theories for relief.

Dated: April 26, 2013

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

From: mrb10364evr@aol.com
To: Jackie_Garcia@cand.uscourts.gov
Date: 07/10/2013 11:56 AM Subject:
Re: Bates v. City of San Jose

Thanks for the notice regarding my motion to reopen the time to file an appeal. However, I am troubled by the references made to a hearing being held on April 26, 2013 on my motion for relief. The court has noted that I failed to appear for the hearing in its order denying my rule 60 motion, the civil minutes and my motion to reopen the time to file an appeal. These references imply that I was somehow in default for not appearing at the hearing. I was never notified about a hearing on my motion for relief. After I filed my motion for relief, I spoke to a court employee (Cita Escolano?)on the phone and she informed me the court would notify me if there would be a hearing on my motion. I filed my reply brief on April 12, 2013, in person. Ms Escolano informed me that there would not be a hearing on my motion for relief and that I did not have to appear on the hearing date. She informed me the motion would be decided on the papers. She also told me that the judge's decision would be sent to my residence. I have a witness that will verify what Ms Escolano told me. What Ms Escolano told me is consistent with USDC Local Civil Rule 7-6 which states that no oral testimony will be received in connection with any motion, unless ordered by the assigned judge. Under the What Is A Hearing section in Chapter 12 of the Pro Se Litigant's Handbook handed out by this court, it also states that many judges choose to cancel or vacate scheduled hearings. It states judges are very busy and will decide cases "on the papers." It further states that a hearing date is required when a motion is filed, but there will not necessarily be a hearing on a particular motion. I respectfully request an explanation as to the reason Ms Escolano provided me with information that was apparently inaccurate. Since a hearing on a motion requires an order by the assigned judge per Local Rule 7-6, could you please provide me with a copy of Judge Whyte's order setting the hearing and proof that each party was served notice. Could you please provide me with the proof that each party was served with the order denying my motion for relief and advise me if there's a transcript of the hearing?

Thanks in advance for your cooperation!

Fred Bates

Fred Bates
1069 Lenoir Rd
Magnolia, MS 39652
(408) 472-4387

July 31, 2013

Jackie Garcia, Courtroom Clerk for Judge Whyte
United States District Court – Northern District of California
280 South First Street
San Jose, CA 95113

Reference No. C06-05302 RMW

Dear Ms. Garcia,

This letter is a follow-up to the email I sent you on July 10, 2013. In the email, I stated that several court documents indicated I failed to appear for the hearing on April 26, 2013, on my Rule 60 Motion. I asked that you send me a copy of Judge Whyte's order setting the hearing per Local Rule 7-6. I asked for the proof (certificate of service) that each party was served with notice of the order setting the hearing, as well as, the order denying my motion. I also asked for an explanation as to the reason why Ms. Escolano provided me with inaccurate information regarding the hearing on my motion. She stated there would be no hearing. Ms. Escolano said the motion would be decided on the papers. She said I did not have to appear on the hearing date and the decision of the court would be mailed to my residence. As of the date of this letter, I have not received a response from you. I ask that you respond with the information I requested by email at mrb10364evr@aol.com or by mail at my address listed above. The issues I raise could have an influence on my appeal of the court's order denying my Rule 60 Motion. A copy of my email from July 10, 2013, is enclosed. You have my sincere apology if my requests cause any inconvenience(s) for the court.

Respectfully submitted,

Fred Bates

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FEDERICK BATES, Plaintiff, v. CITY OF SAN JOSE et al., Defendants.	Case No. C-06-05302-RMW **Response to Letter** [Re Docket No. 68]

Federick Bates has filed a request with the court for (1) a copy of any order signed by the undersigned setting a hearing on his motion for relief from judgment and proof of its service; (2) a copy of the order denying the motion for relief and proof of its service; and (3) advice as to whether there is a transcript of the hearing.

On March 5, 2013, defendants filed a stipulation, signed by plaintiff and defendants, modifying the briefing schedule for plaintiff's motion and setting the hearing on the motion for April 26, 2013, at 9 a.m. *See* Dkt. No. 47. The court approved the stipulation on March 18, 2013. *See* Dkt. No. 50. It is unclear whether the plaintiff received a copy of that order.

There was no substantive hearing on April 26, the stipulated hearing date, as plaintiff did not appear. Plaintiff apparently expected the court would send out an order setting the date pursuant to

the stipulation. Because he did not receive one, he did not appear. Although the court granted the parties' stipulation requesting April 26 as the hearing date, a hearing was not necessary or required, and the court submitted the matter on the papers.

Dated: August 12, 2013

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

United States District Court
For the Northern District of California

EXHIBIT E

RESPONSE TO LETTER

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
Phone Number: (408) 472-4387
E-mail Address: mrb10364evr@aol.com

Pro Se

FILED

SEP 27 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Frederick Bates

Plaintiff,

vs.

CITY OF SAN JOSE; ROBERT DAVIS, City of San Jose Chief of Police; ADONNA AMOROSO, City of San Jose Deputy Chief of Police

Defendants.

Case Numbers: No. 13-16397;
No. 5:06-cv-05302-RMW

REQUEST FOR INDICATIVE RULING PURSUANT TO FRAP 12.1 AND FRCP 62.1

Plaintiff – Appellant Frederick Bates ("Bates") filed a "motion for leave to file in district court a motion for clarification of order" with the Ninth Circuit Court of Appeals dated September 9, 2013. The Appellate Court issued an order filed on September 19, 2013, denying Bates' motion without prejudice to renewal after compliance with Federal Rule of Appellate Procedure 12.1 (court of appeals may remand for further proceedings if the district court states that it would grant the motion or that the motion raises a substantial issue).

Bates raises two substantial issues in his motion for leave with the Appellate Court. First issue is the discrepancy between Judge Whyte's ruling as stated in the official transcript of the

hearing of Bates' Rule 60 Motion on April 26, 2013, and Judge Whyte's written ruling based on the Civil Minutes of the hearing. The judgment denying Bates' Rule 60 Motion as stated by the Civil Minutes and written ruling indicate a decision on the merits, and the judgment granting Defendants' motion to dismiss as stated by the transcript of the hearing indicate a judgment by default. It is clear that there are two disparate rulings on Bates' Rule 60 Motion.

The second substantial issue surrounds the motion to dismiss itself. The motion to dismiss was not made during the hearing according to the transcript and no record of the motion is apparent in the docket of the District Court. The Defendants' motion to dismiss is a mystery.

The two substantial issues discussed above need clarification in order for Bates to address jurisdictional and due process issues relative to his pending appeal. A copy of Bates' motion for leave filed with the Court of Appeals and the attached exhibits are enclosed, as well as, a copy of the ORDER from the Court of Appeals.

Plaintiff- Appellant respectfully requests that this court issue an INDICATIVE RULING that it will grant a MOTION FOR CLARIFICATION OF ORDER by Plaintiff if the Court of Appeals remand for further proceedings.

Respectfully submitted,

Date: September 25, 2013

Plaintiff- Appellant Frederick Bates

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE et al.,

Defendants.

Case No. C-06-05302-RMW

STATEMENT RE REQUEST FOR INDICATIVE RULING

[Re Docket No. 77]

On September 19, 2013, the Ninth Circuit denied Frederick Bates' "motion for leave to file in district court a motion for clarification of order," which it construed as a motion for remand. Dkt. No. 76. The Ninth Circuit indicated that it would reconsider the issue if Bates filed a motion in this court and this court indicated that it was likely to grant Bates' motion or that it raised a substantial issue. Dkt. No. 76; *see also* Fed. R. App. P. 12.1.[1]

Bates has now filed a "request for indicative ruling pursuant to FRAP 12.1 and FRCP 62.1" with this court. *See* Dkt. No. 77. Although the relief Bates seeks is unclear, he argues this court should decide two substantial issues before the Ninth Circuit considers his appeal.

[1] "If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue." Fed. R. App. P. 12(a).

First, Bates argues that there is a discrepancy between this court's statements from the bench at an April 26, 2013 hearing[2] on Bates' Rule 60 motion and this court's written order with respect to Bates' Rule 60 motion. *Compare* April 26, 2013 Order, Dkt. No. 55 *with* April 26, 2013 Transcript, Dkt. No. 71. Bates argues that the court's written order with respect to his Rule 60 motion indicated a decision on the merits, which differed from the court's statement at the hearing which indicated a default. The court acknowledges that what it said at the time set for hearing on Bates' motion for relief was incorrect. The court should have said, "the motion for relief is denied" rather than defendants' "motion to dismiss [plaintiff's claim for relief] is granted." Because Bates was not present, no argument was made and the only substantive statement made was the court's statement that the motion was dismissed.[3] Although the court did not indicate at the hearing whether it was dismissing the motion because of default or on the merits, it was dismissed on the merits. In preparation for the hearing, the court had reviewed all of the papers and reached a decision. Because no one appeared to convince the court to alter its decision, the court's decision to deny plaintiff relief under Rule 60 became the order.

Bates also argues he needs clarification as to the existence of a motion to dismiss. Defendants did not file a motion to dismiss nor would one have been appropriate given that the case had been closed since July 2008 when this court entered judgment. The court assumes that Bates' concern is based on the court's statement at the end of the April 26, 2013 hearing, to counsel for defendant that "Your motion is -- or the motion to dismiss is granted." April 26, 2013 Transcript 2. Defendants did not make a motion. The court's intention was to indicate that it had found in favor of defendants as to Bates' Rule 60 motion for relief from judgment. As the transcript indicates, the hearing was called to resolve a "motion for relief from judgment." April 26, 2013 Transcript 2. The Rule 60 motion for relief from judgment was the only motion at issue in the hearing and the only motion at issue in the case at the time of the hearing. At the hearing, the court denied Bates' Rule 60 motion and explained its decision in an order posted later that day. *See* Order, Dkt. No. 55.

[2] Bates argues in his motion for leave before the Ninth Circuit that he was not notified of the hearing, but the April 26, 2013 hearing was held pursuant to a stipulation between Bates and defendants. *See* Dkt. No. 50.

[3] As explained in the next paragraph, the court's exact language at the hearing was imprecise, but did not indicate a decision based on default.

Therefore, the court finds that Bates has not raised any substantial issues, and, to the extent he seeks relief related to these issues, the court would deny it.

Dated: October 25, 2013

RONALD M. WHYTE
United States District Judge

United States District Court
For the Northern District of California

FILED

JUL 31 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK BATES, Plaintiff - Appellant, v. CITY OF SAN JOSE; et al., Defendants - Appellees.	No. 13-16397 D.C. No. 5:06-cv-05302-RMW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted July 21, 2015**

Before: CANBY, BEA, and MURGUIA, Circuit Judges.

Frederick Bates appeals pro se from the district court's post-judgment order denying his motion for relief from judgment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the denial of Bates' motion to vacate under Fed. R. Civ. P. 60(b)(4), *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(9th Cir. 1995), and for an abuse of discretion the denial of Bates' motion to vacate under Fed. R. Civ. P. 60(d)(3), *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). We affirm.

The district court properly determined that Bates was not entitled to relief under Rule 60(b)(4) because the district court's prior judgment was not void due to jurisdictional error or a violation of due process. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) ("Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.").

The district court did not abuse its discretion in denying Bates relief under Rule 60(d)(3) because Bates failed to establish by clear and convincing evidence that the alleged scheme produced a "fraud on the court." *Estate of Stonehill*, 660 F.3d at 443-44 ("Courts have inherent equity power to vacate judgments obtained by fraud.").

We reject Bates' contentions that the district court improperly corrected its "judgment," or that it failed to provide Bates with notice of the hearing on his motion.

Bates' opposed motion to vacate the district court's judgment, filed on September 25, 2014, is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,	)	C-20-07609 BLF
	)	
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
	)	
VS.	)	AUGUST 12, 2021
	)	
CITY OF SAN JOSE, ET AL.,	)	PAGES 1-16
	)	
DEFENDANTS.	)	
	)	

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: FREDERICK BATES
IN PROPRIA PERSONA
1235 MUIRKIRK COURT
FOLSOM, CALIFORNIA 95630

FOR THE DEFENDANTS: OFFICE OF THE CITY ATTORNEY
BY: ARDELL JOHNSON
200 EAST SANTA CLARA STREET, 16TH FLOOR
SAN JOSE, CALIFORNIA 95113

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

SAN JOSE, CALIFORNIA AUGUST 12, 2021

P R O C E E D I N G S

(ZOOM PROCEEDINGS CONVENED AT 9:03 A.M.)

THE CLERK: OKAY, YOUR HONOR. I BELIEVE WE'RE READY TO BEGIN.

THE COURT: ALL RIGHT. GOOD MORNING. GOOD TO SEE YOU.

LET'S CALL THE CASE AND GET YOUR APPEARANCES.

THE CLERK: MR. JOHNSON, IF YOU WANT TO TURN OFF THE VIDEO ON ONE, JUST MUTE YOUR VIDEO. THAT WAY WE'RE NOT SEEING YOU TWICE. THERE YOU GO. THEN YOU STILL HAVE YOUR BACKUP.

OKAY. CALLING CASE 20-7609, BATES VERSUS CITY OF SAN JOSE, ET AL.

IF YOU WOULD PLEASE STATE YOUR APPEARANCES, AND IF WE COULD BEGIN WITH THE PLAINTIFF AND THEN MOVE TO DEFENDANT.

THE COURT: MR. BATES, I THINK YOU'RE ON MUTE.

I'M NOT HEARING HIM.

MR. BATES: I UNMUTED.

THE COURT: OKAY. I JUST NEED YOU TO SPEAK UP A LITTLE BIT, SIR.

MR. BATES: OKAY. HOW'S THAT?

THE COURT: THAT'S BETTER. SOMETIMES WHEN YOU USE THE HEADPHONES, IT ACTUALLY MAKES IT HARDER TO HEAR. BUT IF YOU SPEAK UP, THAT SHOULD WORK FINE.

MR. BATES: I'M SORRY, YOUR HONOR.

THE COURT: THAT'S NO PROBLEM.

MR. BATES: OKAY. PLAINTIFF FRED BATES APPEARING PRO SE.

THE COURT: GOOD MORNING.

MR. JOHNSON: GOOD MORNING, YOUR HONOR.

ARDELL JOHNSON APPEARING FOR THE DEFENDANTS.

THE COURT: GOOD MORNING, MR. JOHNSON.

ALL RIGHT. THIS IS THE CITY'S MOTION TO DISMISS THE COMPLAINT AND DECLARE MR. BATES A VEXATIOUS LITIGANT.

MR. JOHNSON, YOUR PAPERS WERE VERY COMPLETE. IS THERE ANYTHING YOU'D LIKE TO ADD?

MR. JOHNSON: NO, YOUR HONOR. THANK YOU.

THE COURT: OKAY.

AND, MR. BATES, I RECOGNIZE THE SERIOUSNESS OF A VEXATIOUS LITIGANT ORDER AND I WANT TO GIVE YOU FULL OPPORTUNITY TO BE HEARD, SIR, SO I'M READY FOR YOUR ARGUMENT.

MR. BATES: WELL, I OPPOSE THE CITY'S MOTION TO DECLARE ME A VEXATIOUS LITIGANT BECAUSE I'M SURE YOU'VE READ OVER MY COMPLAINT AND MY OPPOSITION, AND I'M SURE YOU'RE AWARE THAT I BRING UP SOME VERY SERIOUS ISSUES.

AND ALSO I -- BY PRECEDENT THAT WAS SET IN TURNER V. PLEASANT, I'M ENTITLED TO BRING AN INDEPENDENT ACTION IN EQUITY.

IN THAT CASE -- THE PLAINTIFFS IN THAT CASE FILED SEVERAL MOTIONS AND COMPLAINTS AND APPEALS, JUST AS I HAVE, AND EVEN

REQUESTED THE JUDGE RECUSE HIMSELF, AND THEY WERE ALL DENIED.

IT WAS ONLY WHEN THEY FILED THE INDEPENDENT ACTION IN EQUITY, WHICH WAS ALSO DENIED BY THE DISTRICT COURT, THEY APPEALED AND THE FIFTH CIRCUIT OVERRULED THE DISTRICT COURT AND GRANTED THE PLAINTIFFS THEIR INDEPENDENT ACTION IN EQUITY.

SO I'M NOT A VEXATIOUS LITIGANT. I'M JUST MERELY STANDING UP FOR MY RIGHTS.

AND I BELIEVE MY ACTIONS HAVE ALL BEEN LAWFUL, CONSISTENT WITH STATUTORY LAW, AS WELL AS CASE LAW.

THE COURT: SO THIS ISN'T YOUR FIRST INDEPENDENT ACTION IN EQUITY, THOUGH, IS IT?

MR. BATES: WELL --

THE COURT: YOU'VE RAISED THIS ISSUE BEFORE AND THE NINTH CIRCUIT HAS REVIEWED IT.

MR. BATES: RIGHT. I -- I RAISED IT BEFORE AS AN INDEPENDENT ACTION IN EQUITY.

BUT IT REALLY, REALLY WAS -- IT WAS HEARD AS A RULE 60 MOTION BECAUSE IT REALLY AT THAT TIME WAS NOT A NEW COMPLAINT.

THIS IS A NEW COMPLAINT.

THE COURT: WELL, YOU FILED A CASE THAT JUDGE DAVILA HEARD, DIDN'T YOU?

MR. BATES: NO, YOUR HONOR. I -- MY CASE WASN'T HEARD BY JUDGE DAVILA.

THE COURT: ALL RIGHT. IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO DISCUSS THIS MORNING? I'LL TURN BACK TO

MR. JOHNSON.

MR. BATES: OH, I HAVE QUITE A FEW THINGS I'D LIKE TO DISCUSS.

I WOULD LIKE TO DISCUSS, YOU KNOW, THEIR -- THEY WANT ME TO BE DECLARED THE VEXATIOUS LITIGANT AND THAT I'VE ABUSED THE JUDICIAL PROCESS.

BUT AS YOU READ IN MY OPPOSITION, IT WAS -- IT HAS BEEN THE CITY THAT HAS CONSISTENTLY ABUSED THE JUDICIAL PROCESS. IT BEGAN WITH MY SMALL CLAIMS CASE WHERE I SUBPOENAED WITNESSES FOR THE CITY, THEY REFUSED TO EVEN APPEAR IN COURT. THERE WAS NO LITIGATION AT ALL IN THAT SMALL CLAIMS CASE, NONE WHATSOEVER. THE CITY WAS VERY WELL AWARE OF THAT.

AND YET, THEY MADE THAT DEFENSE OF COLLATERAL ESTOPPEL KNOWING THAT THERE WAS NO LITIGATION.

AND AS I STATED IN MY OPPOSITION, THEY -- THE REQUIREMENTS FOR, FOR ISSUE PRECLUSION -- AND IN YOUR CASE -- IN A CASE THAT YOU RULED ON, IN RE: SPEILBAUER, YOU SAID WHEN THE STATE COURT JUDGMENT IS THE BASIS FOR ISSUE PRECLUSION, THE COURT HAS TO FOLLOW THE LAW OF THE STATE WHERE THAT JUDGMENT WAS RENDERED.

THAT'S PRETTY CLEAR.

THE COURT, IN MY UNDERLYING COMPLAINT, DIDN'T FOLLOW THE PRECLUSION LAW IN CALIFORNIA. THERE'S NO LITIGATION AT ALL.

BUT ALSO, THERE'S NO RECORD AT ALL AS TO WHAT HAPPENED IN THAT CASE BECAUSE NOTHING HAPPENED IN THAT CASE.

THE COURT: I BELIEVE THE NINTH CIRCUIT HAS ALREADY

CONSIDERED THAT ARGUMENT.

MR. BATES: WELL --

THE COURT: I HAVE TO FILE -- YOU KNOW I'M BOUND TO FOLLOW THE NINTH CIRCUIT? YOU UNDERSTAND THAT? IT'S NOT MY PREROGATIVE TO DISAGREE WITH A HIGHER COURT.

MR. BATES: WELL, THE -- CERTAINLY THE TURNER CASE STATES THAT IN --

THE COURT: DID YOU HAVE A FULL CITATION FOR THAT TURNER CASE? BECAUSE I CAN'T -- I COULDN'T LOOK THAT UP. YOU DIDN'T GIVE ME AN OFFICIAL CITATION. I DON'T -- IT LOOKS LIKE SOME KIND OF DOCKET THING, BUT I DON'T HAVE ACCESS TO THAT.

SO I -- I'M LOOKING FOR THAT CASE, BUT YOU DIDN'T GIVE ME A CITATION.

MR. BATES: WELL, I GAVE YOU THE INFORMATION THAT I COULD FIND ON IT.

THE COURT: ALL RIGHT.

MR. BATES: WELL, IT'S A VERY WELL KNOWN CASE AND IT HAS HISTORICAL SIGNIFICANCE, SO I'M SURE --

THE COURT: I'M NOT SUGGESTING OTHERWISE. YOU JUST DIDN'T GIVE ME A CITATION.

I'M ALSO NOTING THAT MR. JOHNSON DOES ARGUE IN HIS PAPERS, AT PAGE 4, THAT IN DECEMBER OF 2015, YOU FILED A NEW LAWSUIT WITH ALLEGATIONS ARISING OUT OF THE SAME CIRCUMSTANCES UNDERLYING THE PRESENT CASE. THAT'S WHAT MR. JOHNSON ARGUES.

HE CITES A CASE IN THIS DISTRICT, 15-CV-5729, ASSIGNED TO

JUDGE DAVILA. THAT -- IS THAT INCORRECT?

MR. BATES: I'VE NEVER APPEARED BEFORE JUDGE DAVILA.

THE COURT: WELL, I DON'T KNOW IF YOU HAD AN APPEARANCE, BUT THAT'S A CASE THAT HE IDENTIFIES. AND HE -- AND MR. JOHNSON GOES ON TO IDENTIFY THAT ON APPEAL, THE NINTH CIRCUIT SUMMARILY DISMISSED THE APPEAL AND CITES NINTH CIRCUIT DOCKET 16-16094.

I --

MR. BATES: YES, YOUR HONOR.

THE COURT: DID YOU FILE THAT LAWSUIT?

MR. BATES: YES, I FILED THAT LAWSUIT.

THE COURT: OKAY. SO YOU HAVE HAD -- SO IT GOT FILED --

MR. BATES: BASED ON -- I'M SORRY.

THE COURT: OKAY. GO AHEAD.

MR. BATES: I DID FILE A LAWSUIT FOR DISCRIMINATION BECAUSE THE CITY -- I FILED A DISCRIMINATION COMPLAINT AND A MISCONDUCT COMPLAINT AGAINST THE CITY OFFICIALS, AND IT WAS NEVER INVESTIGATED ACCORDING TO CITY POLICY. THEY CLEARLY DID NOT FOLLOW CITY POLICY AT ALL.

AND I -- I FILED -- I FILED THAT LAWSUIT.

THE COURT: OKAY. BUT YOU DON'T -- YOU DON'T DISAGREE WITH MR. JOHNSON'S RECITATION THAT THE COURT GRANTED A MOTION TO DISMISS AND THE NINTH CIRCUIT AFFIRMED?

MR. BATES: WELL, I DON'T -- I DON'T DISAGREE WITH

THAT.

THE COURT: OKAY.

MR. BATES: BUT I THINK WE'RE -- I THINK WE'RE NOT LOOKING AT THIS FROM THE PROPER PERSPECTIVE.

THE PERSPECTIVE THAT I BROUGHT THIS CASE, WHICH IS TRUE, IS THAT THE CITY ENGAGED IN EXTENSIVE FRAUD WHICH UNDERMINES THE INTEGRITY OF THIS COURT, AND I RESPECTFULLY SAY, YOUR HONOR, YOU HAVE THE AUTHORITY TO PRESERVE -- AND THE OBLIGATION TO PRESERVE THE INTEGRITY OF THE JUDICIAL SYSTEM.

LET ME REMIND YOU AND MR. ARDELL THAT YOU ALL ARE OFFICERS OF THE COURT, AND SO IT -- WE CAN TALK OF PROCEDURES, YEAH, YOU FILED THIS AND YOU FILED THAT.

YES, I DON'T DENY -- I FILED ALL THOSE, JUST LIKE THE PLAINTIFFS IN THE TURNER CASE.

BUT THE FIFTH CIRCUIT COURT OF APPEALS SAID THAT DIDN'T MATTER BECAUSE SOMETIMES WHEN AN INJUSTICE IS SO EGREGIOUS, IT MUST YIELD TO -- A RES JUDICATA MUST YIELD TO A WELL PLED INDEPENDENT ACTION IN EQUITY.

THE ISSUE HERE IS THE FRAUD THAT THEY COMMITTED, AND EVERY -- AND EVERY STEP OF THE WAY, THE COURTS HAVE BASICALLY TURNED A DEAF EAR TO WHAT I'VE BEEN SAYING, AND I FIND EGREGIOUS, I FIND IT OFFENDING.

I GREW UP IN THE SOUTH DURING JIM CROW, I EXPERIENCED BLATANT DISCRIMINATION, AND NOW I COME TO THE COURT BECAUSE THEY DENIED ME A CCW PERMIT UNDER THE FALSE PRETENSE THAT THEY

MISUNDERSTOOD MY WORK, WORK RESTRICTION, WHEN THEY HAD ALL KINDS OF EVIDENCE.

WHEN I WENT TO THEM -- I WENT TO THEM SEVERAL TIMES TO -- AND ASKED THEM TO CHANGE IT AND PRESENTED THEM INFORMATION. THEY IGNORED EVERY OPPORTUNITY THEY HAD TO CHANGE THIS AND -- TO CHANGE IT AND MAKE IT RIGHT, AND THEY ONLY CHANGED IT WHEN I WENT TO FAIR HOUSING AND EMPLOYMENT IN DECEMBER 2004, AND UNDER THE THREAT OF A LAWSUIT THEY CHANGED IT.

AND THEN THEY COME TO THIS COURT AND FILE ALL THESE FALSE CLAIMS AND FALSE NARRATIVES AFTER THEY HAD ADMITTED -- IF YOU READ THE ANSWER TO THEIR -- TO MY ORIGINAL COMPLAINT, YOU WILL SEE THEY MAKE ADMISSIONS THAT THEY GOT THE LETTER FROM DR. NG STATING THAT I DID NOT HAVE A PSYCHOLOGICAL DISABILITY, BUT THEY DENIED IT ANYWAY.

DEFENDANT YOUNIS SAYS IN HIS DEPOSITION, YES, I TOLD BATES THAT HE WAS -- WE WERE NOT GOING TO LOOK AT THAT AND CHANGE THAT DECISION, EVEN THOUGH HE HAD THE LETTER SAYING THAT I DID NOT HAVE A PSYCHOLOGICAL DISABILITY.

THE ISSUE HERE IN THE WHOLE THING WAS THE HEARING REQUIREMENT, THE DUE PROCESS REQUIREMENT THAT THE COURTS HAVE FAILED TO LOOK AT AND FAILED TO EVEN CONSIDER.

I MADE ALL KINDS OF REQUESTS OF DEFENDANT YOUNIS AND HE REFUSED EVERY ONE OF THEM.

YOU KNOW, I ASKED HIM IF HE WOULD -- IF THERE WAS ANY WAY THAT WE COULD RESOLVE THAT ISSUE --

THE COURT: MR. BATES, I HATE TO CUT YOU OFF, SIR, BUT I'M HERE TODAY TO LOOK AT THE PLEADINGS THEMSELVES --

MR. BATES: RIGHT.

THE COURT: -- AS TO WHETHER YOU HAVE STATED A CLAIM, AND TO LOOK TO SEE WHETHER YOU ARE A VEXATIOUS LITIGANT UNDER THE LAW, WHICH WOULD -- ALL THAT MR. JOHNSON IS ASKING IS THAT YOU BE LIMITED AND PRECLUDED FROM FILING ADDITIONAL ACTIONS ON THIS SET OF FACTS, NOT TO DEPRIVE YOU OF YOUR RIGHT TO ACCESS TO THE COURTS ON OTHER MATTERS THAT ARE UNRELATED.

AND SO I THINK WE'RE GETTING A LITTLE FAR AFIELD FROM THE ISSUE THAT IS BEFORE ME TODAY.

MR. BATES: WELL -- WELL, THE ISSUE -- I APOLOGIZE. I UNDERSTAND WHAT THE ISSUE IS, THEIR MOTION TO DISMISS BASED ON -- WHICH CAN BE CHARACTERIZED IN A VERY FEW WORDS.

THEIR POSITION IS THIS: THAT MY MOTION -- MY COMPLAINT SHOULD BE DISMISSED ON THE BASIS OF RES JUDICATA OR LAW OF THE CASE DOCTRINE.

THE COURT: UM-HUM.

MR. BATES: AND I'M SAYING NO BECAUSE TURNER V. PLEASANT, AND IT'S A VERY POPULAR -- I MEAN, NOT POPULAR, IT'S A VERY WELL KNOWN CASE, HISTORICAL SIGNIFICANCE. IT CAN BE EASILY -- IT CAN BE EASILY LOOKED UP.

THE COURT: AND I -- ALL RIGHT. MR. BATES, I JUST ASKED IF YOU HAD THE CITATION, AND I WILL HAVE SOMEONE LOOK IT UP. I -- THAT'S ALL I ASKED.

LET'S MOVE ON FROM THAT. I WILL READ TURNER VERSUS PLEASANT.

MR. BATES: OKAY.

THE COURT: IT'S FROM THE FIFTH CIRCUIT. IT'S NOT BINDING ON ME. YOU DO UNDERSTAND THAT?

MR. BATES: WELL, IT RELIES ON PRECEDENT OF THE UNITED STATES SUPREME COURT.

THE COURT: I'M SURE IT DOES. BUT THE FIFTH -- I WILL READ IT. I WILL READ IT. I JUST HAVE TO FIND IT.

MR. BATES: BUT YOU'RE BOUND BY THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

THE COURT: YES, I AM.

MR. BATES: ALL I'M ASKING FROM DAY ONE IS THAT THE COURTS FOLLOW THE LAW, AND IF I CAN'T HAVE THAT, THEN I'M GOING -- I'M GOING TO HAVE TO LIVE WITH IT.

I'VE LIVED WITH IT BEFORE, BUT I HAVE TO LIVE WITH THE FACT THAT I'M JUST NOTHING MORE THAN A SECOND CLASS CITIZEN.

AND I LOOK BACK ON MY TIME IN -- GROWING UP IN MISSISSIPPI THAT I'M NO BETTER OFF TODAY THAN I AM THEN?

AND YOU HAVE THE -- YOU HAVE THE OBLIGATION AND THE AUTHORITY TO CHANGE THIS.

SO THAT'S -- THAT'S MY POSITION.

THE COURT: OKAY. THANK YOU, SIR.

MR. JOHNSON, WOULD YOU LIKE ANY FINAL COMMENTS?

MR. JOHNSON: I DON'T HAVE ANY FURTHER COMMENTS, YOUR

HONOR.

I SPENT SOME TIME TRYING TO FIND THAT CASE. I BELIEVE THE CITATION IS AT 663 F.3D 770.

THE COURT: THANK YOU.

MR. JOHNSON: AND I WON'T BOTHER TO EXPLAIN THE CASE. YOU CAN READ IT.

THE COURT: I WILL.

MR. JOHNSON: I THINK YOU'LL -- I THINK YOU'LL SEE THAT IT'S FAR AFIELD FROM THE ISSUE, OR THE FACTUAL SITUATION THAT WE HAVE IN THIS CASE.

AND, YOU KNOW, I WOULD LIKE THE COURT TO KNOW, AND I WOULD LIKE MR. BATES TO KNOW, THAT WE DID NOT MAKE THIS MOTION TO HAVE HIM DECLARED AS A VEXATIOUS LITIGANT LIGHTLY. WE WAITED AND HAD HOPED THAT THE PRIOR RULINGS AND DIRECTIONS FROM THE NINTH CIRCUIT WOULD HAVE SATISFIED MR. BATES THAT HE'D HAD HIS DAY IN COURT.

EVIDENTLY THAT HASN'T HAPPENED, AND SO, YOU KNOW, RELUCTANTLY, AND WITH REGRET, WE'VE HAD TO BRING THIS MOTION TO HAVE HIM DECLARED A VEXATIOUS LITIGANT.

BUT I THINK THAT THE LETTER HE SUBMITTED TO THE NINTH CIRCUIT, WHICH WE QUOTED AT THE TOP OF PAGE 4 OF OUR MOTION, IS AN ACKNOWLEDGMENT THAT UNLESS THE COURT DECLARES HIM AS A VEXATIOUS LITIGANT, WE WILL CONTINUE TO HAVE TO DEFEND AND ADDRESS THESE SAME ISSUES THAT HAVE BEEN PRESENTED TIME AND TIME AGAIN.

THE COURT: ALL RIGHT.

MR. BATES: WELL, MR. -- YOUR HONOR, MAY I -- MAY I ADD SOMETHING TO THAT?

THE COURT: I'LL GIVE YOU JUST ONE MORE MINUTE, SIR.

MR. BATES: OKAY. WELL, AS I SAID BEFORE, I WAS THE ONE THAT TRIED TO AVOID A LAWSUIT IN THIS CASE. I BEGGED DEFENDANT YOUNIS, IS THERE ANYTHING WE CAN DO SO WE DON'T HAVE TO MAKE A FEDERAL CASE OUT OF THIS?

I OFFERED TO TAKE A PSYCHOLOGICAL EVALUATION. I OFFERED -- WHEN HE REJECTED THAT, I SAID, IS THERE ANY WAY WE CAN DO IT?

AND HE SAID, NO.

I SAID, WELL, WHAT IF I GET DOWN ON MY KNEES AND BEG?

HE SAID, THAT WOULDN'T DO ANY GOOD.

SO IF YOU WANT TO DECLARE ME A VEXATIOUS LITIGANT BECAUSE ME, A BLACK PERSON, A BLACK MAN THAT GREW UP IN THE SOUTH DURING JIM CROW, IN THE NATIONAL DEBATE ABOUT SYSTEMIC RACISM, EQUITY, BLACK LIVES MATTER, SOCIAL JUSTICE, GO AHEAD.

YOU KNOW, I'M NOT GOING TO TRY TO TWIST ANYBODY'S ARMS TO DO ANYTHING.

BUT I DO -- I WILL CONTINUE TO BE AS RESPECTFUL AS I CAN OF THE PROCESS, AND AS I'VE SPENT MY LIFE DEDICATED TO BEING THE BEST CITIZEN I CAN, RESPECTING THE INSTITUTIONS OF GOVERNMENT, THE CONSTITUTION, AND THE RULE OF LAW. THAT WILL NOT CHANGE BECAUSE THAT'S WHO I AM.

BUT THIS WOULD BE A SAD STATE OF AFFAIRS BECAUSE THE ISSUE IS NOT BEING ADDRESSED HERE. THE ISSUE IS THE FRAUD. THEY -- THE DEFENDANTS CAME IN AND THEY PRESENTED -- THEY ADMITTED THAT THEY WERE WRONG IN THE -- IN THEIR ANSWER TO MY ORIGINAL COMPLAINT, AND THE JUDGE COULD HAVE ENTERED, SUA SPONTE, A RULING GRANTING SUMMARY JUDGMENT IN MY FAVOR BASED ON THEIR ADMISSION.

THE ISSUE IS THEY GOT THE LETTER FROM DR. NG SAYING I DIDN'T HAVE A PSYCHOLOGICAL DISABILITY, AND THEY DENIED MY CCW PERMIT WITHOUT THE HEARING REQUIRED BY 12027.1.

I'M NOT THE ONE THAT IS ON TRIAL HERE. THE SYSTEM IS ON TRIAL AND THE COURT'S ON TRIAL.

THE COURT: WELL, I DON'T KNOW HOW -- FOR THE COURT TO BE ON TRIAL, YOU'LL HAVE TO TALK TO THE NINTH CIRCUIT ABOUT THAT. IF YOU THINK THAT I'M ON TRIAL RIGHT NOW, THERE'S NOTHING I CAN RESPOND TO.

MR. BATES: NO, I'M NOT TALKING ABOUT YOU. I'M TALKING ABOUT THE JUDGE THAT MADE THE RULING IN THE ORIGINAL COMPLAINT IS ON TRIAL AND THE, AND THE CITY, THE ATTORNEYS FOR THE CITY, ALL OFFICERS OF THE COURT WHO, WHO ARE PERPETRATING THIS FRAUD, AND THAT'S THE ONLY WAY IT COULD BE ACCURATELY DESCRIBED IS A HUGE FRAUD.

THE COURT: SO, MR. BATES, I WILL -- I WILL JUST -- I WANT TO READ TURNER VERSUS PLEASANT, AND I APPRECIATE THAT YOU HAVE POINTED OUT ITS SIGNIFICANCE, SO I WILL GIVE IT A CAREFUL

READING.

I ONLY WANT TO COMMENT THAT I CLEARLY UNDERSTAND THAT YOU FEEL AGGRIEVED BY THE COURT, BY THE CITY, AND BY THE SYSTEM.

AND I -- I HAVE MANY LITIGANTS WHO COME BEFORE ME AND LOSE AND FEEL THEY'VE BEEN HEARD, AND I RECOGNIZE THAT YOU ARE A LITIGANT WHO FEELS YOU HAVE NOT BEEN HEARD, AND SO THAT IS SOMETHING THAT GIVES ME GREAT CONCERN.

AND I -- YOU MAY LOSE, BUT I WANT YOU TO KNOW THAT I PROMISE TO READ EVERYTHING THAT YOU'VE GIVEN ME. OKAY?

MR. BATES: WELL, I ONLY ASK, IF I MAY, AND I'LL BE -- I SEE WHERE -- I THINK I KNOW WHERE THIS IS GOING, BUT I WILL ASK A RHETORICAL QUESTION.

DID -- WAS THERE LITIGATION IN THE SMALL CLAIMS COURT? DID THE COURT FOLLOW THE RULES, THE CALIFORNIA PRECLUSION RULES WHICH IS SET UP IN THE CALIFORNIA JUDGE'S BENCH GUIDE AND -- WHEN IT DISMISSED MY COMPLAINT AGAINST THE CITY OF SAN JOSE?

IT SIMPLY DOESN'T FOLLOW THE LAW. WE'RE ABOUT -- THIS NATION IS ABOUT RULE OF LAW, AND THEY DIDN'T FOLLOW THE RULE OF LAW.

THE COURT: ALL RIGHT.

MR. BATES, THANK YOU FOR JOINING.

MR. JOHNSON, THANK YOU FOR APPEARING ON ZOOM.

AND AS I SAY, MR. BATES, I MAY NOT MAKE -- SATISFY YOU IN MY ORDER. I HOPE I SATISFY YOU THAT I HAVE REVIEWED EVERYTHING, AND I APPRECIATE YOUR ARGUMENT TODAY.

MR. BATES: THANK YOU.

THE COURT: THANK YOU VERY MUCH.

MR. BATES: THANK YOU.

MR. JOHNSON: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

(THE PROCEEDINGS WERE CONCLUDED AT 9:23 A.M.)

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, et al.,

Defendants.

Case No. 20-cv-07609-BLF

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE AS TO DEFENDANT CITY OF SAN JOSE AND DECLARING PLAINTIFF A VEXATIOUS LITIGANT

[Re: ECF No. 10]

Before the Court is Defendant City of San Jose's[1] Motion to Dismiss Plaintiff's Complaint and Declare Plaintiff a Vexatious Litigant. *See* ECF No. 10 ("Motion"). Specifically, Defendant City of San Jose ("the City") requests that the Court (1) dismiss Plaintiff's Complaint with prejudice; (2) declare Plaintiff a vexatious litigant against the City, its officials or employees, and judicial officers; and (3) require Plaintiff to obtain leave of court before filing any future actions against those entities. *See* Motion at 11-12. Plaintiff opposes the Motion in its entirety. *See* ECF No. 15 ("Opp'n"). The Court held a hearing on the Motion on August 12, 2021. For the reasons stated below, the City's Motion is GRANTED. Plaintiff's Complaint is DISMISSED WITH PREJUDICE as to the City of San Jose, and the Court ORDERS that Plaintiff must obtain leave of court before filing any future actions against the City, its officials or employees, or judicial officers.

[1] Defendants Robert Davis, Adonna Amoroso, and Tuck Younis remain unserved. The Court previously extended the deadline to serve them. *See* ECF No. 20. This Order does not pertain to the claims against those Defendants.

I. BACKGROUND

Since 2006, Plaintiff has filed four lawsuits—including this one—arising from conduct that is alleged to have occurred after he retired from the San Jose Police Department in 2004.

A. *Bates I*

Plaintiff first filed a small claims lawsuit against the City on November 10, 2005 in the Santa Clara County Superior Court. *See Frederick Bates v. City of San Jose*, No. 2005-4-SC-015768 (Cal. Super. Ct. Santa Clara Cty.) ("*Bates I*"). In that suit, Plaintiff sought to recover from the City a $1,500 retainer that he paid his attorney to help him secure his concealed carry permit through the process underlying the claims in his federal lawsuits. The state court entered judgment in favor of the City on January 30, 2006.

B. *Bates II*

On August 29, 2006, Plaintiff filed his first federal court lawsuit. *Frederick Bates v. City of San Jose, Robert Davis, Adonna Amoroso, & Tuck Younis*, No. 5:06-cv-5302-RMW (N.D. Cal. filed Aug. 29, 2006) ("*Bates II*"). In that complaint, he alleged that upon his retirement from the police department in April 2004, he received a retirement identification card that was not stamped with an endorsement allowing him to carry a concealed weapon. *See Bates II*, ECF No. 1 ¶ 6; *see also* Cal. Pen. Code § 12027.1(a) (entitling certain retired peace officers to obtain retirement ID cards with concealed carry endorsements). Plaintiff asserted that Amoroso, then the deputy chief of police, denied his concealed carry authorization without a hearing because of a work restriction on Plaintiff's medical records indicating that he was to avoid psychologically stressful work. *Bates II*, ECF No. 1 ¶ 7; *see also* Cal. Pen. Code § 12027.1(e) (prohibiting issuance of a concealed carry endorsement to peace officers who retire "because of a psychological disability").

After the City refused to issue him the endorsement, Plaintiff claimed that in August 2004, Tuck Younis, an acting captain for the police department, received information from Plaintiff's physician clarifying that Plaintiff did not have a psychological disability and should not precluded from carrying a concealed weapon on that basis. *Bates II*, ECF No. 1 ¶ 8. Plaintiff alleged that it took four months beyond that time before the police department reversed its decision and issued him a concealed carry endorsement. *Id.* ¶ 11. Plaintiff asserted two causes of action, one against

the individual defendants and one against the City, alleging violation of his civil rights, deprivation of due process, and deprivation of the right to bear arms for failing to immediately grant him a concealed carry endorsement. *Id.* ¶¶ 5-16. Plaintiff sought compensatory and punitive damages plus attorneys' fees. *Id.* ¶ 17.

On July 7, 2008, Judge Ronald Whyte granted defendants' motion for summary judgment. *Bates II*, ECF No. 30. Judge Whyte held that (1) the individual defendants were entitled to qualified immunity because the right to a good cause hearing under Plaintiff's circumstances was not clearly established law, *id.* at 6-7; and (2) that Plaintiff was collaterally estopped from asserting his claim against the City because it was adjudicated in in *Bates I* when the small claims court entered judgment in favor of the City, *id.* at 7-8. Judge Whyte entered judgment in favor of defendants. *Bates II*, ECF No. 31.

Plaintiff filed his first appeal in *Bates II* on July 29, 2008. *Bates II*, 9th Cir. No. 08-16757. The Ninth Circuit affirmed in a memorandum disposition on November 20, 2009. *Id.*, ECF No. 20. Plaintiff submitted a letter to the Ninth Circuit on February 1, 2010, alleging that the district court judgment was a product of "misconduct by the City." *Id.*, ECF No. 22. The Ninth Circuit took no action in response to the letter and stated that no further filings would be accepted in the case as of February 6, 2010. *Id.*, ECF No. 42. Despite this order, Plaintiff continued to file documents in the appeal. *Id.*, ECF Nos. 24-30.

Back in the district court, on February 21, 2013, Plaintiff filed a motion for relief from judgment under Fed. R. Civ. P. 60, arguing that attorneys for the City and other defendants had "concocted an unconscionable plan designed to improperly influence" Judge Whyte to grant defendants' motion for summary judgment. *See Bates II*, ECF No. 43, at 5-16. The court denied the motion on April 26, 2013, *id.*, ECF No. 55. Plaintiff appealed that ruling to the Ninth Circuit, which affirmed two years later on July 31, 2015. *Bates II*, 9th Cir. No. 13-16397, ECF No. 41. While Plaintiff's petition for rehearing was pending, he submitted a letter to the Ninth Circuit, stating:

> A failure of this court to reverse itself all but ensures that litigation will not end, because the current ruling of this court is void by law and I am under no obligation to comply with it. I will not be bullied by the court or the City in relinquishing my rights in this matter.

> This means that more judicial resources will be wasted; and it will also create a very uncomfortable situation.

Id., ECF No. 43. The Ninth Circuit denied the petition for rehearing and said that "no further filings "w[ould] be entertained." *Id.*, ECF No. 45.

While the appeal from the first Rule 60 motion was still before the Ninth Circuit, Plaintiff filed another Rule 60 motion, alleging that his own attorney fraudulently entered a stipulation to dismiss defendant Younis from the case without his consent. *Bates II*, ECF No. 72. Judge Whyte denied that motion. *Id.*, ECF No. 86. Plaintiff appealed that order to the Ninth Circuit, and the Ninth Circuit dismissed the appeal on February 10, 2014. *Bates II*, 9th Cir. No. 14-15080, ECF No. 4.

After partial proceedings in *Bates III*, *see infra* Section I.C, Plaintiff filed a third Rule 60 motion on May 9, 2016, and a motion to recuse Judge Whyte on June 16, 2016, alleging that Judge Whyte had shown "pervasive and deep-seated favoritism" toward the City. *Bates II*, ECF Nos. 116, 123. Judge Whyte denied both motions in August 2016. *Id.*, ECF No. 128. Plaintiff appealed to the Ninth Circuit, which summarily affirmed, finding that "the questions raised in this appeal are so insubstantial as not to require further argument." *Id.*, 9th Cir. No. 16-16581, ECF No. 11.

C. *Bates III*

On December 14, 2015, Plaintiff filed a new lawsuit against the City, Mayor Sam Liccardo, Vice Mayor Rose Herrera, and nine City councilmembers. *Frederick Bates v. City of San Jose, Sam Liccardo, Rose Herrera, Charles Jones, Ash Kalra, Raul Peralez, Manh Nguyen, Magdalena Carrasco, Pierluigi Oliverio, Tam Nguyen, Donald Rocha, & Johnny Khamis*, No. 15-cv-5729-EJD (N.D. Cal. filed Dec. 14, 2015) ("*Bates III*"). Plaintiff alleged that the defendants failed to respond to his letters asking for investigations of alleged misconduct by the City Attorney and other City officials. *Id.*, ECF No. 1. Magistrate Judge Nathaniel Cousins granted defendant's motion to dismiss on June 10, 2016. *Id.*, ECF No. 40. Plaintiff appealed, and the Ninth Circuit summarily dismissed, saying again that the questions raised were "insubstantial." *Id.*, 9th Cir. No. 16-16094, ECF No. 14. Plaintiff filed yet another Rule 60 motion on June 8, 2017, which Judge Cousins denied three weeks later. *Id.*, ECF Nos. 57, 60. Plaintiff again appealed, and the Ninth

Circuit again summarily dismissed. *Id.*, 9th Cir. No. 17-16413, ECF No. 4.

D. *Bates IV* – This Lawsuit

On October 29, 2020, Plaintiff filed this lawsuit against the City, Robert Davis, Adonna Amoroso, and Tuck Younis. *Frederick Bates v. City of San Jose, Robert Davis, Adonna Amoroso, & Tuck Younis*, No. 5:20-cv-7609-BLF (N.D. Cal. filed Oct. 29, 2020) ("*Bates IV*"). Plaintiff's Complaint seeks to assert an "independent action in equity" to set aside the judgment in *Bates II*. *Id.*, ECF No. 1. He alleges three grounds for setting aside the judgment: (1) that his attorney and Defendants' attorneys committed fraud by dismissing defendant Younis by stipulation without Plaintiff's permission; (2) that the court inappropriately applied res judicata in its earlier summary judgment ruling; and (3) that previous judges in these cases have showed bias against him and in favor of the City. *Id.* ¶¶ 8, 15, 20. Plaintiff purports to bring his lawsuit under Fed. R. Civ. P. 60, 28 U.S.C. § 1738, and the First, Fifth, and Fourteenth Amendments to the Constitution. *Id.* at 2.

II. LEGAL STANDARD

A. Motion to Dismiss

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim." *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (internal quotation marks and citation omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pro se complaint must be liberally construed, since a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Entler v. Gregoire*, 872 F.3d 1031, 1038 (9th Cir. 2017) (cleaned up).

When evaluating a Rule 12(b)(6) motion, the district court must consider the allegations of the complaint, documents incorporated into the complaint by reference, and matters which are subject to judicial notice. *Louisiana Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048,

1063 (9th Cir. 2016) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

B. Motion to Declare Plaintiff Vexatious Litigant

"The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). "Restricting access to the courts is, however, a serious matter." *Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014). "[T]he right of access to the courts is a fundamental right protected by the Constitution," and "[p]rofligate use of pre-filing orders could infringe this important right." *Id.* at 1061-62 (cleaned up). Thus, "pre-filing orders should rarely be filed," and only when certain requirements are met. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). "Nevertheless, '[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.'" *Molski*, 500 F.3d at 1057 (quoting *De Long*, 912 F.2d at 1148). A district court therefore has discretion to restrict a litigant's future filings by requiring leave of court. *See De Long*, 912 F.2d at 1146-47.

A court must analyze the four *De Long* factors before imposing pre-filing restrictions. A district court must: "(1) give litigants notice and 'an opportunity to oppose the order before it [is] entered'; (2) compile an adequate record for appellate review, including 'a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed'; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as 'to closely fit the specific vice encountered.'" *Ringgold-Lockhart*, 761 F.3d at 1062 (quoting *De Long*, 912 F.2d at 1147-48). "The first and second of these requirements are procedural," while the third and fourth requirements are "substantive considerations" helpful to defining who is a vexatious litigant and fashioning an appropriate remedy." *Id.* at 1062.

III. DISCUSSION

The Court will first address the City's motion to dismiss before turning to its request to declare Plaintiff a vexatious litigant.

A. Motion to Dismiss

The City moves to dismiss Plaintiff's Complaint in full, arguing that each of his three grounds for this independent action in equity is barred by the law-of-the-case doctrine. Motion at 6-9. Plaintiff does not substantively respond to the City's law-of-the-case argument, instead arguing that his three theories of fraud satisfy the five elements traditionally required to sustain an independent action in equity. Opp'n at 4-15. The Court agrees with the City.

Federal Rule of Civil Procedure 60 preserves a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding" in an earlier action. Fed. R. Civ. P. 60(d)(1). Relief from an earlier judgment "must be granted only in instances of grave injustice." *United States v. Beggerly*, 524 U.S. 38, 45 (1998). This is a "demanding standard." *Id.* at 46. To assert an independent action in equity, a plaintiff must demonstrate (1) that he has a meritorious claim or defense, (2) that the plaintiff is diligent and not at fault, (3) there is a lack of an alternative remedy, and (4) that the judgment is manifestly unconscionable." *Wilson v. Leigh Law Grp., P.C.*, No. 20-cv-3045-MMC, 2020 WL 3972574, at *2 (N.D. Cal. July 14, 2020).

The Court need not analyze all four factors because it finds the first factor dispositive. Plaintiff's underlying claims are not meritorious because they are within the law-of-the-case doctrine. "Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court" in the same case. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (cleaned up). "A court may have discretion to depart from the law of the case where: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; 4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Id.*

Here, each of Plaintiff's bases for his independent action was considered and rejected by the Ninth Circuit in his other actions against the City and the other defendants.[2] First, Plaintiff brought two separate Rule 60 motions asserting that his and the City's attorneys committed fraud

[2] Although the law-of-the-case doctrine traditionally applies only to issues decided earlier in the same lawsuit, an independent action in equity is considered a "continuation of the former suit" that contains the judgment the independent action seeks to set aside. *See Beggerly*, 524 U.S. at 46.

by dismissing defendant Younis from *Bates II*. *See Bates II*, ECF Nos. 72, 116. Judge Whyte denied both motions, *id.*, ECF Nos. 86, 128, and the Ninth Circuit dismissed both of Plaintiff's appeals. *See id.*, 9th Cir. Nos. 13-16397 & 14-15080. Similarly, Plaintiff has three times argued that Judge Whyte misapplied res judicata to the state court judgment, and each time that argument has been rejected. It was the original basis for granting summary judgment in favor of the City, *see Bates II*, ECF No. 30, and the Ninth Circuit affirmed that decision, *see id.*, 9th Cir. No. 08-16757. The Ninth Circuit twice more rejected Plaintiff's argument in his Rule 60 motions that the doctrine was misapplied. *See id.*, 9th Cir. Nos. 13-16397 & 16-16581. And finally, Plaintiff's argument that Judge Whyte showed bias toward him was also rejected by the Ninth Circuit. *See id.*, 9th Cir. No. 16-16581. The rejection of each of Plaintiff's theories is thus law of the case.

The Court finds that there is no reason to exercise its discretion to depart from the law of the case. *Alexander*, 106 F.3d at 876. The earlier decisions on these issues are not clearly erroneous. Indeed, another judge on this court has previously rejected Plaintiff's theories of fraud, and the Ninth Circuit found Plaintiff's arguments to overturn those decisions "insubstantial." *E.g.*, *Bates II*, 9th Cir. No. 16-16581, ECF No. 11. Furthermore, there has been no intervening change in the law, no allegation of substantially different evidence than when these theories were first asserted, nor any changed circumstances. And manifest injustice will not occur from applying the law-of-the-case doctrine to theories that have been evaluated by multiple courts.

In his opposition (and at the hearing), Plaintiff argues that *Turner v. Pleasant*, 663 F.3d 770 (5th Cir. 2011), compels the Court to allow this action to proceed. But that case is inapposite. In *Turner*, the plaintiffs sought relief from a judgment entered against them in their personal injury lawsuit. At trial, the defendants retained a lawyer and an expert witness who, unbeknownst to the plaintiffs, each was personal friends with the trial court judge. *Id.* at 773. After plaintiff's original appeal of the judgment was dismissed, the House of Representatives initiated impeachment proceedings against the trial court judge and issued a Report discussing, among other improprieties, the *Turner* case. *Id.* at 774. The Report revealed that, during the trial, the defense attorney helped facilitate the gift of all-expenses-paid hunting trips to the judge from a company appearing before the judge in a different case. *Id.* The House unanimously voted to impeach the

judge, and the Senate voted to remove him from office. *Id.* Plaintiffs sought to reopen the judgment in their case, pointing to the House Report and alleging that the defendants used the expert witness to gain further favor with the trial judge. *Id.* at 774-75. The Fifth Circuit reversed the district court's rejection of the request on res judicata grounds, finding that the "unusual facts" and "historic context" of the case made it "at least plausible that the district court did not perform its task in the manner expected." *Id.* at 777.

This case is far afield from *Turner*. The facts underlying the independent action in *Turner* came from a one-and-a-half year investigation by the House of Representatives that resulted in only the eighth impeachment and removal of a federal judge in United States history, in part based on his behavior in the underlying lawsuit. *Turner*, 663. F3d at 777. Here, in contrast, other judges on this court and the Ninth Circuit have repeatedly evaluated and rejected Plaintiff's claims of fraud and bias, finding that "the questions raised in [these appeals] are so insubstantial as not to require further argument." *E.g.*, *id.*, 9th Cir. No. 16-16581, ECF No. 11. *Turner* thus provides no reason to grant relief from the prior judgment.

The Court also finds that leave to amend is not warranted. Leave must ordinarily be granted unless one or more of the following factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (discussing *Foman* factors). Here, leave to amend would be futile. As recounted above, another judge in this district has examined and rejected Plaintiff's arguments multiple times, and the Ninth Circuit has repeatedly stated that Plaintiff's claims are "insubstantial" and not worthy of further examination.

On this basis, the City's Motion to Dismiss is GRANTED WITHOUT LEAVE TO AMEND as to claims against the City.

B. Motion to Declare Plaintiff a Vexatious Litigant

The City further requests that the Court declare Plaintiff a vexatious litigant against the City, its officials and employees, and judicial officers. Motion at 9-11. Plaintiff opposes, primarily repeating his allegations and arguments against the motion to dismiss. Opp'n at 15-16.

For the following reasons, the Court agrees with the City and will institute a pre-filing screening order.

i. Notice and Opportunity to Oppose

The first requirement for a pre-filing screening order is satisfied where the litigant is given notice that the court is considering a pre-filing screening order and an opportunity to oppose such an order before it is issued. *See Ringgold-Lockhart*, 761 F.3d at 1062. A hearing is not required. *See Ou-Young v. Roberts*, No. 19-cv-07000-BLF, 2019 WL 6619879, at *3 (N.D. Cal. Dec. 5, 2019). Here, the City requested that the Court declare Plaintiff a vexatious litigant in its Motion. *See* Motion at 9-11. Plaintiff had the opportunity to oppose the request in his opposition brief, and he did so. *See* Opp'n at 15-16. Additionally, the Court held oral argument on the matter and afforded Plaintiff a full opportunity to address the issue. Accordingly, Plaintiff received notice of and actually opposed the issuance of an order declaring him a vexatious litigant, and the first *De Long* factor is met.

ii. Adequate Record for Review

"An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed." *Ou-Young*, 2019 WL 6619879, at *3 (quoting *De Long*, 912 F.2d at 1147); *see also Hurt v. All Sweepstakes Contests*, No. C-12-4187-EMC, 2013 WL 144047, at *5 (N.D. Cal. Jan. 11, 2013) (second *De Long* factor met where the court "compiled a list of all the actions Plaintiff filed"). The record must at least show "that the litigant's activities were numerous or abusive." *Id.*

The Court has recounted in the Background section the cases that Plaintiff has filed in this district based on the same allegations as the Complaint in this case, the myriad motions he made in each case, and the five appeals to the Ninth Circuit that he filed. All motions and appeals were unsuccessful. The second *De Long* factor is thus met.

iii. Frivolous or Harassing Filings

The third *De Long* factor requires that the Court "make substantive findings" that the litigant's actions have been either frivolous or harassing. "To determine whether the litigation is frivolous, district courts must look at both the number and content of the filings as indicia of the

frivolousness of the litigant's claims." *See Ringgold-Lockhart*, 761 F.3d at 1064. "The plaintiff's claims must not only be numerous, but also be patently without merit." *Id.* (cleaned up). The Court may alternatively make a finding that the litigant has engaged in a pattern of harassment. *See id.* "Finally, courts should consider whether other, less restrictive options are adequate to protect the court and parties." *Id.*

The Ninth Circuit has articulated "a helpful framework" of five factors for evaluating the frivolous or harassing nature of a plaintiff's filings: "(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, *e.g.*, does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties." *Ringgold-Lockhart*, 761 F.3d at 1062 (citation omitted).

The first factor analyzes whether Plaintiff's history of litigation is vexatious, harassing, or duplicative, and weighs in favor of a pre-filing screening order. As recounted in the Background section, Plaintiff has repeatedly sued the City and several of its officers and employees, despite courts finding Plaintiff's allegations meritless, and he has baselessly accused the judges presiding in those cases of bias against him. In each case, Plaintiff has filed multiple motions to reopen the case and multiple appeals of the denial of those motions to the Ninth Circuit, all of which have been dismissed. Plaintiff has also made clear that he intends to continue his campaign, saying in a letter to the Ninth Circuit that, unless judgment was reversed in his favor, the "litigation will not end" and "more judicial resources will be wasted." *Bates II*, 9th Cir. No. 13-16397, ECF No. 43. This campaign is clearly comprised of harassing and duplicative lawsuits.

The second factor—Plaintiff's motive in pursuing the litigation—also weighs in favor of a screening order. Plaintiff has been repeatedly told that his claims are not viable and barred by res judicata or the law-of-the-case doctrine. His conduct of filing new lawsuits, in addition to his motions to reopen his cases and his motion to disqualify Judge Whyte in the principal case, strongly suggests that he will keep filing new cases in the hope of finding a new judge to

adjudicate his claims. After reviewing the orders issued by judges in this district and on the Ninth Circuit, the Court can only conclude that Plaintiff's purpose is to harass the defendants.

The third factor looks to whether Plaintiff is represented by counsel. The Court is mindful that because Plaintiff is a pro se litigant, it should "tread[] carefully" in considering a pre-filing screening order. *See Frost*, 2020 WL 1288326, at *7 (citing *De Long*, 912 F.2d at 1147). But the judges in this circuit have been patient with Plaintiff's conduct and have thoroughly heard his arguments multiple times. Judge Whyte adjudicated Plaintiff's original federal claims in *Bates II* and three motions for relief from judgment. Judge Cousins adjudicated Plaintiff's second federal lawsuit in *Bates III*, along with one motion for relief from judgment. And the Ninth Circuit adjudicated five separate appeals from those decisions. The courts have been lenient with Plaintiff, but that leniency cannot "preempt the use of judicial time that properly could be used to consider the meritorious claims of others." *Boustred v. Gov't*, No. 08-cv-00548-RMW, 2008 WL 4287570, at *2 (N.D. Cal. Sep. 17, 2008) (citing *De Long*, 912 F.2d at 1148). Given this long history, this factor leans in favor of a screening order.

The fourth factor—whether Plaintiff has "caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel"—is clearly in favor of a screening order. The City has borne the expenses of defending against the same set of allegations for almost fifteen years through four lawsuits and five separate appeals to the Ninth Circuit, and the courts have borne the burden of adjudicating each one. Plaintiff himself admits that judicial resources have been "wasted" in the course of his lawsuits. *Bates II*, 9th Cir. No. 13-16397, ECF No. 43. Addressing the repeated complaints, motions, and appeals consumes judicial resources that would be better spent adjudicating claims not raised and rejected multiple times.

Finally, the fifth factor—whether there are less restrictive options that are adequate—is also in favor of a screening order. Given Plaintiff's previous cases, mere dismissal of this Complaint would be insufficient to stop Plaintiff's campaign. Indeed, Plaintiff has promised that he will continue to file lawsuits and that "more judicial resources will be wasted" if judgment is not entered in his favor. Monetary sanctions for frivolous filings would similarly waste judicial resources because any new lawsuits would have to be addressed by the City and adjudicated by a

judge prior to the imposition of sanctions. The Court thus finds that a screening order is the most efficient means of deterring Plaintiff's conduct.

Based on this record, the Court concludes that Plaintiff's conduct in bringing these lawsuits, motions, and appeals has been frivolous and harassing.

iv. Narrowly Tailored

A "[n]arrowly tailored order[] [is] needed 'to prevent infringement of the litigator's right of access to the courts.'" *De Long*, 912 F.2d at 1148 (quoting *Woods v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1525 (9th Cir. 1983)). Narrow tailoring is often accomplished by restricting the pre-filing restriction to certain entities or on certain facts. *See, e.g.*, *Frost v. United States*, No. 19-cv-5190-EMC, 2020 WL 1288326 (N.D. Cal. Mar. 18, 2020) (restricting pre-filing restriction to suits against "any federal entity or any current or former federal employees").

The City requests that the Court limit the pre-filing restriction to lawsuits "in which the City of San Jose, or any City of San Jose official or employee, or any judicial officer, is named as a defendant." Motion at 11. Given Plaintiff's history of repeatedly suing the City and its officers and employees—despite orders from both the district court and the Ninth Circuit finding those suits meritless—the Court concludes that an order requiring pre-filing screening of lawsuits against the City and its officers and employees is warranted.

The Court also finds that judicial officers should be included within the scope of the pre-filing restriction. Although Plaintiff has not named judicial officers as defendants in his lawsuits, those lawsuits have included rejected allegations of bias and conspiracies involving the court. For example, Plaintiff has without evidence accused Judge Whyte of showing "deep-seated and pervasive bias" in his rulings such that "he [wa]s unable to render a fair judgment" on Plaintiff's claims. *Bates II*, ECF No. 123, at 3. And the Complaint in this case alleges that judges of this court have "deep-seated bias" against him and "favoritism for Defendants," and that they have not "act[ed] in an impartial matter." Compl. at 2, ¶¶ 20-23. Plaintiff has further alleged that the court has "conspired with Defendants" to hold fraudulent hearings and rule against Plaintiff. *Id.* ¶ 20. These allegations have been rejected as meritless by both other judges in the district and the Ninth

Circuit. *Bates II*, 9th Cir. No. 16-16581, ECF No. 11.

An order requiring pre-filing review of any lawsuit or other action filed by Plaintiff against the City, its officers or employees, or judicial officers is narrowly tailored to address Plaintiff's propensity to sue based on the allegations in the Complaint in this case and his previous cases. This order will not prevent Plaintiff from litigating potentially meritorious claims against those entities, but it will prevent those entities and the courts from being burdened by meritless lawsuits.

* * *

The Court recognizes Plaintiff's frustration with the events underlying his lawsuits, which are no doubt compounded by the racism Plaintiff says he has faced throughout his life. But the Court is bound to apply the law, which it finds requires dismissal of Plaintiff's claims against the City with prejudice and institution of tailored pre-suit screening.

IV. ORDER

Accordingly, IT IS HEREBY ORDERED that:

(1) Plaintiff's Complaint (ECF No. 1) is DISMISSED WITH PREJUDICE as to Defendant City of San Jose;

(2) Plaintiff is declared a vexatious litigant and thus must obtain leave of court before filing any lawsuit or other action that alleges claims against the City of San Jose, its officers or employees, or judicial officers;

(3) The Clerk of Court shall not accept for filing any lawsuit or other action alleging claims against the City of San Jose, its officers or employees, or judicial officers until it has been reviewed by a judge and approved for filing. The Clerk shall forward any such lawsuit or other action to the general duty judge for pre-filing screening; and

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(4) This order applies to lawsuits or other actions that Plaintiff seeks to file in this district, lawsuits filed in state court and removed to this district, and claims or other actions filed in adversary proceedings in this district's bankruptcy court.

Dated: August 23, 2021

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

NO. 21-16867

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK BATES, Plaintiff-Appellant v. CITY OF SAN JOSE, a municipal corporation, et al. Defendant-Appellees.	NO. 21-16867 D.C. No. 5:20-cv-07609-BLF and 5:06-cv-05302-RMW Northern District of California, San Jose

ANSWERING BRIEF

Appeal from the United States District
for the Northern District of California (San Jose)
D.C. No. 5:20-cv-07609-BLF

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in the present action or parties in the privity with them were parties to the prior proceeding." (*Id.*) For purpose of res judicata, "[t]he cause of action is the right to obtain redress for harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 798 (2010).) "When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Id.*)

Even though judgments in small claims actions do not have collateral estoppel effect (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1052-53), a final small claims judgment is entitled to res judicata effect. (*See Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 907.) The judgment in *Bates I*, the small claims action, was res judicata because in the complaint in that action Bates alleged as follows:

> After I (Plaintiff) retired from the San Jose Police Department on 4-01-04, the department denied me authorization to carry a concealed weapon (CCW). The department violated by rights by failing to grant me a hearing and failing to show "good cause" for the denial as required by law. I was forced to obtain legal representation, after which, the Police Department reversed it's [sic] decision and granted me authorization to carry a concealed weapon on 2-17-05. Because of the department's willful violation of my rights and state law (California Penal Code Section 12027.1), I suffered a monetary loss of $1,500 that I paid in attorney fees.

(*Bates II,* ECF 30 at 8.) Thus, the harm Bates suffered, as alleged in the small claims court complaint, was denial of a permit for a concealed weapon and denial

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, et al.

Defendants.

Case Number: 5:20-cv-07609-BLF

CITY OF SAN JOSE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND DECLARE PLAINTIFF A VEXATIOUS LITIGANT

Date: August 12, 2021
Time: 9:00 a.m.
Courtroom: 3, 5th Floor
Judge: Hon. Beth L. Freeman

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Introduction

In 2008, this Court ended Plaintiff Frederick Bates's lawsuit against the City of San Jose and other named defendants by granting their motion for summary judgment and issuing a final judgment of dismissal. Unsatisfied with that result, Plaintiff has spent the thirteen years since then seeking to resurrect his suit with various motions, appeals, and other filings. In total, Plaintiff has filed at least four motions to reopen judgment, two new complaints, and five appeals stemming from his original 2006 lawsuit. All have been based on the same allegations and events. All have failed. The instant action and complaint—which is a virtual replica of the several unsuccessful "Rule 60" motions and related claims Plaintiff filed in 2013 and 2016—represents Plaintiff's latest such filing.

Plaintiff's complaint is meritless. Its claims are plainly precluded by the law-of-the-case doctrine, and it alleges no fraud or other basis for reopening the thirteen-year-old final judgment against Plaintiff. The City requests that the Court dismiss. The City further requests that the Court prevent further harassment of Defendants and abuse of the judicial process by declaring Plaintiff a vexatious litigant.

Relevant Background

I. Plaintiff's initial action in 2006 and related appeal

In 2005, Plaintiff sought damages from the City in a state lawsuit. Plaintiff did not prevail there, and in 2006, he filed his first federal suit against the City. (N.D. Cal. C-06-05302-RMW, Dkt. 30.) Plaintiff claimed that Defendants violated his civil rights by causing an eight-month delay in his receipt of a concealed weapon permit following his retirement from the San Jose Police Department in April 2004. (*Id.*) This Court disposed of that claim in July 2008 by granting summary judgment in favor of all defendants. (*Id.*) The Court issued a final judgment dismissing the case the same day. (*Id.*, Dkt. 31) Thus began a thirteen-year period in which Plaintiff would file

three lawsuits against the City and its personnel, submit myriad motions, requests, and letters to the courts, and initiate three separate appeals, all of which would fail.

In the first appeal of this multiplicity, Plaintiff sought to reverse this Court's 2008 judgment against him. (*Id.*, Dkt. 34 and 9th Cir. 08-16757.) The Ninth Circuit affirmed this Court's judgment in November 2009. (N.D. Cal. C-06-05302-RMW, Dkt. 38.) Plaintiff subsequently submitted a letter to the Court of Appeal dated February 1, 2010, asserting that this Court's judgment resulted from "misconduct by the City" (9th Cir. 08-16757, Dkt. 22). The Ninth Circuit declined to take any action in response to the letter, and ordered on February 16, 2010 that no further filings be accepted in the closed appellate case. (9th Cir. 08-16757, Dkt. 23.)

Plaintiff nonetheless continued to submit documents to the Ninth Circuit. (9th Cir. 08-16757, Dkts. 24-25 and 27-30.) One such document was entitled "Motion to Vacate Void Judgment," signed by Plaintiff on September 25, 2012. (*Id.*, Dkt. 30; a copy of this motion was also submitted to this Court by Plaintiff at N.D. Cal. C-06-05302-RMW, Dkt. 54.) Plaintiff argued in the motion that the City's attorneys had "concocted an unconscionable plan designed to improperly influence" the District Court's decision regarding summary judgment, "perpetrated fraud on the court," and made "false assertions of fact and misrepresentations" (N.D. Cal. C-06-05302-RMW, Dkt. 54.) Plaintiff also argued that the Court's decision violated the Full Faith and Credit Act. (*Id.*) The Ninth Circuit took no action on the motion.

II. Plaintiff attempts to reopen judgment with two Rule 60 motions in this Court, both of which are denied, and both of which he unsuccessfully appeals

A few months later, in February 2013, Plaintiff filed a motion with this Court under Federal Rule of Civil Procedure 60 seeking relief from the 2008 judgment of dismissal. (N.D. Cal. C-06-05302-RMW, Dkt. 43) Plaintiff' motion was based on allegations of attorney misconduct—misconduct he attributed to the City's attorneys as well as his own. Plaintiff's primary argument

was (as in the letters he had filed) that the City's attorneys had "concocted an unconscionable plan designed to improperly influence" the Court's 2008 decision to grant the defendants' Motion for Summary Judgment. (*Id.* p. 10.) Plaintiff asserted that, as part of this plan, the City's attorneys made "false claims" (*id.*), engaged in a "scheme to defraud the court" *(id.*), and "deliberately misled this court" (*id.* at p. 18–19). Plaintiff emphasized in the motion that he had "filed three letters and three motions with the Ninth Circuit between February 2010 and September 2012 challenging that Court's order based on the misconduct by the attorneys for the Defendants." (N.D. Cal. C-06-05302-RMW, Dkt. 53, p. 3:9 – 11.)

This Court denied Plaintiff's Rule 60 motion in April 2013 (*Id.*, Dkt. 55), and Plaintiff initiated another appeal (*Id.*, Dkt. 62; and 9th Cir. 13-16397). In the new appeal, Plaintiff once again accused the City's attorneys of committing fraud on the court. (9th Cir. 13-16397, Dkt. 7.)

In September 2013, while that appeal was pending, Plaintiff filed a second Rule 60 motion with this Court that contained additional accusations directed at his own former lawyer as well as the City's attorneys. (N.D. Cal. C-06-05302-RMW, Dkt. 72.) The principal allegation in this second Rule 60 motion was that Plaintiff's attorney entered into a stipulation to remove one defendant (Tuck Younis) from the lawsuit without Plaintiff's consent, which Plaintiff regarded as a fraudulent act. *See id.* That motion was denied (*id.*, Dkt. 86), and Plaintiff initiated a third appeal (N.D. Cal. C-06-05302-RMW, Dkt. 88 and 9th Cir. 14-15080), which the Ninth Circuit summarily dismissed in February 2014 (N.D. Cal. C-06-05302- RMW, Dkt. 92).

On July 15, 2015, the Ninth Circuit also affirmed the District Court's denial of Plaintiff's first Rule 60 motion. (N.D. Cal. C-06-05302-RMW, Dkt. 100.) While Plaintiff' petition for rehearing of the Ninth Circuit decision was pending, he sent the Court of Appeal a letter dated October 15, 2015 (9th Cir. 13-16397, Dkt. 43) that stated on page 3:

> A failure of this court to reverse itself all but ensures that litigation will not end, because the current ruling of this court is void by law and I am under no obligation to comply with it. I will not be bullied by the courts or the City in relinquishing my rights in this matter. This means that more judicial resources will be wasted; and it will also create a very uncomfortable situation.

Plaintiff's petitioned for rehearing, and the Ninth Circuit denied the petition three days after his October 15 letter. (N.D. Cal. C-06-05302-RMW, Dkt. 102.)

III. Plaintiff files a new lawsuit, yet another Rule 60 motion to reopen judgment, and unsuccessful appeals from the Court's adverse orders on both

In December 2015, Plaintiff filed a new lawsuit with allegations arising out of the same circumstances underlying the present case (N.D. Cal. 15-cv-5729-EJD, Dkt. 1). Plaintiff alleged in the new action that City's mayor and councilmembers violated his constitutional rights when they did not respond to an open letter he had posted on the internet accusing other city officials of misconduct. (*Id.*) Plaintiff's complaint sought a $5 million damages award against the City and $100,000 in punitive damages against each individual Councilmember. (*Id.*) The Court dismissed the suit for failure to state a claim. (*Id.*, Dkt. 40.) Bates appealed, and the Ninth Circuit summarily affirmed the district court's order on December 14, 2016, holding that the "questions raised in [Bates's] appeal [were] so insubstantial as not to require further argument." (9th Cir. 16-16094, Dkt. 14.) Bates filed a motion for reconsideration, which was denied. (*Id.*, Dkt. 16.)

Finally, Plaintiff filed his third Rule 60 motion for relief from judgment in this Court in May 2016. (N.D. Cal. C-06-05302-RMW, Dkt. 116.) Plaintiff sought in that motion to recuse Judge Ronald M. Whyte, to whom the case was assigned, based on the allegation that Judge Whyte had shown bias against him. (*Id.*) In August 2016, the Court denied Plaintiff's motion for recusal and motion for relief from judgment. (*Id.* Dkt. 128.) The Court ruled that the relief Plaintiff sought was barred by the law of the case doctrine given that Plaintiff's claims of fraud, violation of the Full Faith and Credit Act, and related arguments had already been decided multiple times. *See id.* The

Court held that Plaintiff had therefore not shown that relief was warranted under Rule 60 and denied the motion. *Id.* Plaintiff appealed form the Court's denial of Plaintiff's motion to reopen. (9th Cir. 16-16581.) The Ninth Circuit summarily affirmed, again finding that Plaintiff's appeal raised issues "so insubstantial as not to require further argument," and then denied Plaintiff's motion for reconsideration. (*Id.* Dkts. 11, 14.) The mandate in that appeal issued in March 2017. (*Id.* Dkt. 15.)

Argument

This Court has entered a final judgment, on the merits, disposing of all Plaintiff's claims in this action. "A judgment is the final determination of an action and thus has the effect of terminating the litigation" between the parties. Wright, Miller, & Kane, Definition of a "Judgment," 10 Fed. Prac. & Proc. Civ. § 2651 (3d ed.). The Court has also issued multiple orders denying Plaintiff's request to reopen that judgment. Plaintiff's case is therefore at an end unless he can demonstrate that one of the extraordinary circumstances in law or equity to justify the unusual step of disturbing a final judgment applies.

He cannot. Plaintiff again invokes the Court's equitable power to set aside judgments procured by a bona fide fraud on the Court, Fed. R. Civ. P. 60(d)(3), but as with Plaintiff's abortive Rule 60 motions in 2013 and 2016, Plaintiff's allegations of fraud consist of immaterial grievances and recapitulations of arguments he argued unsuccessfully in opposing summary judgment when this case was still live years ago. It follows that Plaintiff has adduced nothing to prove any fraud, much less evidence to prove it clearly and convincingly. *See Warwick v. Univ. of the Pac.*, No. C 08-3904 CW, 2011 WL 5573939, at *5 (N.D. Cal. 2011) (plaintiff failed to prove fraud on the court under applicable clear and convincing standard).

Plaintiff splits his fraud claim into three parts. First, he claims that "the City engaged in a conspiracy with Plaintiff's attorney . . . to perpetrate a fraud on the court." *See* Compl. ¶ 5. Second, Plaintiff argues that enforcement of an earlier judgment on preclusion grounds "violates [his] due

process rights." *Id.* ¶ 16. Third, Plaintiff says that the Court itself engaged in fraud by failing to act impartially and "conspire[ing] with Defendants to hold a fraudulent hearing" in 2013. *Id.* ¶ 20.

Plaintiff has already advanced—and this Court has already repeatedly disposed of—all of these arguments over the course of this long case. The law-of-the-case doctrine accordingly precludes those arguments here, which are in any event meritless. Plaintiff's continued use of the courts to prosecute his grievance despite multiple orders over multiple years is abusive, and he is a vexatious litigant who should be declared so to protect the court and Defendants from further abuse.

I. Plaintiff's claim of fraud between attorneys is barred and meritless

In his 2013 and 2016 Rule 60 motions, Plaintiff asked this Court to set aside its final judgment on the grounds that "his attorney and attorneys for Defendants perpetrated fraud on the court by filing the stipulation of dismissal" of defendant Tuck Younis. (N.D. Cal. C-06-05302-RMW, Dkts. 43, 72.) That is the same argument Plaintiff makes in his complaint now, namely that his attorney and Defendants' attorney conspired to commit fraud, including through "a fraudulent stipulation" to cause the dismissal of Defendant Younis. Compl. ¶¶ 5-8. Plaintiff's theory of fraud in the 2013 and 2016 motions was that the stipulation of dismissal was "filed without any input whatsoever from Bates" and without "gaining any benefit [for Plaintiff] whatsoever." (N.D. Cal. C-06-05302-RMW, Dkt. 72.) Plaintiff likewise claims here that collusion is clear from the fact that "Plaintiff never authorized his attorney to dismiss Defendant Younis" and that the stipulation was entered into "without any reason being given." Compl. ¶ 8.

When faced with these allegations the first time, this Court rejected them out of hand. (N.D. Cal. C-06-05302-RMW, Dkt. 86.) The Court observed that the only basis for Plaintiff's claim of collusion was his own "self-serving declaration" created "five years after the court entered judgment," which the Court ruled was "insufficient" to meet Plaintiff's "high burden" of providing clear and convincing evidence of fraud on the Court. (*Id.*) The Court further ruled that, even if true,

Plaintiff's allegations would not have established that the "adversary process was undermined" for purposes of the fraud-on-the-court exception to the finality of judgments since defendant Younis would have been shielded by qualified immunity to the same degree as the other named defendants had he remained in the case. (*Id.*) The Ninth Circuit subsequently affirmed the Court's ruling in all respects. (N.D. Cal. C-06-05302-RMW, Dkts. 92, 100.) And both this Court and the Ninth Circuit again reaffirmed that ruling on law-of-the-case grounds in 2016 and 2017. (*Id.*, Dkts. 128, 134.)

That was the end of the matter, many times over. Because this Court (not to mention the appellate court) already considered and disposed of Plaintiff's "fraud" argument regarding defendant Younis in 2013, and then again in 2016, it is the law of the case, "the purpose of which is to prevent relitigation of issues that have been decided." *See, e.g., Suel v. Sec'y of Health & Human Servs.*, 192 F.3d 981, 984 (Fed. Cir. 1999). Indeed, Plaintiff proves the wisdom of the observation that without the law-of-the-case doctrine, "cases would end only when obstinate litigants tire of re-asserting the same arguments over and over again." *See United States v. Agofsky*, 516 F.3d 280, 283 (5th Cir. 2008); *cf. Vidimos, Inc. v. Wysong Laser Co.*, 179 F.3d 1063, 1066 (7th Cir. 1999) ("In a case involving modest stakes, now in its eighth year, such a litigating strategy [of raising issues that have already been decided] is inconsiderate to the parties and the judiciary, and will not be allowed to succeed.").

Moreover, this Court's rejection of Plaintiff's fraud theory was undoubtedly correct. As the Court observed in its 2013 ruling, "[c]ourts are to read 'fraud on the court' [within the meaning of the equitable principle enshrined in Rule 60] narrowly, in the interest of preserving the finality of judgments." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1104 (9th Cir. 2006); (N.D. Cal. C-06-05302-RMW, Dkt. 86). The mere allegation that Plaintiff's attorney did not sufficiently uphold his interests, even if true, would not suffice to prove the singular species of fraud that could

justify reopening a final judgment eight years after it was entered. (N.D. Cal. C-06-05302-RMW, Dkt. 86.)

II. The law-of-the-case doctrine bars Plaintiff's repeatedly rejected *res judicata* argument

In his opposition to summary judgment back in 2007, Plaintiff argued that the Court could not apply *res judicata* to preclude his claim against the City of San Jose based on an earlier adverse state-court ruling. (N.D. Cal. C-06-05302-RMW, Dkt. 24.) This Court rejected that claim, ruling that *res judicata* did in fact bar Plaintiff's suit against the City, and the Ninth Circuit affirmed that conclusion. (N.D. Cal. C-06-05302-RMW, Dkts. 30, 38.) Plaintiff then filed his first Rule 60 motion in 2013, in which he again argued that the adverse state judgment could not have preclusive effect in his lawsuit. (N.D. Cal. C-06-05302-RMW, Dkt. 43 p. 18.) This Court again rejected the argument, and the Ninth Circuit again affirmed. (N.D. Cal. C-06-05302-RMW, Dkts. 55, 100.) And Plaintiff raised the argument with this Court a third time in yet another Rule 60 motion in 2016. This Court and the Ninth Circuit rejected it, again. (*Id.*, Dkts. 128, 134.)

Plaintiff now advances that argument before this Court for at least the fourth time. Compl. ¶¶ 14, 16 (arguing that the Court "failed to follow the requirements of . . . The Full Faith and Credit Act" by "giving preclusive effect" to his state-court judgment, which "violates Plaintiff's due process rights"). He may not do so. The law-of-the-case doctrine precludes Plaintiff from once again litigating an issue on which this Court has issued definitive rulings. *See Suel*, 192 F.3d at 984. As plaintiff should have learned from the last times he tried the same thing, the equitable remedy described in Rule 60(d) is not a vehicle to "relitigate old matters or raise new arguments that could have previously been presented prior to the entry of judgment." *See Figy v. Amy's Kitchen, Inc.*, No. C 13-03816-SI, 2014 WL 3362178, at *3 (N.D. Cal. July 7, 2014); *see also Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995) (holding that Rule 60 may not be used "merely" to "reiterate arguments that [the party already] presented to the district court").

III. Plaintiff's arguments that the Court engaged in impartial and fraudulent conduct are barred and meritless

This Court has already rejected Plaintiff's theory that the Court did not act impartially and showed "bias" against him in its past conduct and rulings. (N.D. Cal. C-06-05302-RMW, Dkt. 128.) The law-of-the-case doctrine bars Plaintiff from raising that argument again. In any event, Plaintiff's misplaced claim of bias—based on nothing more than his disagreement with the Court's rulings—is not a basis for reopening the thirteen-year-old judgment against him, as this Court has already observed. (*Id.*) There has been no "fraud" to justify Rule 60 relief. *See Latshaw*, 452 F.3d at 1104.

IV. Plaintiff is and should be declared a vexatious litigant

"The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). The purpose of such orders is to prevent the "flagrant abuse of the judicial process" wherein "one person to preempt[s] the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *Id.* (internal markings omitted). Four factors inform the Court's decision whether to declare a vexatious litigant:

> First, the litigant must be given notice and a chance to be heard before the order is entered. Second, the district court must compile an adequate record for review. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. Finally, the vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered.

Id.

All four factors are met here. First, the City seeks a vexatious litigant order in an ordinary noticed motion, so Plaintiff will have the opportunity to respond and thereby be heard before entry of the order. Second, the Court will be able to compile an adequate record for review following full briefing by the parties, which requires only that the Court make reference to Plaintiff's many

abusive filings in this Court and the Ninth Circuit over the past thirteen years, as the City here documents. *See Frost v. United States*, No. 19-CV-05190-EMC, 2020 WL 1288326, at *6 (N.D. Cal. Mar. 18, 2020) (holding that the second factor "requires only that the court compile a list of actions and filings by the litigant"); *Boustred v. Gov't*, No. C-08-00546 RMW, 2008 WL 4287570, at *2 (N.D. Cal. Sept. 17, 2008) (holding that second factor was met by reference to previous court orders dismissing actions by plaintiff).

Third, Plaintiff's conduct in this and related matters has amply demonstrated that Plaintiff has used the judicial process to engage in frivolous and harassing conduct. All told, Plaintiff has sought to resurrect his claims against Defendants through six different complaints or motions to reopen in this Court, not to mention the battery of menacing and belligerent letters that have accompanied such filings. Plaintiff has also sued the City of San Jose's sitting mayor and councilpersons under frivolous claims stemming from the same grievances about this Court's 2008 judgment against him. All such actions by Plaintiff have been rejected, often multiple times, because all have had no basis in law. Indeed, the Ninth Circuit has found Plaintiff's appeals from this Court's orders disposing of his claims to have been "so insubstantial" as to warrant summary dismissal without argument. (*See, e.g.*, 9th Cir. 16-16094, Dkt. 14.; 9th Cir. 16-16581, Dkt. 11.)

Plaintiffs many filings have, in short, been both "harassing" and "numerous [as well as] patently without merit." *See Molski*, 500 F.3d at 1059 (holding that a vexatious litigant designation is warranted either because a plaintiff's claims are "harassing" or because they are "numerous" and "patently without merit"). Despite repeated rulings against him, Plaintiff has maintained a persistent crusade against the City, its officials, and the courts, causing the unnecessary expenditure of time and resources by all. Indeed, as Plaintiff's letter to the Ninth Circuit (9th Cir. 13-16397, Dkt. 43) vowing "that litigation will not end" and that the failure to capitulate to him will mean "more

judicial resources will be wasted" makes clear, wasting the courts' and the parties' time is the whole point. The time has come for the Court to put an end to this abuse of the judicial process.

Fourth, the Court can issue a narrowly tailored order that addresses the singular problem of Plaintiff's abuse of the courts with lawsuits against the City of San Jose and its officials or employees. The City requests that the Court require Plaintiff to obtain leave of court before filing any further lawsuit, or any further document in any existing case, in which the City of San Jose, or any City of San Jose official or employee, or any judicial officer, is named as a defendant. *See, e.g.*, *Ou-Young v. Stone*, No. 19-CV-07000-BLF, 2019 WL 6619879, at *9 (N.D. Cal. Dec. 5, 2019) (declaring plaintiff a vexatious litigant and ordering: (1) the plaintiff to "obtain leave of court before filing any complaint that alleges claims against" all federal judges, and (2) that the "Clerk of the Court . . . not accept for filing any complaint" alleging claims against federal judges "until the complaint has been reviewed by a judge and approved"); *Frost*, WL 1288326, at *9 (requiring leave of court before plaintiff could file claims "against any federal entity or any current or former federal employee"); *Sepehry-Fard v. Select Portfolio Servicing, Inc.*, No. 14-CV-05142-LHK, 2015 WL 1063070, at *12 (N.D. Cal. Mar. 10, 2015) (same, regarding any action with respect to a particular property). Such an order would be no broader than necessary to forestall Plaintiff's further use of the courts to exact punishment on the City and its employees for his long-concluded, unmeritorious grievance.

Conclusion

Plaintiff has raised the exact arguments of his complaint in the same effort to revive his 2006 lawsuit multiple times in this Court and the Ninth Circuit Court of Appeals. The courts have rejected the arguments as unmeritorious, frivolous, and barred. Yet Plaintiff is here raising them again, unnecessarily imposing on the Court's time and that of Defendants. The City requests that the

Court issue an order dismissing Plaintiff's complaint. The City further requests that the Court declare Plaintiff a vexatious litigant and issue an order in accordance with that declaration.

Respectfully submitted,

Dated: March 1, 2021

NORA FRIMANN, City Attorney

By: /s/ Matthew Pritchard
MATTHEW PRITCHARD
Senior Deputy City Attorney

Attorneys for CITY OF SAN JOSE

United States District Court
For the Northern District of California

E-FILED on 7/7/08

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FREDERICK BATES,

Plaintiff,

v.

CITY OF SAN JOSE, ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police, ADONNA AMOROSO, individually and in her official capacity as City of San Jose Deputy Chief of Police, and TUCK YOUNIS, individually and in his capacity as City of San Jose Police Captain,

Defendants.

No. C-06-05302 RMW

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Re Docket No. 19]

Plaintiff Frederick Bates, a retired sergeant with the San Jose Police Department, has sued the City of San Jose ("the City"), its Chief of Police, Robert Davis, and former Deputy Chief Adonna Amoroso alleging that defendants violated his civil rights by denying Bates a permit to carry a concealed weapon.[1] Defendants move for summary judgment on plaintiff's claim.

[1] Plaintiff also sued current Assistant Chief of Police, Tuck Younis, but Younis was subsequently dismissed by stipulation.

I. BACKGROUND

The California Penal Code permits qualifying retired peace officers to obtain from their former law enforcement agencies retirement identifications with an endorsement authorizing them to carry concealed and loaded firearms. *Unland v. Block*, 59 Cal. App. 4th 1537, 1528 (1997). Bates was formerly a sergeant with the San Jose Police Department. He was granted a disability retirement from the department in April 2004, due to the fact that the City could not accommodate the work restrictions placed upon him by his physician, at least in part to "avoid psychologically or physically stressful work." Upon receipt of this information, defendant Amoroso, then deputy chief, denied Bates a concealed weapon permit under Cal. Penal Code § 12027.1(e) which prohibits the issuance of a permit to carry a concealed weapon to any officer who has retired "because of a psychological disability."[2] It is undisputed that she did not hold a hearing to make this determination and that she based her decision solely on Bates's retirement application, which included his physician's work restrictions. Amoroso testified that she did not review the entirety of Bates's disability retirement package, which Bates contends was available to her and which she must have reviewed. Bates asserts that a review of the entirety of the disability retirement package would have made it clear to Amoroso that his disability retirement was based upon a heart condition, rather than a psychological disability.

Several months after the initial denial by Amoroso, the San Jose Police Department received clarifying information from Bates's physician stating that Bates did not have a psychological disability and that he was an appropriate candidate to carry a concealed weapon. Based on this information, the Police Department reversed its earlier decision and granted Bates a permit to carry a concealed weapon in August 2004.

Thereafter, Bates sued the City in the Superior Court of California, County of Santa Clara small claims court seeking to recoup the $1,500 retainer he had paid to his attorney for purposes of helping him secure his concealed weapon permit. The state court entered a judgment in favor of the City. Bates now sues the City, Davis and Amoroso for violation of his civil rights to freedom from

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[2] The text of Cal. Penal Code § 12027.1(e) reads: "No peace officer who is retired after January 1, 1989, because of a psychological disability shall be issued an endorsement to carry a concealed and loaded firearm pursuant to this section."

United States District Court
For the Northern District of California

deprivation of due process of law, freedom from summary punishment and freedom from the deprivation of the right to bear arms for failing to initially grant him a concealed weapons permit under § 12027.1.[3]

II. ANALYSIS

A. Civil Rights Claim

42 U.S.C. § 1983 "creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 943 (9th Cir. 2004) (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (*en banc*)). For Bates to successfully prove his civil rights claim, he "must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." *Jones v. Williams*, 297 F.3d 940, 934 (9th Cir. 2002). The parties do not dispute that the denial of a concealed weapons permit to Bates occurred under the color of state law. They do, however, disagree as to whether it resulted in the deprivation of any constitutional right.

The Due Process Clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property" without due process of law. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972); *Mullins v. Oregon*, 57 F.3d 789, 795 (9th Cir. 1995). The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness (i.e., denial of procedural due process guarantees) or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective (i.e., denial of substantive due process guarantees). *See County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998).

Defendants argue that the Ninth Circuit has already rejected the argument that the denial of a permit to carry a concealed weapon under Cal. Penal. Code § 12027 gives rise to a constitutional violation. In *Association of Orange County Deputy Sheriffs v. Gates*, former deputy sheriffs who had retired under medical disability brought suit under 42 U.S.C. § 1983 alleging they had been denied

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[3] The denial of a concealed weapons permit does not constitute a deprivation of the right to bear arms. *Hickman v. Block*, 81 F.3d 98, 101-02 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996). Further, the court does not see a basis for Bates's contention that the denial of a concealed weapons permit under § 12027.1 constitutes punishment, summary or otherwise.

certificates allowing them to carry concealed after retirement. The officers argued that Cal. Penal Code §§ 12031(b)(1) and 12027, which provide for the certificates, created an entitlement sufficient to warrant constitutional protection. The Ninth Circuit determined otherwise:

> The only restrictions imposed by § 12027(a) and § 12031(b)(1) are 1) the agency from which the officer retires issues a certificate indicating whether or not the officer may carry a concealed weapon and 2) the privilege of carrying a loaded concealed weapon may be denied or revoked for "good cause". This court finds, as did the court below, that the requirement of "good cause" prior to the denial of a weapons certificate does not create a constitutionally protected interest, because it is not a "significant substantive restriction on the basis for [the] agency's action."

Ass'n Orange County Deputy Sheriffs v. Gates, 716 F.2d 733, 734 (9th Cir. 1983) (citing *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)); *see also Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982) (private investigator did not have property interest in concealed weapons permit under Cal. Penal Code § 12050).

In 1988, § 12027.1 was amended to require a hearing with notice by an impartial three-member panel on good cause. Bates contends that this amendment dictates a different result from that in *Gates*. Section 12027.1(b)(1) now provides, "An identification certificate authorizing the officer to carry a concealed and loaded firearm or an endorsement may be revoked or denied by the issuing agency only upon a showing of good cause. Good cause shall be determined at a hearing, as specified in subdivision(d)." Subsection (d) provides, "Any hearing conducted under this section shall be held before a three-member hearing board. One member of the board shall be selected by the agency and one member shall be selected by the retired peace officer or his or her employee organization. The third member shall be selected jointly by the agency and the retired peace officer or his or her employee organization." Following subsection (d), subsection (e) provides, "No peace officer who is retired after January 1, 1989, because of a psychological disability shall be issued an endorsement to carry a concealed and loaded firearm pursuant to this section."

As set forth above, it is undisputed that Amoroso did not conduct a hearing before denying Bates the concealed weapons permit. In one respect, the 1988 amendment does not assist Bates. The California Court of Appeal has determined that the requirement of a hearing prior to denial of a concealed weapons permit under § 12027.1 does not apply to subsection (e). In *Unland v. Block*, the court determined that the fact that subsection (e) prohibiting a concealed weapons permit for officers

United States District Court
For the Northern District of California

retired because of a psychological disability was separate from subsection (b) providing for a "good cause" hearing signified that the legislature intended for denial for retirement with a psychological disability to proceed differently. *Unland*, 59 Cal. App. 4th at 1545. The court reasoned that although the legislature was armed with the knowledge that prior to the enactment of § 12027.1, law enforcement agencies permitted an officer's medical and psychological records to determine good cause, it nonetheless "created a summary denial procedure for officers who retired because of a psychological disability, and a full adversarial hearing procedure in all other cases of denial or revocation." *Id.* at 1546.

In this case, however, Bates contends that he did not retire due to a psychological disability under subsection (e). Instead, he argues, Amoroso misconstrued the reason for his retirement. Because his retirement was not because of a psychological disability, which he asserts that a careful review of his application for retirement would have revealed, Bates asserts that he was denied the right to a "good cause" hearing under subsection (b)(1). The court agrees that reading Bates's retirement application packet reasonably leads to the conclusion that Bates did not retire due to a psychological disability.

The court thus examines whether the 1988 amendment to § 12027.1 adding the hearing requirement created a constitutionally protected interest in a concealed weapons permit in this case. "Procedural guarantees ordinarily do not transform a unilateral expectation into a constitutionally protected interest" unless they "are intended to operate as a significant substantive restriction on the basis for an agency's actions." *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). Here, the requirement for a "good cause" hearing was added following the Ninth Circuit's decision in *Gates*, indicating that the Legislature meant to impose a substantive restriction on the decision to deny a concealed weapons permit. Further, the requirements for conducting such a good cause hearing are spelled out in detail. Thus, it appears that Bates had a constitutionally protected interest in a good cause hearing prior to the denial of a concealed weapons permit.

Viewing all evidence in favor of Bates and assuming that Amoroso had access to all the facts in his disability retirement packet and focused solely on the restrictions placed upon Bates by his physician to "avoid psychologically or physically stressful work," the denial of a concealed weapons permit implicates the violation of a constitutionally protected right. Because it is relatively clear from

the retirement application that Bates's retirement was due to hypertension that was caused or exacerbated by "psychoemotional stress" and not a psychological disability, Bates should have received a good cause hearing prior to the denial of a concealed weapons permit under § 12027.1.

The court notes, however, that plaintiff has now received his concealed weapons permit under § 12027.1 without a good cause hearing. After he submitted further information clarifying the reason for his retirement, he was issued a concealed weapons permit. It would certainly appear that no further process is due at this point. Nevertheless, Bates continues to assert his civil rights have been violated so that he may recover the retainer paid to his attorney and receive punitive damages and attorney's fees for the instant action.

B. Qualified Immunity

Plaintiffs Amoroso and Davis, sued in their individual and official capacities, assert that any actions taken with respect to the denial of Bates's concealed weapons permit are subject to qualified immunity. A court considering a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right, then proceed to determine if the right was "clearly established." *Wilson v. Layne*, 526 U. S. 603 (1999); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). The threshold question is: taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As set forth above, the answer to that threshold question is yes.

If a violation of a constitutional right could be made out on the allegations, the next step is to ask whether the right was clearly established. *Saucier*, 533 U.S. at 201. It is not necessary that a prior decision rule "the very action in question" unlawful for a right to be clearly established. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, "the contours of the right must be sufficiently clear so that a reasonable official would know that his conduct violates that right." *Browning v. Vernon*, 44 F.3d 818, 823 (9th Cir. 1995). An alternative expression of the "clearly established" law standard is that the law gave the official "fair warning." *See Serrano v. Francis*, 345 F.3d 1071,1077 (9th Cir. 2003). Both expressions have the same object. *Id.* Under the alternative "fair warning" standard, the question is whether the contours of the right have been defined with sufficient specificity that a state official had fair warning that his conduct deprived plaintiff of his rights. *See id.* at 1077.

Here, it is not as clear that the right to a good cause hearing under the circumstances set forth is a clearly established one. On one hand, the relevant statute has been amended to include the provision of a good cause hearing before a retired officer can be denied a concealed weapons permit. On the other hand, the statute's good cause hearing requirement does not apply to the denial of a permit to an officer who retired due to a psychological disability under subsection (e). Although the court concluded above that under the circumstances Bates was deprived of his right to a good cause hearing, that finding does not lead to the conclusion that the right to a hearing under the circumstances was necessarily clearly established. The court concludes that a reasonable official under the same circumstances would not know that her conduct violated Bates's right to a good cause hearing, particularly in light of *Unland*, which held that subsection (e) created an automatic denial rule for officers who retired because of a psychological disability. *Id.*, 59 Cal. App. 4th at 1545. Accordingly, Amoroso and Davis are entitled to qualified immunity.

C. Collateral Estoppel

Defendants further contend that Bates is collaterally estopped from asserting the instant civil rights claim against the City because the issue was previously adjudicated in the state court. "Issue preclusion by collateral estoppel prevents relitigation of issues argued and decided in prior proceedings." *Rodgers v. Sargent Controls & Aerospace*, 136 Cal. App. 4th 82, 89 (2006) (citing *Castillo v. City of Los Angeles*, 92 Cal. App. 4th 477, 481 *Rodgers v. Sargent Controls & Aerospace*, 136 Cal. App. 4th 82, 89 (2006)) (citations and quotation marks omitted).

As a threshold matter, Bates argues that defendants have waived their collateral estoppel defense by failing to plead it in their answer in this action. It is true that defendants did not assert collateral estoppel as an affirmative defense. Nevertheless, although "collateral estoppel is waived if not raised in the trial court," *People v. Morales*, 112 Cal. App. 4th 1176, 1185 (2003), "[c]ollateral estoppel as a defense need not be alleged in an answer or other responsive pleading, *Rodgers*, 136 Cal. App. 4th at 89. Here, it is sufficient that defendants raised the issue of collateral estoppel in their motion for summary judgment.

"Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the

one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].' [¶] It is implicit in this three-prong test that only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. [Citation.] An issue is actually litigated '[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . .'" *People v. Carter*, 36 Cal. 4th 1215, 1240 (2005) (citing *People v. Sims*, 32 Cal. 3d 468, 484 (1982)) (alterations in original).

Here, the collateral estoppel test is satisfied. As set forth above, plaintiff seeks to recover the retainer and attorney's fees expended to secure his concealed weapons permit. His basis for recovery is that he was deprived of his civil rights because of the denial of a concealed weapons permit upon his retirement. Whether Bates was deprived of his civil rights by the City was necessarily decided in the state court action in which he previously sought his retainer fees. In response to the question on the Small Claims Court complaint form, "Why does Defendant owe the Plaintiff money?", Bates wrote:

> After I (Plaintiff) retried from the San Jose Police Department on 4-01-04, the department denied me authorization to carry a concealed weapon (CCW). The department violated my rights by failing to grant me a hearing and failing to show "good cause" for the denial as required by law. I was forced to obtain legal representation, after which, the Police Department reversed it's [sic] decision and granted me authorization to carry a concealed weapon on 2-17-05. Because of the department's wilfull violation of my rights and state law (California Penal Code Section 12027.1), I suffered a monetary loss of $1,500.00 that I paid in attorney fees.

Decl. James Brennan, Ex. A. The Small Claims Court issued a notice of entry of judgment on January 30, 2006 denying Bates's claim. *Id.*, Ex. B. This constitutes a final judgment against Bates and in favor of the City on the merits of his claim that his rights were violated. Accordingly, whether rightly or wrongly decided by the Small Claims Court, Bates may not relitigate the issue of whether the City violated his rights in this forum.

III. ORDER

For the foregoing reasons, the court grants defendants' motion for summary judgment.

DATED: 6/25/08

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Notice of this document has been electronically sent to:

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Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

Dated: 7/7/08

/s/ MAG
Chambers of Judge Whyte

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK BATES, Plaintiff-Appellant, v. CITY OF SAN JOSE; ROBERT DAVIS, individually and in his official capacity as City of San Jose Chief of Police; ADONNA AMOROSO, individually and in her official capacity as City of San Jose Deputy Chief of Police; TUCK YOUNIS, individually and in his official capacity as City of Jose Police Captain, Defendants-Appellees.	No. 21-16867 D.C. No. 5:20-cv-07609-BLF MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Submitted April 17, 2023**

Before: CLIFTON, R. NELSON, and BRESS, Circuit Judges.

Frederick Bates appeals pro se from the district court's judgment dismissing

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

his independent action in equity and entering a vexatious litigant pre-filing order. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Prodanova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1105 (9th Cir. 2021). We affirm.

The district court properly treated Bates's independent action in equity as seeking the same post-judgment relief that he sought in *Bates v. City of San Jose*, No. C-06-05302 RMW (N.D. Cal. July 7, 2008). *See Nev. VTN v. Gen. Ins. Co. of Am.*, 834 F.2d 770, 775 (9th Cir. 1987) ("An independent action resembles a separate suit, yet it seeks in essence to duplicate the relief afforded by a [Rule 60] motion in the original proceedings. Motions and independent actions for relief commonly have been treated as interchangeable."). Because Bates's current challenges to prior decisions regarding his allegations of fraud, the preclusive effect of small claims court judgments, and judicial bias are consequently barred, the district court properly dismissed Bates's action. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("[A] court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." (citation and internal quotation marks omitted)); *see also McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (collateral estoppel bars parties from reraising identical issues that were previously litigated where the determination of that issue in a prior case was a "critical and

necessary part of the judgment in the earlier action" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion in declaring Bates to be a vexatious litigant and entering a pre-filing review order against him after providing notice and an opportunity to be heard, developing an adequate record for review, making substantive findings as to the frivolous and harassing nature of his conduct, and narrowly tailoring the order to prevent abusive litigation. *See Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (setting forth the requirements the district court must consider before imposing pre-filing restrictions); *Moy v. United States*, 906 F.2d 467, 469 (9th Cir. 1990) (setting forth standard of review).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n. 2 (9th Cir. 2009).

AFFIRMED.

Supreme Court, U.S.
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No. 23-53

In The

Supreme Court of the United States

FREDERICK BATES,

Petitioner,

v.

CITY OF SAN JOSE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented:

Whether the Ninth Circuit's ruling affirming the district court's dismissal of Petitioner's independent action on the basis of collateral estoppel and law of the case conflicts with this Court's precedent that under FRCP 60, res judicata must at times yield to an independent action in order to prevent a grave miscarriage of justice.

Whether the Ninth Circuit's ruling affirming the district court's declaration that Petitioner is a vexatious litigant, and subjecting Petitioner to a pre-filing screening order is arbitrary and capricious, and deprives Petitioner of his constitutional right of access to the courts, due process, equal protection of law, and equal treatment under the law.

LIST OF PARTIES TO THE PROCEEDING

Frederick Bates, Petitioner
City of San Jose California, Respondent
Adonna Amoroso, Respondent
Tuck Younis, Respondent
Robert Davis, Respondent

LIST OF PROCEEDINGS RELATED TO THIS CASE

Bates I

Frederick Bates v. City of San Jose, No. 2005-4-SC-015768 (Cal. Super. Ct. Santa Clara Cty.)

Bates II

Frederick Bates v. City of San Jose, Robert Davis, Adonna Amoroso, & Tuck Younis, No. 5:06-cv-5302-RMW (N.D. Cal. filed Aug. 29, 2006)

- Relevant appeal – 9th Cir. No. 08-16757

Bates III

Frederick Bates v. City of San Jose, Sam Liccardo, Rose Herrera, Charles Jones, Ash Kalra, Raul Peralez, Manh Nguyen, Magadalena Carrasco, Pierluigi Oliverio, Tam Nguyen, Donald Rocha, & Johnny Khamis, No. 15-cv-5729-EJD (N.D. Cal. Filed Dec. 14, 2015)

- Relevant appeal – 9th Cir. No. 17-16413

LIST OF PROCEEDINGS RELATED TO THE CASE – Continued

Bates IV (this case)

Frederick Bates v. City of San Jose, Robert Davis, Adonna Amoroso, & Tuck Younis, No. 5:20-cv-7609-BLF (N.D. Cal. filed Oct. 29, 2020)

- Relevant appeal – 9th Cir. No. 21-16867

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PETITION FOR WRIT OF CERTIORARI

Frederick Bates petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum opinion is attached as Appendix A. The district court's order granting motion to dismiss with prejudice as to Defendant City of San Jose and declaring Plaintiff a vexatious litigant is attached as Appendix B. The district court's order granting individual Defendants' motion to dismiss is attached as Appendix C.

JURISDICTION

The Ninth Circuit Court of Appeals denied Petitioner's appeal on April 21, 2023. This petition is timely pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES RELATED TO THIS CASE

U.S. CONSTITUTION

Article IV, Section 1 (full faith and credit clause)

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

STATUTES

United States Code

28 U.S. Code, Section 1738 – State and Territorial statutes and judicial proceedings; full faith and credit

The acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a

judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. Section 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rules of Civil Procedure

Rule 60. Relief from a Judgment or Order

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from judgment, order, or proceeding;

(2) grant relief under *28 U.S.C. Section 1655* to a defendant who was not personally notified of the action; or

(3) Set aside a judgment for fraud on the court.

STATEMENT OF THE CASE

Petitioner, who is black/African American, retired as a police sergeant from the San Jose Police Department on April 1, 2004, because of a medical disability. Petitioner was initially denied authorization to carry a concealed weapon (CCW) by Respondent Adonna Amoroso, a Deputy Chief of Police, without a due process hearing required by California Penal Code Section 12027.1. Amoroso stated reason for denying Petitioner a CCW permit was that she believed he retired on a psychological disability because of his work restriction to avoid psychological stress. Section 12027.1 prohibits the issuance of a CCW permit to an officer that retires on a psychological disability.

Petitioner's medical records, which were available to Amoroso, make it clear that Petitioner's work restriction to avoid psychological stress was due to his uncontrolled hypertension that caused damage to his heart, and not for psychological reasons. Petitioner's performance appraisals were consistently above standard with several individual rating categories exceptional. Additionally, the reason for Petitioner's medically related work restriction was discussed at his retirement board hearing that was open to the public. Furthermore, San Jose Police Department policy prohibits police administrators from interpreting work restrictions. The policy states that any question or confusion about a work restriction will be cleared by the City's Medical Director. Amoroso stated in a deposition that she was aware of this policy.

In August 2004, Respondent Tuck Younis, a Police Captain, received a letter from Petitioner's doctor explaining that his work restriction was a term of arts used to label his disability. Petitioner's doctor stated that he should have no problem or difficulty carrying a concealed weapon because of his work restriction to avoid psychological stress.

After receiving the letter from Petitioner's doctor, Younis denied him authorization to carry a concealed weapon, without the due process hearing required by Section 12027.1, just as Respondent Amoroso. Younis also told Petitioner's union representative approximately two weeks later that he would not be allowed to appeal the decision by Amoroso denying him authorization to carry a concealed weapon.

Petitioner made another attempt to secure his CCW permit when his attorney sent Respondent Robert Davis, the Chief of Police, a letter in October 2004, demanding Petitioner be issued a CCW permit based on the letter from his doctor explaining that he was a suitable candidate to carry a concealed weapon. Davis refused to issue Petitioner a CCW permit, without a due process hearing just as Respondents Amoroso and Davis. Petitioner was granted a CCW permit in December 2004, after he filed a complaint with the California Department of Fair Employment and Housing.

Petitioner sued the City of San Jose in small claims court (Bates I) in order to recover a $1,500 retainer he paid an attorney to help him secure a CCW permit. The small claims court entered judgment in

favor of the City, without allowing any testimony, with an implied ruling that it had no authority to grant the compensation Petitioner was seeking. No transcript or record exists for the proceeding.

In August 2006, Petitioner filed a federal lawsuit (Bates II) against Respondents for a violation of his constitutional rights based on the denial of his authorization to carry a concealed weapon without the due process hearing required by law. Respondents filed a motion for summary judgment that was granted by the district court in July 2008. Petitioner appealed to the Ninth Circuit Court of Appeals on July 29, 2008. The district court's judgment was affirmed in a memorandum disposition on November 20, 2009.

Petitioner made attempts to obtain relief from the judgment in Bates II by motions under Rule 60 of the Federal Rules of Civil Procedure. On February 21, 2013, Petitioner filed a Rule 60 motion for relief arguing that Respondents perpetrated fraud on the court, that the district court erred in granting Respondents' summary judgment motion on the basis of collateral estoppel, and that the district court exhibited bias towards Petitioner. Petitioner's motion was denied by the district court, and the judgment was affirmed by the Ninth Circuit Court of Appeals in July 2015.

Petitioner filed a second Rule 60 motion alleging that his attorney had fraudulently entered a stipulation with Respondent City of San Jose to dismiss Respondent Younis from Bates II without Petitioner's consent. The motion was denied and Petitioner appealed to the

Ninth Circuit. The appeal was dismissed by the Ninth Circuit on February 10, 2014.

In December 2015, Petitioner filed a new lawsuit, Bates III, against the City of San Jose and members of the San Jose City Council alleging that the City had failed to open an investigation into Petitioner's discrimination and misconduct complaint against employees of the City Attorney's Office and Police Department. The City was granted its motion to dismiss in June 2016. Petitioner appealed, and the Ninth Circuit summarily dismissed the appeal. Petitioner filed a Rule 60 motion for relief in June 2017, that was also denied by the district court. Petitioner appealed and it was denied by the Ninth Circuit.

On October 29, 2020, Petitioner filed the current case, Bates IV, an independent action in equity for relief from judgment. Petitioner puts forth three grounds for relief: (1) that Petitioner's attorney and Respondents' attorney perpetrated fraud during the litigation of Bates II, and that the district court perpetrated fraud during litigation of Petitioner's Rule 60 motion in Bates II filed in February 2013; (2) that the district court inappropriately applied collateral estoppel in granting Respondents' summary judgment motion in Bates II; and (3) that the courts showed bias against Petitioner and in favor of Respondents. The district court granted Respondent City of San Jose's motion to dismiss and declare Petitioner a vexatious litigant on August 23, 2021. The motion to dismiss by Respondents Adonna Amoroso, Tuck Younis, and Robert Davis were granted by the district court on October 12, 2021.

Petitioner's appeal was filed on November 1, 2021. The Ninth Circuit denied Petitioner's appeal on April 21, 2023, with a memorandum disposition. Petitioner's Petition for Writ of Certiorari is timely under Supreme Court Rule 13.1.

REASONS FOR GRANTING THE WRIT

I. Introduction

This Court should grant review of this case in order to set aside the ruling of the Ninth Circuit because it conflicts with the decision of this Court in *United States v. Beggerly*, 524 U.S. 38 (1998) that permits independent actions to prevent a grave miscarriage of justice. Permitting the judgment to stand in Bates II would be a grave miscarriage of justice. This Court should grant review to keep its pledge to guard the neutrality requirement of the Fifth Amendment jealously. This Court should also grant review in order to examine the lower federal courts' use of pre-filing screening orders pursuant to 28 U.S.C. Section 1651(a) to provide guidance on the important issue of what constitutes a vexatious litigant. At present, a coherent, uniform and objective standard on what constitutes a vexatious litigant among the federal Courts of Appeals is lacking. A vexatious litigant declaration deprives a person of their First Amendment right of access to the courts, a right this Court has termed as "one of the most precious of the liberties safeguarded by the Bill of Rights."

II. The Court of Appeals Ruling Conflicts with the Precedent of this Court Holding that Independent Actions are Permitted Under FRCP 60 to Prevent a Grave Miscarriage of Justice

A. Petitioner's fraud claims in this case are equivalent to the forged letter relied on by a defendant to obtain judgment against a plaintiff that this Court found in *Beggerly* was an injustice sufficiently gross to demand a departure from the rigid adherence to the doctrine of res judicata to prevent a grave miscarriage of justice

In affirming the judgment of the district court in this case, Bates IV, the Ninth Circuit disregards this Court's ruling in *United States v. Beggerly*, 524 U.S. 38 (1998). The Ninth Circuit ruling holds that the district court properly treated Petitioner's independent action in equity as seeking the same post-judgment relief that he sought in Bates II. In Bates II, Petitioner filed a Rule 60 motion seeking relief on the grounds that Respondents perpetrated fraud, the district court inappropriately applied the doctrine of collateral estoppel, and the courts exhibited bias toward Petitioner. The Ninth Circuit ruled that these same allegations by Petitioner in this case, Bates IV, also challenging the judgment in Bates II, are barred by law-of-the-case and collateral estoppel; and that the district court properly dismissed Petitioner's action. The Ninth

Circuit and the district court improperly views Bates II and Bates IV as the same case.

Federal Rules of Civil Procedure 60(d)(1) preserves a court's power to "entertain an independent action to relieve a party from judgment, order, or proceeding." In *Beggerly*, this Court held that independent actions are reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). *Beggerly* undermines the position of the inferior courts in this case that Bates II and Bates IV are identical cases, holding that an independent action is a continuation of the former suit on the question of the jurisdiction of the court. In every other sense, an independent action in equity is a new case that should be available only to prevent a grave miscarriage of justice.

This Court, in *Beggerly*, noted that *Marshall v. Holmes*, 141 U.S. 589 (1891) was such a case that demanded a departure from the rigid adherence to the doctrine of res judicata. In that case, the plaintiff alleged that judgment had been taken against her in the underlying action as a result of a forged document. The Court found that "the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged." Use of the forged letter was found to be sufficient to set aside the judgment in order to prevent a grave miscarriage of justice.

Petitioner makes an allegation in this case that the judgment in Bates II would not have been rendered against him but for an unconscionable scheme between Respondents' attorney and Petitioner's attorney to perpetrate fraud on the district court with the filing of Respondents' motion for summary judgment. The scheme included the false claim that Petitioner was denied a CCW permit only one time by Respondent Adonna Amoroso; and that he was granted authorization to carry a concealed weapon soon after Respondent Tuck Younis received a letter from Petitioner's doctor clarifying that Petitioner was a suitable candidate to carry a concealed weapon. The facts are clear that Petitioner was denied a CCW permit by Respondents Tuck Younis and Robert Davis, without a hearing required by California Penal Section 12027.1, after Younis received the letter from Petitioner's doctor. (Section 12027.1 implicates a constitutionally protected interest, because the hearing requirement places a significant substantive restriction on a law enforcement administrator making a decision regarding the issuance of a CCW permit to a retiring law enforcement officer).

As a part of the fraudulent scheme, Respondents' attorney and Petitioner's attorney entered an agreement to dismiss Respondent Younis by stipulation, without Petitioner's consent, in order to destroy Petitioner's cause of action against Younis, thereby preventing Petitioner from obtaining a judgement against Younis. Subsequently to Younis being dismissed by stipulation, he filed a declaration in support of Respondents' summary judgment motion falsely stating

that Respondent Davis, the Chief of Police, played no role in the denial and later granting of Petitioner's CCW permit. The district court's judgment reflects that the court was improperly influenced by Younis' perjured testimony in his declaration; because Davis was granted qualified immunity.

It is indisputable that Respondent Davis played a role in the matter of Petitioner's CCW permit authorization because he delegated his decision-making authority regarding Petitioner's CCW permit to Respondents Amoroso and Younis. Davis was also sent a letter by Petitioner's attorney demanding that he issue Petitioner a CCW permit after he was denied one by Amoroso and Younis. The evidence is indisputable that Davis denied Petitioner a CCW permit, without a due process hearing, just as Amoroso and Younis.

Petitioner also makes an allegation of fraud against the district court in this case that warrants relief from judgment in Bates II. Petitioner alleges that the district court made several fraudulent docket entries misstating the grounds for his Rule 60 motion, filed in February 2013, as challenging the court costs ("Costs Taxed") awarded to the City of San Jose in Bates II. The docket entries set the stage for a fraudulent hearing that the district court conducted without Petitioner's knowledge on April 26, 2013. According to the transcript, Respondents' attorney was granted an ex parte motion to dismiss [Petitioner's Rule 60 motion]. The civil minutes contradicts the transcript reflecting that the district court would take the matter under submission and enter a written ruling at a later

time. Petitioner's allegations of fraud against the district court are supported by the record.

This Court's opinion in *Beggerly* supports a finding that the fraud by Respondents' attorney, Petitioner's attorney, the district court judge and court staff, who are officers of the court, are injustices sufficiently gross to demand a departure from the rigid adherence to the doctrine of res judicata in order to prevent a grave miscarriage of justice. But for the fraud by Respondents' attorney, Petitioner's attorney, and the district court, judgments would not have been rendered against Petitioner. The Court of Appeals disregarded this Court's precedent and inappropriately applied the doctrines of collateral estoppel and law-of-the-case in affirming the dismissal of Petitioner's independent action in equity, despite his meritorious fraud claims.

B. The Ninth Circuit and district court's disregard for the U.S. Constitution, the full faith and credit act, and this Court's precedent when applying collateral estoppel in Bates II is an injustice that is sufficiently gross to demand a departure from the doctrine of res judicata to prevent a grave miscarriage of justice

In its motion for summary judgment in Bates II, Respondent City of San Jose claimed a defense of collateral estoppel. The collateral estoppel defense is based on the judgment in a small claims complaint Petitioner filed against the City in 2005, in the State of California. Judgment was entered against Petitioner

and in favor of the City without any testimony being allowed. The small claims commissioner made an implied finding that the court lacked the authority to grant Petitioner the compensation he was seeking. The issues raised in Petitioner's complaint were not litigated in the small claims proceedings. There is no transcript or record of the proceedings.

When determining the preclusive effect of a state court judgment, 28 U.S.C. Section 1738 (the full faith and credit act) requires a federal court to follow the preclusion law of the state where the judgment was rendered. The full faith and credit act implements the full faith and credit clause of the U.S. Constitution (Article IV, Section 1). This Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) held that "Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments, but rather goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken."

In *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373 (1985) this Court states: "More generally, *Kremer* indicates that Section 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment."

It is without question, that the collateral estoppel aspect of res judicata does not apply to judgments rendered in the Small Claims Courts in the State of California. In *Sanderson v. Niemann*, 17 Cal.2d 563 (1941),

the Supreme Court of California held that the California statute creating a small claims court emphasizes its informal character; and that the informal characteristics are of the utmost significance in disclosing theoretical grounds for refusing to apply collateral estoppel to judgments of small claims courts.

The judgment of the Ninth Circuit in Bates II affirming the district court's order granting the City of San Jose's motion for summary judgment based on the collateral effect of the small claims court judgment also conflicts with the Ninth Circuit's very own precedent and the findings of the court in the appeals' hearing. In the hearing, the Court remarked that it was "dubious" about collateral estoppel, and made findings that there was no litigation in the smalls claim case, and that there was no transcript or a sufficient record of the proceedings.

In *Clark v. Bear Stearns & Co.*, 966 F.2d 1318 (9th Cir. 1992), the Ninth Circuit held that the party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment; and that it is not enough that the party introduce the decision of the prior court, rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issue previously litigated. The Ninth Circuit went further and stated: "Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal."

The Ninth Circuit's flagrant disregard for, not only its own precedent, but the precedent of this Court, disregard for the U.S. Constitution and the command of 28 U.S.C. Section 1738, and its findings in the appeals' hearing discrediting the district court's decision on collateral estoppel that conflicts with its memorandum disposition more than meets the requirements for a meritorious independent action. The Ninth Circuit's memorandum disposition does not consider California's preclusion law. In *Marrese*, this Court reversed and remanded because the lower courts did not consider the state preclusion law. This Court's ruling in *Marrese* supports Petitioner's allegation in this case, Bates IV, that the lower courts inappropriately applied collateral estoppel in Bates II; and that but for the clearly erroneous rulings of the courts, judgment would not have been rendered against Petitioner. The Court should grant Petitioner's writ as to this issue.

C. Petitioner's claim in this case that the Ninth Circuit deprived him of his constitutional right to an impartial and disinterested tribunal during Petitioner's appeal's hearing in Bates II is an injustice sufficiently gross to demand a departure from the doctrine of res judicata to prevent a grave miscarriage of justice

In the hearing on Petitioner's appeal of the district court's judgment in Bates II that grants Respondents' motion for summary judgment, a judge on the panel

made comments exhibiting bias towards Petitioner and favoritism for Respondents that deprived Petitioner of his due process right to an impartial and disinterested tribunal guaranteed under the Fifth Amendment. The judge stated that it's a cliché to say, "why did you make a federal case of this? He asked for the concealed weapons permit. He's denied. He requested it again. He's granted. Why doesn't he just drop the darn thing?" These comments by the judge clearly shows that he was not impartial and disinterested in the outcome of Petitioner's lawsuit against Respondents. The judge's comments not only violate the Due Process Clause of the Fifth Amendment, but it also disregards this Court's holding in *Marshall v. Jerrico*, 446 U.S. 238 (1980).

In *Marshall v. Jerrico*, this Court held the following: "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous of distorted conception of the facts or the law. *See Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a

popular government, that justice has been done," *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."

The comments of the Court of Appeals' judge asking why Petitioner made this a federal case, and why Petitioner doesn't just "drop the darn thing" does not give the appearance or reality of fairness. Petitioner was deprived of a "proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." The Court of Appeals' lack of neutrality was manifested in its memorandum disposition affirming the judgment of the district court, despite discrediting the district court's order granting Respondents' summary judgment motion on the basis of collateral estoppel in the hearing on Petitioner's appeal.

This flagrant lack of neutrality by the Court of Appeals alone is an injustice that is sufficiently gross to demand a departure from the rigid adherence to the doctrine of res judicata, for which, independent actions under Rule 60 are reserved. This Court also commented in *Marshall v. Jerrico* that "The requirement of neutrality has been jealously guarded by this Court."

III. The Vexatious Litigant Declaration and Pre-filing Screening Order in this Case Violates Petitioner's Constitutional Rights

Courts have consistently recognized that declaring a litigant vexatious, restricting their access to the courts, is an extraordinary remedy that should rarely be used, especially in the case of a pro se litigant. This Court held in *BE & K Const. Co. v. NLRB*, 536 U.S. 403, 415 n. 12, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) that the First Amendment right of the people to petition the government for a redress of grievances, which secures the right to access the courts, has been termed one of the most precious of the liberties safeguarded by the Bill of Rights.

The district court in this case, Bates IV, stated that it was mindful that because Petitioner is a pro se litigant, it should tread carefully in considering a pre-filing screening order. Yet, the district court instituted a pre-filing screening order against Petitioner without any objective finding that his litigation was excessive when looking at the differing standards within the Ninth Circuit and among the other federal Courts of Appeals.

The Ninth Circuit and the district court appear to rely on the case of *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057 (2014) for guidance on the issue of a vexatious litigant. However, the Ninth Circuit, in its memorandum opinion, affirmed the judgment of the district court; even though the district court's judgment does not meet the requirements for issuing a

pre-filing screening order as outlined in *Ringgold-Lockhart v. County of Los Angeles*.

The Court of Appeals simply states in its memorandum opinion that the district court did not abuse its discretion in declaring Petitioner a vexatious litigant and entering a pre-filing review order after providing notice and opportunity to be heard, developing an adequate record for review, making substantive findings as to the frivolous and harassing nature of Petitioner's conduct, and narrowly tailoring the order to prevent abusive litigation.

The procedural requirements identified in *Ringgold-Lockhart v. County of Los Angeles* of notice and opportunity be heard, and developing an adequate record for review seems to be met. However, the substantive findings required by *Ringgold-Lockhart* are non-existent based on its holding that: "[B]efore a district court issues a pre-filing injunction . . . it is incumbent on the court to make 'substantive findings as to the frivolous or harassing nature of the litigant's actions.'" *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990) (quoting *In re Powell*, 851 F.2d 427, 431 (D.C.Cir.1988) (per curiam)). To determine whether the litigation is frivolous, district courts must "look at 'both the number and content of the filings as indicia' of the frivolousness of the litigant's claims." *Id.* (quoting same). While we have not established a numerical definition for frivolousness, we have said that "even if [a litigant's] petition is frivolous, the court [must] make a finding that the number of complaints was inordinate." *Id.* Litigiousness alone is not enough, either: "'The plaintiff's

claims must not only be numerous, but also be patently without merit.' *Molski*, 500 F.3d at 1059 (quoting *Moy*, 906 F.2d at 470)."

The Ninth Circuit makes no findings independent of the district court as to the number and content of Petitioner's filings against the City of San Jose and City officials as indicia of the frivolousness of his claims. The district court found that Petitioner was a vexatious litigant on the basis of four lawsuits he filed against the City of San Jose and several City officials since 2005; a small claims complaint (Bates I) filed in 2005; a federal lawsuit (Bates II) filed in 2006; a federal lawsuit (Bates III) filed in 2015; the current case (Bates IV) filed in 2020; and motions and appeals related to Bates II and Bates III. The district court's only finding as to the frivolous nature of Petitioner's filings is that his claims have been repeatedly rejected by the Ninth Circuit and other district court judges. But that is not entirely true. As Petitioner has already argued, the Ninth Circuit's finding in the hearing on his appeal of the district court's judgment granting Respondents' motion for summary judgment in Bates II discredits the district court's judgment on the issue of collateral estoppel. The Ninth Circuit's finding proves that Petitioner's claim as to the issue of collateral estoppel in this case is not 'wholly fanciful or patently without merit.'

Petitioner's four lawsuits, related motions and appeals do not come close to what other courts have found inordinate. *Ringgold-Lockhart* found that in *Molski*, 500 F.3d at 1060, the Court held that about 400

similar cases were inordinate; in *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523, 1526 (9th Cir. 1983), thirty-five actions filed in 30 jurisdictions were inordinate; In *In re Oliver*, 682 F.2d 443, 444 (3d Cir. 1982), more than fifty frivolous cases were inordinate; and in *In re Green*, 669 F.2d 779, 781 (D.C.Cir.1981) (per curiam), between 600 and 700 complaints were inordinate.

As to the requirement that a plaintiff's claims must be patently without merit, Petitioner's claims in this case, as has been argued above, have been thoroughly proven to be meritorious. But for the fraudulent scheme, and the inappropriate application of collateral estoppel by the Court of Appeals and district, judgment would not have been rendered against Petitioner in Respondents' motion for summary judgment in Bates II. But for the blatant bias of the Court of Appeals during his appeal of the judgment in Bates II, and the fraud by the district court relative to Petitioner's Rule 60 motion in Bates II, judgments also would not have been rendered against Petitioner. Therefore, the Court of Appeals ruling affirming the district court's declaration that Petitioner is a vexatious litigant, and imposing a pre-filing screening order unlawfully restricts Petitioner's access to the courts. Petitioner has been deprived of his First Amendment right to petition the government for redress of grievances, his Fifth Amendment right to due process, and his Fourteenth Amendment rights to equal protection of law and equal treatment under the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK BATES
Pro Se
1235 Muirkirk Ct.
Folsom, CA 95630
(408) 510-9174
mrb10364evr@aol.com

Dated: July 18, 2023

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630
(408) 510-9174

September 11, 2023

Supreme Court of the United States
Scott S. Harris, Clerk
1 First Street, NE
Washington, D.C. 20543-0001

Re: Petition for a Writ of Certiorari, No. 23-53
Frederick Bates, Petitioner v. City of San Jose, et al., Respondents
Exhibits enclosed on flash drive: audio recording of appeals' hearing, complaint for damages, the City's answer to complaint for damages, and excerpts from transcript of hearing on the City's summary judgment motion in Bates II; docket entries, Rule 60 motion, transcript of hearing on Rule 60 motion, and Civil Minutes in Bates II

Dear Mr. Harris:

Enclosed is a copy of the audio recording of the hearing on my appeal of the judgment of the District Court in my lawsuit against the Respondents filed in 2006. The District Court's judgment grants Respondents their motion for summary judgment. The District Court case number is C06-05302-RMW. The Ninth Circuit case number is 08-16757. The lawsuit is referred to as 'Bates II' in my petition for writ of certiorari. My independent action in equity, Bates IV (this case), attempts to set aside the judgment in Bates II. My petition seeks a review of the Ninth Circuit's judgment affirming the dismissal of my independent action in equity by the District Court, and the District Court's declaration that I am a vexatious litigant. Please refer to my petition for details.

I am submitting the audio recording that is irrefutable evidence that the claims in my independent action in equity, that have been repeatedly rejected by the lower Courts, are meritorious, and that the judgments of the District Court and the Ninth Circuit as to my independent action in equity are clearly erroneous. Each of the claims are stated as reasons for granting my petition for a writ of certiorari. The audio recording is an official copy taken from the Ninth Circuit's website.

First, the audio recording supports my fraud claims because it clear that the attorney for the City of San Jose, Michael Dodson, made false claims in the appeals' hearing. He falsely stated that I was only without my CCW permit for a four-month period, and that the City reversed the initial decision of Respondent Amoroso to deny me a CCW permit upon receiving

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

clarifying information from my doctor regarding my work restriction to avoid psychological stress. The claim by Mr. Dodson that I was without my CCW permit for only four months contradicts what he said in the hearing in District Court on the City's motion for summary judgment. In that hearing, Mr. Dodson said it was about eight or nine months that I was without my CCW permit when questioned by the judge. In the City's answer to my complaint in Bates II, the City also admits that I was without my CCW permit for eight months. Mr. Dodson's false claims in the appeals' hearing was no insignificant oversight. It was part of the unconscionable scheme referenced in my petition. Because the record is sufficiently clear that Respondents Tuck Younis and Rob Davis denied my CCW permit without the due process hearing required by California Penal Code Section 12027.1 after they received the clarifying information from my doctor about my work restriction. The hearing required by Section 12027.1 implicates a constitutionally protected interest. The audio recording supports my claims that the dismissal of Respondent Younis from Bates II by stipulation without my authorization, and Younis's false declaration in support of the City's summary judgment motion that Respondent Davis played no role in the denial and later issuance of my CCW permit destroyed my causes of action against both Younis and Davis. It is clear from the audio recording of the appeals' hearing and the transcript of the hearing on the City's summary judgment motion that there is no mention of the unconstitutional acts of Younis and Davis based on their denial of my CCW permit. My complaint for damages, the City's answer to my complaint, and the transcript of the hearing on the City's summary judgment motion are included as exhibits to supplement the audio recording. Please take note of the highlighted text.

Secondly, the audio recording support my claim that the Courts failed to follow the law as it relates to the City's defense of collateral estoppel. The recording shows that a judge on the Ninth Circuit panel was dubious about collateral estoppel based on a judgment the City won against me in a small claims court in the State of California, referred to as 'Bates I' in my petition. The finding of the judge during the hearing totally discredits the City's collateral estoppel defense because he implied that there was no actual litigation in the small claims case, and that there was no transcript or any record showing what was litigated in the small claims proceeding. It is also important to note that under California preclusion law, collateral estoppel or issue preclusion does not apply to a judgment entered in small claims court because of their informal nature. What this Court should find very troubling is that the Ninth Circuit affirmed the District Court on this issue in its memorandum disposition despite discrediting the City's collateral estoppel defense in the hearing, thereby, failing to follow the commands of the full faith and credit act and the Constitution. The memorandum disposition has been used by the Courts to reject my repeated claims that collateral estoppel does not apply to a judgment from a small claims court in California. Please refer to my petition for additional information on the issue of collateral estoppel.

Thirdly, the audio recording reflects that the same judge that discredited the City's collateral estoppel defense also discredited the City's claim that there was not enough evidence in the record to support a Monell claim. The judge rebutted the City's assertion by saying that all you need for a Monell claim is a decision by a policy-maker. You don't need a policy.

Fourthly, it is unmistakable in the audio recording that the same judge that discredited the City's collateral estoppel defense and assertion regarding a Monell claim made biased comments

against me that shows favoritism for the City. As noted in my petition, the judge questioned why I was making this a federal case, and why I didn't just drop the darn thing. The questions of the judge deprived me of a tribunal that was impartial and disinterested in the outcome of my case. The hostility and bias of the judge is quite shocking and does not give even the slightest appearance of impartiality. The fact that the Ninth Circuit affirmed the judgment of the District Court as to collateral estoppel, even though it was determined in the appeals' hearing that collateral estoppel should not apply, also lends support to my claim of bias. This blatant lack of impartiality is unconstitutional and should shock the conscience of this Court.

Additionally, I'm including exhibits to support my claim that the District Court staged a fraudulent hearing on a Rule 60 motion I filed in February 2013, seeking relief from judgment in Bates II. The exhibits include copies of docket entries misstating the reason for my motion as being "Costs Taxed,' my Rule 60 motion showing the bases for my motion, and copies of the transcript and civil minutes of the hearing on my Rule 60 motion that contradict each other. Relevant text in each exhibit is highlighted. See page 13 of my petition for details.

The Courts have never rebutted or refuted my claims of fraud, the Courts' misapplication of collateral estoppel, and bias. In fact, as noted above, the audio recording reflects that in the appeals' hearing, the Ninth Circuit found that the City's collateral estoppel defense to be dubious and that my Monell claim has merit. The Courts have since simply rejected or refused to accept my claims based on the deceptive memorandum disposition of the Ninth Circuit following the hearing, and because of blatant bias in favor of Respondents. The biased and hostile comments of the judge in the appeals' hearing in the audio recording is alone enough to warrant a reversal of the Ninth Circuit's judgment, since the comments deeply offends the Due Process Clause of the Constitution.

I'm submitting this letter and exhibits to assist the Court in making its decision on my petition for a writ of certiorari. The petition should be granted.

Sincerely,

Frederick Bates, Petitioner
Pro Se

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

September 19, 2023

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630

RE: Bates v. City of San Jose, CA, et al.
Exhibits with Flash Drive
No: 23-53

Dear Mr. Bates:

In reply to your letter or submission, received September 15, 2023, I regret to inform you that the Court is unable to assist you in the matter you present.

Under Article III of the Constitution, the jurisdiction of this Court extends only to the consideration of cases or controversies properly brought before it from lower courts in accordance with federal law and filed pursuant to the Rules of this Court.

The Rules of the Court make no provision for the filing via electronic media.

Your papers are herewith returned.

Sincerely,
Scott S. Harris, Clerk
By:

Susan Frimpong
(202) 479-3039

Enclosures

Subj: **Violations of the City's Code of Ethics**
Date: 10/26/2010 2:19:51 P.M. Pacific Daylight Time
From: [redacted]s@aol.com
To: mayoremail@sanjoseca gov

Mayor Reed I'm sure you are aware that I made allegations that Chief of Police Rob Davis, City Attorney Rick Doyle and some of their subordinates violated the City's Code of Ethics. I sent you a copy of the letter and supporting documents I sent to the Ninth Circuit Court of Appeals in April, and I sent you a letter in September informing you of the motion I filed. You are well aware that my allegations are that Davis, Doyle and their subordinates lied in their depositions and a summary judgment motion relative to my lawsuit for civil rights violations. You are well aware that these allegations are easily proven from the evidence I submitted. So far, I have not received any contact from the City informing me that an investigation has been initiated, even though I made a formal complaint with Employee Relations. I'm sure you are well aware that police officials in denying me a CCW permit without a hearing, violated City policy and state law which are so carefully crafted that this situation should never have occurred. As an attorney Mayor Reed, you know that it would have been highly unlikely the City would have prevailed in my lawsuit were it not for the false information presented in court. The fact that my attorney refused to counter the false claims by the City with the true facts, suggest a very disturbing and highly unethical relationship between him and the City Attorney's Office. The depth to which the City stooped to prevail in this case is disgraceful. The blatant manner in which City officials deprived me of my rights was equal to any experience I had growing up black in the south during the 50's and 60's. Their actions had very little to do with a CCW permit, but more to do with retribution and discrimination. Mayor Reed you made a pledge that government would be honest, open and transparent. You promised "no lying, no cheating and no stealing." You promised the citizens of San Jose that you would eliminate corruption from City Hall. The allegations against the officials I named are as corrupt as any that I have seen in my 20 years with the department. The City's failure to act clearly suggest that you and other City leaders are engaging in a cover-up. I find your indifference and lack of sensitivity for my civil rights insulting. What a double standard on your part Mayor Reed. You were quick to call for investigations of former council member Terry Gregory and former mayor Ron Gonzalez for alleged ethics violations. So I ask if there will be an investigation of the allegations I made against the above named officials. According to City policy and as a matter of common courtesy, I'm entitled to an answer.

Fred Bates, retired police sergeant

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

August 3, 2010

Re: Misconduct by City Officials

Employee Relations
200 East Santa Clara Street
San Jose, CA 95113

To Whom It May Concern:

In April 2004, I retired from the Police Department on a medical disability. I was denied authorization to carry a concealed weapon (CCW) without a hearing by Deputy Chief Adonna Amoroso because of my work restriction. In August 2004, I contacted Captain Tuck Younis in Police Personnel and asked that my CCW case be reopened. My doctor submitted a letter to Younis explaining that my work restriction should not preclude me from carrying a concealed weapon. With that clarifying information, the department denied my CCW privileges twice more without a hearing. I was ultimately granted a CCW permit in December 2004 after notifying the City of my intent to take legal action. In August 2006, I filed a lawsuit in Federal District Court alleging civil rights violations. In response to the lawsuit, City officials conspired to cover up the fact that my due process rights were violated. This cover-up was accomplished through false statements by Amoroso and Younis in their depositions, and by a "Motion for Summary Judgment" filed by Deputy City Attorney Michael Dodson. Mr. Dodson also made completely false statements relative to a hearing in the Ninth Circuit Court of Appeals in November 2009. It is very clear that City Attorney Richard Doyle and Chief of Police Rob Davis were intimately involved in this plot. This unethical conduct by the above named officials is a violation of the City's Code of Ethics.

In her deposition, Deputy Chief Amoroso (now retired) stated that she misinterpreted my work restriction to "avoid psychological stress" to mean I had a psychological disability. She claimed to not have authority to read my medical records which state numerous times that my work restriction was prescribed because of my heart and blood pressure problems. Her claim has no credibility. Amoroso was well aware that I signed a consent form giving the City unlimited access to my medical and psychological records. State law specifically grants police administrators authority to review medical and psychological records when making decisions regarding CCW permits. Several documents exist that

proves Amoroso read confidential medical information. Even more important is departmental policy that prohibits administrators from interpreting work restrictions. The policy states that any questions or confusions about work restrictions are to be resolved by the City's Medical Director. Amoroso stated in her deposition that she was aware of the policy. She was well aware that I had been working with that same work restriction for three years. During that time, I was assigned to Internal Affairs, Patrol and the School Safety Unit. At no time were there any questions about my psychological status or my suitability to carry a concealed firearm. Furthermore, it has been departmental policy as far back as 1988 to provide a hearing on **any denial** of a CCW permit. The City has refused to state the current policy regarding hearings when a CCW permit is denied.

After receiving the letter clarifying my work restriction, Captain Younis told me that the City Attorney's Office would not allow me to appeal the matter because my appeal was not made within forty five days. He contradicted this statement in his deposition saying it was Chief Davis' policy to not reopen cases decided by previous administrations. This claim by Younis is ludicrous because Davis had been Chief of Police for several months at the time of my retirement. Further discrediting Younis' claim is a statement by the City's Legal Adviser, Jim Brennan. Mr. Brennan told me it was Deputy City Attorney Carl Mitchell that made the decision to not reopen my CCW case. In his deposition, Younis stated he made a recommendation to Deputy Chief Pete Oliver to reverse the denial of my CCW permit. He contradicted this claim later by stating that he alone made the decision to reverse the denial of my CCW permit in a "Declaration in Support of the City's Motion for Summary Judgment," which was granted by the U. S. District Court. Younis further stated that Chief Davis played no role in this matter, even though Davis received a demand letter from my attorney. (At the time of his deposition, Captain Younis had been promoted to Assistant Chief)

I appealed the District Court's Summary Judgment order to the Ninth Circuit Court of Appeals. The hearing was held in November 2009. Deputy City Attorney Michael Dodson represented the City during my appeal as well as during the City's Motion for Summary Judgment in District Court. Mr. Dodson knowingly made false and misleading statements in the City's Appellate Brief and during the hearing in November 2009. He falsely stated that I was given my CCW permit in August 2004, immediately after the Police Department received the letter clarifying my work restriction. Mr. Dodson was well aware that I was denied a CCW permit after the letter was received, and that I did not receive my permit until December 2004. This clearly violated the hearing requirement of 12027.1 of the Penal Code. Section 12027.1 mandates a hearing on any denial of a CCW permit, except for psychological disabilities. Mr. Dodson also misled the court to believe there was a final judgment on a small claims action I filed against the City prior to my lawsuit in Federal District Court.

The City's "Motion for Summary Judgment" was a total fraud. It was only successful because, in the ultimate form of betrayal, my attorney refused to counter the false and misleading statements made by Mr. Dodson. This leads me to ask, "What did the City offer him for selling me out?" Since the courts offered Amoroso immunity because she claimed to be confused about my work restriction, it would have been impossible for the courts to also offer immunity to City officials that denied me a CCW permit without a hearing after receiving the clarifying letter. (Please refer to the packet I sent to Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals for more details)

As stated earlier, City Attorney Richard Doyle and Chief of Police Rob Davis were intimately involved in the decision making regarding this matter, even though efforts were made to distance them from the decisions that were made. It is clear that Tuck Younis was covering for Chief Davis and the City Attorney's Office. What hypocrisy by Davis. He recently fired two officers for allegedly covering up a DUI by a former officer. It is also clear that Davis promoted Younis to Assistant Chief to ensure that Younis went along with this scheme. Why so many City officials chose to compromise their personal and professional integrity by lying is mind-boggling. Since Mayor Reed has not responded to my letter dated April 25, 2010, I can only conclude that perhaps the corrupt actions by these officials have his blessings.

The conduct by City officials in this matter is indefensible. Their conduct was mean-spirited, discriminatory, and was motivated by retribution and hatred. Not only did City officials violate the law by denying me a CCW permit without a hearing, they violated the City's very own policies and Code of Ethics. The false and misleading statements made by City officials during their depositions and "Motion for Summary Judgment" show a reckless disregard for the truth and total disrespect for the legal process. (It should also be noted that City Attorney Richard Doyle, Chief Davis, Assistant Chief Younis and Deputy City Attorney Carl Mitchell all refused to appear on their subpoenas in my small claims action) The involved officials that remain employed with the City should be held accountable. How these officials conducted themselves is an embarrassment to the City. Their actions suggest that there is a culture of **corruption** in the Police Department and the City Attorney's Office. It is disheartening to know that, being a person of color, respect for my rights and for me as a person by the City of San Jose is no greater today than it was during the time I lived in the South during the 1950's and 1960's.

Enclosed is the packet I sent to Chief Judge Alex Kozinski of The Ninth Circuit Court of Appeals and several other documents to corroborate claims I made in this letter. Please contact me at the above phone number to schedule a meeting. There is a great deal more information that I would like to share with Employee Relations.

It should be noted that misconduct alleged against Deputy City Attorney Michael Dodson is currently under review by the State Bar of California.

Sincerely,

Fred Bates

cc: San Jose City Council Members
Debra Figone, San Jose City Manager

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Office of the City Manager
EMPLOYEE RELATIONS

August 20, 2010

Fred Bates
[redacted]
Folsom, CA 95630

Dear Mr. Bates:

We are in receipt of your letter dated August 3, 2010, received in our office on August 10, 2010. We appreciate you forwarding your concerns to our office. We take concerns like these very seriously and are currently reviewing the complaint for next steps.

We will be in touch with you shortly. In the meantime, if you have any additional information you would like to provide, please do not hesitate to let us know.

Sincerely,

Alex Gurza
Director of Employee Relations

200 East Santa Clara Street, San José, CA 95113 *tel* (408) 535-8150 *fax* (408) 292-6436 www.sanjoseca.gov

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Office of the City Manager
EMPLOYEE RELATIONS

November 5, 2010

Mr. Fredrick Bates
[redacted]
Folsom, CA 95630

Re: Alleged Misconduct by City Officials

Dear Mr. Bates:

Thank you for your letters of August 3, 2010 and September 16, 2010, which we have reviewed along with the accompanying materials. We regret that you were dissatisfied with the outcome of your case against the City and Deputy Chief Amoroso. However, after a careful review of all available information, it is clear that all of the arguments you raise in your letter concerning the merits of your claim were presented to the Court by your attorney. Following rejection of the claim you presented to the Small Claims Court, your attorney made all of these arguments to the District Court, and then to the Appellate Court. After careful consideration of your claims, these courts rejected them.

The allegations of misconduct by Police Department staff mentioned in your letter involve employees who have since separated from City service, making any administrative inquiry into the allegations moot. Regarding City Attorney's Office staff, you state in your letter that the misconduct you allege against them is currently under review by the State Bar of California. If that is the case, following that review, should the City be made aware of any substantiation of your allegations, appropriate action will be taken.

Thank you again for your letters and we hope this adequately addresses your concerns.

Sincerely,

Gina Donnelly
Deputy Director of the Office of Employee Relations

c: Richard Doyle, City Attorney

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

May 16, 2012

Re: Violations of the City's Code of Ethics

San Jose Elections Commission
c/o Office of the City Clerk
200 East Santa Clara Street
San Jose, CA 95113

Dear Members of the Elections Commission,

In a letter to Employee Relations dated August 3, 2010, I made allegations that several City officials had engaged in very serious misconduct relative to a lawsuit I filed against the City for civil rights violations. I sued the City because I was initially denied a CCW permit, without a hearing, after I retired from the Police Department on a medical disability. In the letter to Employee Relations, I made allegations that two police administrators, Deputy Chief Adonna Amoroso and Assistant Chief Tuck Younis (both now retired), lied in their depositions. Amoroso lied when she claimed she misunderstood my work restriction. Younis lied about the circumstances surrounding the denial of my CCW permit and the date the decision was reversed. The false statements by Amoroso and Younis were then used by the City Attorney's Office in support of a motion for summary judgment. The City Attorney's Office also misrepresented the judgment in a small claims action I initiated against the City.

After the City's motion for summary judgment was granted, I appealed to the Ninth Circuit Court of Appeals. The City Attorney's Office again misrepresented the small claims judgment and also presented fraudulent, non-record arguments and assertion of facts to the court. This grave misconduct was never addressed by my attorney, Stuart Kirchick. There is strong evidence of an agreement with my attorney and the City Attorney's Office to conceal facts and evidence in this matter. Senior Deputy City Attorney Michael Dodson represented the City in all relevant court proceedings in this matter. However, it is clear that the decisions by the City Attorney's Office were made by City Attorney Richard Doyle with input from Chief Trial Attorney Nora Frimann.

The City's Code of Ethics makes several references to the duty of City officials and employees to maintain the highest standards of integrity and honesty. Since Amoroso and Younis are no longer employed by the City, their violation of the Code of Ethics is no longer relevant. However, the fact that they lied under oath in their depositions and acted in concert with Doyle, Frimann and Dodson, implicates conspiracy, perjury and obstruction of justice. It is clear that Doyle, Frimann and Dodson violated the City's Code of Ethics by using the false statements of Amoroso and Younis in the City's arguments to the courts; and by misrepresenting that there was a final judgment in my small claims action. The Code of Ethics states that employees who violate the Code of Ethics will be subject to disciplinary action and that a violation of the Code of Ethics constitutes official misconduct. I presume that Doyle, Frimann and Dodson are currently employed by the City. Enclosed are copies of a motion to vacate judgment and letters I filed with the Ninth Circuit Court of Appeals, along with a copy of the

letter to Employee Relations. These documents are clear and convincing evidence that the City officials mentioned above violated the City's Code of Ethics.

Since my efforts to have the Mayor's Office initiate an investigation into this matter have failed, I am requesting that the Elections Commission conduct an investigation. (Enclosed are copies of my email to Mayor Reed dated October 26, 2010, and my letter to Sara Wright dated April 2, 2012) Clearly, there is a cover-up occurring. If it is not within the Commission's jurisdiction to investigate these allegations, I am requesting that this letter and the contents of this packet be forwarded to the appropriate authorities within the City government. Apparently when it comes to ethics, the City has a double standard. Under the first standard, rank and file employees are investigated in order to find evidence of misconduct, as in the police pay job audit. And then there is a second standard where high ranking City officials blatantly lie under oath or present false information while under obligation to be truthful, as in this matter and Pensiongate, only to have City leaders cover it up.

Any investigation into these allegations should also focus on the relationship between the City and the courts, since the actions of the courts were clearly biased and improper. In granting the City's summary judgment motion, the courts failed to follow basic laws mandated by Congress and binding precedent. (For details, a copy of my letter to Molly Dwyer, Clerk of Court for the Ninth Circuit Court of Appeals, dated February 27, 2012, is enclosed)The Ninth Circuit Court of Appeals have, so far, refused to hear my motions to vacate judgment in this matter, even though the court's rules state that all motions are presented to a motion's panel. It is quite clear that this is a case of **"case fixing"** and **cheating**. The misconduct by court officials is being addressed with the U.S. House of Representatives Judiciary Committee. (Enclosed are copies of my letters to the Judiciary Committee dated March 30, 2012, and June 13, 2011)

Not only do the misconduct of the City and the courts undermine the integrity of the judicial system, it is also an attack on democracy and the rule of law. This is truly reprehensible. Please contact me by phone and inform me of what action(s) the Commission will take relevant to this matter.

Respectfully,

Fred Bates
Retired Police Sergeant

Enclosures (14)

PLEASE READ THE CITY'S CODE of ETHICS! A COPY IS ENCLOSED.

CITY OF SAN JOSE, CALIFORNIA

Office of the City Clerk
200 East Santa Clara Street, Wing – 2nd Floor
San José, California 95113
Telephone (408) 535-1260
Facsimile (408) 292-6207

SAN JOSE
ELECTIONS COMMISSION
Michael Smith, Chair
Erica Crosgrove, Vice Chair
Linda Edgeworth
Rolanda Pierre-Dixon
Leon Louie

January 2, 2013

Fred Bates
[redacted]
Folsom, CA 95630

Subject:	Findings of San José Elections Commission Complaint
Complaint Filed:	May 21, 2012
Complainant(s):	Fred Bates
Respondent(s):	Office of the City Attorney

Dear Mr. Bates,

This letter will serve to inform you that the San José Elections Commission has conducted a hearing regarding the above-mentioned complaint and has issued the attached Resolution making certain findings. These findings were made after careful review of the complaint, the Independent Evaluator's Report and Recommendation, the response(s) and/or arguments received, and any oral testimony made at the hearing.

The Resolution is attached for your records. Judicial review of the findings may be had pursuant to Section 1094.6 of the California Code of Civil Procedure. Any such petition shall be filed not later than the 90th day following the date on which the findings become final. The findings become final upon the date it is mailed by first-class mail to the party seeking the review.

Please feel free to call the City Clerk's Office if you have questions at (408) 535-1260.

Sincerely,

Toni Taber, CMC
Acting City Clerk

Enclosure: Resolution No. 2012-05

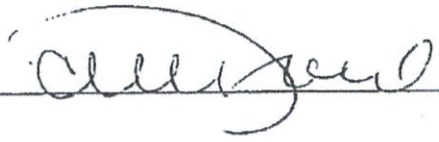
Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail and an additional copy sent by certified mail, in an envelope addressed to:

Fred Bates
[redacted]
Folsom, CA 95630

on this 4th day of January, 2013.

Print Name: Cecilia McDaniel

Signature: 

RD:LH

RESOLUTION NO. 2012-05

A RESOLUTION OF THE SAN JOSE ELECTIONS COMMISSION MAKING CERTAIN FINDINGS PURSUANT TO SAN JOSE CITY COUNCIL RESOLUTION NO. 75640 RELATING TO A COMPLAINT AGAINST OFFICE OF THE CITY ATTORNEY

NOTICE TO ALL PARTIES

THIS IS A RESOLUTION OF THE SAN JOSE ELECTIONS COMMISSION MAKING CERTAIN FINDINGS. READ THIS RESOLUTION CAREFULLY.

THE TIME WITHIN WHICH JUDICIAL REVIEW MUST BE SOUGHT TO REVIEW THE FINDINGS BY THE ELECTIONS COMMISSION CONTAINED IN THIS RESOLUTION IS GOVERNED BY CHAPTER 1.16 OF THE SAN JOSE MUNICIPAL CODE AND THE PROVISIONS OF CALIFORNIA CIVIL PROCEDURE SECTION 1094.6.

BE IT RESOLVED BY THE SAN JOSE ELECTIONS COMMISSION:

WHEREAS, pursuant to the San Jose Municipal Code and Resolution No. 75640 of the City Council of the City of San Jose, the Evaluator of the San Jose Elections Commission hereinafter referred to as Elections Commission, conducted an investigation of a Complaint filed on May 21, 2012, by Fred Bates, Complainant, alleging that City Attorney Richard Doyle, Chief Trial Attorney Nora Frimann and Senior Deputy City Attorney Michael Dodson "violated the City's Code of Ethics"; and

WHEREAS, the Evaluator issued a Memorandum and Recommendations dated June 6, 2012; and

WHEREAS, the Elections Commission conducted a hearing on June 13, 2012, pursuant to the San Jose Municipal Code and Resolution No. 75640, for which Respondent Office of the City Attorney was provided notice and a full opportunity to be heard and present evidence and testimony about the Memorandum and Recommendations of the Evaluator; and

WHEREAS, at the June 13, 2012 hearing, the Elections Commission received and considered testimony and arguments and considered the Memorandum and Recommendations of the Evaluator.

NOW, THEREFORE, BE IT FURTHER RESOLVED BY THE ELECTIONS COMMISSION:

After considering the Memorandum and Report of the Evaluator presented at the public hearing, the entire record in the matter of the Complaint which is incorporated in this Resolution and the testimony and evidence at the public hearing, the Elections Commission makes the following findings:

1. That the Complaint fails to allege facts sufficient to sustain a potential violation of the San Jose Municipal Code;

2. That the Evaluator's recommendation against conducting an investigation of the Complaint is approved;

3. That referral of this matter to another agency would serve no useful purpose; and

4. That the file in this matter should be closed without further action. (Adopted 4-0-1.)

ADOPTED this 13th day of June, 2012, by the votes described above.

MICHAEL SMITH, Chair
San Jose Elections
Commission

ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk

8. If a member of the Commission is a complaining party, that member's right to participate is the same as any other complaining party.

9. A member of the Commission who files a complaint may participate and vote on a matter concerning such complaint except in the following circumstances:

   a. Where the member of the Commission filing the complaint is a witness who was interviewed by the Evaluator during the investigation of the complaint because of the member's personal knowledge of the alleged violation; or

   b. Where a member of the Commission files a complaint based on the member's personal knowledge of facts and circumstances beyond the member's information and belief that there may be a violation of the San José Municipal Code.

F. REVIEW OF COMPLAINTS BY EVALUATOR

1. The Evaluator shall notify the Respondent of the allegations and provide the Respondent with a complete copy of the complaint immediately upon the receipt of the complaint, unless the Evaluator determines that it is necessary to delay the notification in order not to compromise the investigation.

2. The Evaluator shall review every complaint to determine whether sufficient cause exists to conduct a preliminary investigation. Sufficient cause shall exist when a complaint identifies specific facts, which if proven, would be a violation of the Municipal Code. No investigation shall be conducted if the complaint does not contain sufficient facts to demonstrate a potential violation, if the facts would not amount to a violation of law or if identical allegations which have already been addressed in a prior investigation.

3. Complaints which allege violations which have occurred more than four years prior to the date of filing will not be considered by the Commission.

4. Except as provided in this Subsection 4, the Evaluator shall refer any complaint where the Respondent is a classified or unclassified employee appointed by a City Council Appointee to the appointing authority for investigation and action. The Commission shall take no further action on the complaint with regard to the Employee. Any City Employee who is a candidate for City office shall be treated as any other candidate for purposes of Chapter 12.06 of the San José Municipal Code.

5. If the Complaint, on its face, does not warrant a preliminary investigation, the Evaluator shall advise the Chair. The Chair will schedule the Evaluator's Report and Recommendations on a Commission Agenda for approval.

6. If the Commission, upon reviewing the Evaluator's determination of lack of sufficient cause, determines that the complaint identifies specific facts which if proven would be

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

"There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice" Montesquieu, 1742

June 10, 2012

San Jose Elections Commission
Office of the City Clerk
200 East Santa Clara Street
San Jose, CA 95113

Re: Memorandum from Hanson Bridgett to the Elections Commission regarding the complaint against the Office of the City Attorney alleging a violation of the City's Code of Ethics

Dear Commission Members,

This letter was written in response to the findings and recommendations in the report by the Evaluator (Hanson Bridgett LLP). I do not dispute the findings that the Elections Commission has no jurisdiction to investigate the allegation that members of the City Attorney's Office violated the City's Code of Ethics. I do, however, strongly disagree with the Evaluator's opinion that a referral of this matter to another agency would serve no useful purpose. The Evaluator recommended that the file in this matter be closed without further action.

The Evaluator's recommendation is based on the claim that this matter has been litigated extensively in both state and federal court; and that the Ninth Circuit Court of Appeals has rejected the same claims that have been raised in my complaint. The Evaluator also stated that relief I pursued through congressional review has not been successful. These statements by the Evaluator are misleading. The Ninth Circuit Court of Appeals and the House Judiciary Committee have not, in any way, addressed my allegations of misconduct by the City Attorney's Office.

Furthermore, the outcome in a legal proceeding should have no bearing on whether or not this Commission decides to refer this complaint for an investigation pursuant to Resolution No. 75640, paragraph L. This Commission is probably well aware that civil and criminal proceedings make no finding(s) relative to a violation of an organization's Code of Ethics; unlike what the Evaluator would have you believe. Only the City has the authority to enforce its Code of Ethics.

The Commission should refer this complaint for an investigation based on the three following reasons:

(1) All City officials and employees are bound by the requirements of the City's Code of Ethics

The City's Code of Ethics under **Purpose and Scope** states:

"City employees and officials are expected to demonstrate the highest standards of personal integrity, honesty and conduct in **all activities** in order to inspire public confidence and trust in City employees." (All activities would include the conduct of attorneys representing the City during a lawsuit)

(2) **Members of the City Attorney's Office (Richard Doyle, Nora Frimann and Michael Dodson) violated the City's Code of Ethics**

Relevant portions of the Code of Ethics that were violated are:

Policy: paragraph 1. Responsibilities of Public Service

"City officials and employees are obligated to uphold the Constitution of the United States and the Constitution of the State of California and to comply with Federal, State, and local laws and policies."

Doyle, Frimann and Dodson violated federal law by perpetrating fraud on the court. They presented arguments and facts in the City's appellate brief and oral argument to the Ninth Circuit Court of Appeals that they knew to be false, and not in the record of the district court. There were no citations to the record which are also required by law. The applicable federal laws violated are:

Federal Rule of Appellate Procedure ("FRAP") Rule 10: The Record on Appeal
FRAP 28(e) Requirements for Appellee's Brief
FRAP 28-2.8 Record References

Doyle, Frimann and Dodson violated federal law, as well as, the City's Code of Ethics because they encouraged and improperly influenced two police officials (now retired) to make several false statements under oath in their depositions. Those police officials are Deputy Chief Adonna Amoroso and Assistant Chief Tuck Younis. Doyle, Frimann and Dodson also entered a stipulation with my attorney, Stuart Kirchick, to withhold key facts and evidence from the courts. The applicable federal laws violated are:

18 United States Code, Section 371 - Conspiracy
18 United States Code, Sections 1621 thru 1623 - Perjury
18 United States Code, Section 1503 - Obstruction of Justice

Policy: paragraph 1. Responsibilities of Public Service

"City officials and employees are required to maintain the highest standards of integrity and **honesty**..."

Doyle, Frimann and Dodson violated the Code of Ethics by failing to maintain the highest standards of integrity and **honesty** because they misrepresented a small claims judgment relevant to my lawsuit against the City. They argued that there was a final judgment on the merits knowing fully that the small claims court ruling implied that the

court lacked jurisdiction to hear the case or that my complaint was defective. This misrepresentation by the City Attorney's Office misled the courts and resulted in a miscarriage of justice because my lawsuit was not allowed to proceed to trial based on the doctrine of collateral estoppel. The misrepresentation of my small claims judgment constitutes fraud on the court.

Policy: paragraph 9. Discrimination and Harassment

"City employees and officials shall not, in the performance of their duties, discriminate against any person on the basis of race, color, religion, national origin, ancestry, age, sex, gender, pregnancy, childbirth or related medical condition, sexual orientation, marital status, disability, medical condition and actual or perceived gender identity and they will reinforce the City of San Jose's commitment to equal employment opportunity and a work environment free of discrimination and harassment, including sexual harassment."

The actions by the City Attorney's Office and the Police Department violated the City's Code of Ethics because they were motivated by bigotry and retaliation. City policies, state laws and information from physicians were totally ignored or outright rejected that resulted in a violation of my civil rights.

(3) Doyle, Frimann and Dodson are subject to disciplinary action due to their violation of the City's Code of Ethics

Under the section **VIOLATION OF THE CODE OF ETHICS,** it states:

"In addition to any other penalty as provided by law, employees who violate the Code of Ethics **will be** subject to disciplinary action, up to and including termination. The violation of this Code of Ethics by a City official, elected or appointed, constitutes official misconduct."

Contrary to the conclusions of the Evaluator, a referral of this matter to another agency for investigation would definitely serve a useful purpose. It will inspire public confidence and trust in City government. On the other hand, a failure to investigate will give the appearance of a cover-up of the serious allegations of misconduct by the City Attorney's Office.

It should be noted that several documents submitted with my first letter (dated May 16, 2012) to this Commission that proves City Attorney officials engaged in misconduct are not listed as exhibits or is attached to the Evaluator's report. These documents also dispute the Evaluator's conclusions that the Ninth Circuit Court of Appeals has rejected the same claims in my complaint. Copies of these documents are attached to this letter.

Respectfully submitted,

Fred Bates

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

August 4, 2010

Sam Liccardo, San Jose City Council Member
200 East Santa Clara Street
San Jose, CA 95113

Dear Councilmember Liccardo:

Enclosed is a copy of a letter I sent to Employee Relations alleging misconduct by officials from the Police Department and the City Attorney's Office. I believe the information contained in this letter will be of interest to you. The misconduct by the named officials is a clear violation of the City's Code of Ethics.

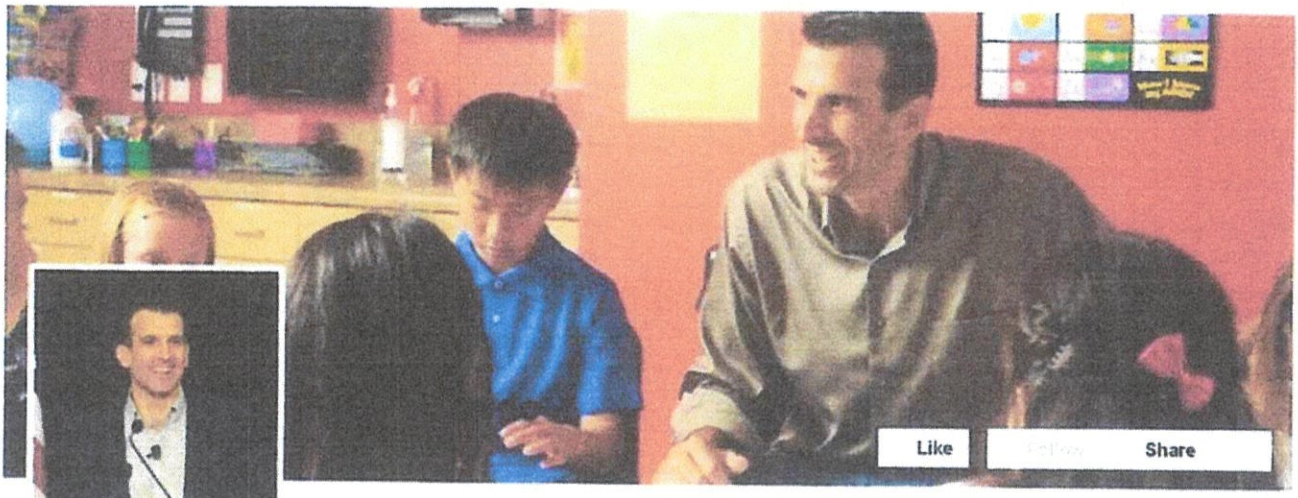
Sincerely,

Fred Bates

From: m[redacted] <mrb[redacted]@aol.com>
To: mayoremail <mayoremail@sanjoseca.gov>
Subject: Open Letter to Mayor Liccardo and the City Council
Date: Mon, Jun 29, 2015 11:17 am
Attachments: Public Corruption Letter.docx (18K)

Mayor Liccardo, attached is an open letter requesting an investigation into misconduct by the City Attorney's Office relative to a lawsuit I filed against the City. This letter can also be viewed at the following links: crnctz.blogspot.com/ and www.openltr.com/letter/open-letter-san-jose-mayor-sam-licardo-and-city-council . I also encourage you to view my group facebook page at this link: https://www.facebook.com/groups/824131267713226/ . I respectfully request a response from you regarding this matter.

Fred Bates



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http://www.sjmayor.org/

PHOTOS

Sam Liccardo

POSTS TO PAGE

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Sam Liccardo
July 7 at 3:03pm · Edited ·

We face a tremendous crisis in our local housing market and Housing 2.0 will bring together experts to share ideas and identify practical solutions to the high cost of housing and the long-term sustainability of our Silicon Valley economy.

San José Housing 2.0 Symposium to help tackle high cost of housing and encourage talent to live...

SAN JOSÉ, CALIF. — July 7, 2015 —The San José Department of Housing will host the Housing 2.0...

KNIGHTFOUNDATION.ORG

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Write a comment...

Fred Bates Mayor Liccardo, on June 29th, I sent you and each councilmember an email regarding a very important matter. So far, only one councilmember has acknowledged receiving my email. However, that councilmember has not stated what the City's plans are for dealing with the very serious issue I raise. I think you will agree with me that at some point the City will have to come out of its state of denial and address this matter. Here is a copy of the email I sent you: Mayor Liccardo, attached is an open letter requesting an investigation into misconduct by the City Attorney's Office relative to a lawsuit I filed against the City. This letter can also be viewed at the following links: crnctz.blogspot.com/ and ://www.opnittr.com/.../open-letter-san-jose-mayor-sam... . I also encourage you to view my group facebook page at this link: https://www.facebook.com/groups/624131267713226/ . I respectfully request a response from you regarding this matter.

A Cheating Scandal in the Silicon Valley - Justice for Sale

CRNCTZ.BLOGSPOT.COM | BY FRED BATES

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Melissa Tarango Help the hard working class of San Jose afford decent

Create

Recen
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Spin! Spi

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Play N
people pla

Investigation of Misconduct by City Attorney Richard Doyle and the City Attorney's Office

From: mrb10364evr@aol.com

To: mayoremail@sanjoseca.gov; district1@sanjoseca.gov; district2@sanjoseca.gov; district3@sanjoseca.gov; district4@sanjoseca.gov; district5@sanjoseca.gov; district7@sanjoseca.gov; district9@sanjoseca.gov; district10@sanjoseca.gov; pierluigi.oliverio@sanjoseca.gov; rose.herrera@sanjoseca.gov; richard.doyle@sanjoseca.gov

Date: Friday, October 2, 2015 at 11:23 AM PDT

October 2, 2015

To: Mayor Liccardo and the City Council

From: Fred Bates

On June 29th of this year(2015), I emailed the Mayor and each Councilmember a copy of an open letter that I posted on the internet requesting an investigation into criminal misconduct by City Attorney Richard Doyle and several other City officials. I only received a response from Councilmember Jones' Chief of Staff, Jerad Ferguson, acknowledging receipt of my email. In return, I asked Mr. Ferguson what action the City Council will take relative to this matter. I have received no response. I also posted a comment on the Mayor's facebook page on July 12th seeking a response relative to my complaint against the City Attorney's Office. I have not received a response from the Mayor's Office. So far, the City's lack of a response to my complaint against Mr. Doyle and the other named City officials is not in accordance with City policies. "Council Policy" and other policies of the City require an investigation, during which, a citizen or employee of the City making a complaint against an elected or appointed official are entitled to certain due process rights. Those rights include a formal interview and the right to present evidence to support the citizen or employee's complaint. Therefore, I respectfully request that the City open an investigation into this matter immediately that is consistent with due process. Should the City fail to do so within fifteen (15) days of the date of this email, I will assume it is the City's intent to continue to discriminate against me, and to continue denying me due process and equal protection of the law. I will then pursue other legal remedies available to me, including but not limited to a lawsuit alleging a violation of my civil rights and discrimination. Attached is a copy of the emails I sent to each Councilmember and the Mayor, as well as, a copy of the comment I posted to the Mayor's facebook page. Also attached is a copy of my complaint letters to the FBI and the Santa Clara County Civil Grand Jury that document my specific allegations of misconduct against City Attorney Richard Doyle and other City officials. I also encourage you to access the following links for additional details:
http://crnctz.blogspot.com/2015/08/exposing-cover-up-of-cheating-scandal.html
http://www.opnlttr.com/letter/open-letter-san-jose-mayor-sam-liccardo-and-city-council
https://www.facebook.com/groups/624131267713226/

Thank you in advance for your courtesy and cooperation relative to this matter.

Fred Bates, Retired Police Sergeant

mayor liccardo's facebook page and emails to the mayor and city council.pdf
1.4MB

Complaint with FBI.docx
19.4kB

Letter to Civil Grand Jury.docx
28.4kB

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 16, 2014

Santa Clara County Civil Grand Jury
Superior Court
191 North First Street
San Jose, CA 95113

Re: Public Corruption Complaint against San Jose City Officials and Federal Court Officials

Dear Members of the Civil Grand Jury,

On May 24th of this year (2014), I filed a complaint with the Criminal Grand Jury and the District Attorney's Office seeking an investigation into criminal misconduct by San Jose city officials relative to a lawsuit I filed against the City in August 2006 for civil rights violations. Complaint letters I filed with the Federal Bureau of Investigation, the State Attorney General's Office and the U.S. House of Representatives Judiciary Committee were included. It was my intent that the Criminal Grand Jury and the District Attorney's Office use the complaint letters as the basis for an investigation.

On June 11th, I spoke to Deputy District Attorney John Chase relative to this matter. Mr. Chase stated that the District Attorney's Office would not be opening an investigation into my complaint. In a follow-up letter sent to me dated June 12, 2014, he stated that the materials I submitted did not clearly list the crimes I believe were committed. This is simply not true. In my letter to the Criminal Grand Jury, I state the following: "My specific allegations are that San Jose city officials committed the criminal acts of conspiracy, perjury, witness tampering, obstruction of justice and possibly bribery." The crimes that I believe were committed by San Jose city officials and court officials are also stated in the letter I filed with the F.B.I. (Copies of the letters are enclosed)

Mr. Chase stated that the District Attorney's Office is unable to open an investigation into the crimes I allege because the acts constituting these crimes seem to have occurred from 2005 to 2007; well beyond the four year statute of limitation for prosecution of these crimes. While Mr. Chase notes correctly that some of the criminal acts I allege did occur from 2005 to 2007, he failed to note that documents I submitted reveals that San Jose city officials engaged in a cover-up of the misconduct by the City Attorney's Office beginning in 2010 and in 2012. Mr. Chase also failed to note that I made an allegation that the San Jose City Attorney's Office engaged in criminal misconduct by conspiring with U.S. District Court officials to falsify court documents and to stage "pretense litigation" on a Rule 60 motion I filed in February 2013. These allegations of misconduct are well within any four year statute of limitations. The District

Attorney's Office lack of interest in opening an investigation into this matter can be attributed to an apparent conflict of interest.

Even though misconduct relative to my lawsuit against the City of San Jose is the basis of my complaint, I am not asking the Civil Grand Jury to review the decisions of the courts relative to this matter. A review of the decisions made by the courts is being made through my appeal that is pending in the Ninth Circuit Court of Appeals. What I am asking is that the Civil Grand Jury, pursuant to its civil watchdog responsibilities and its authority to receive citizens' complaints, conduct an investigation into my charges that the San Jose City Attorney's Office and three retired police administrators engaged in very serious misconduct relative to my lawsuit and that current and former San Jose city officials are engaged in a criminal cover-up of that misconduct.

My lawsuit for civil rights violations against the City relates to the denial of my CCW permit by the police department after I retired on a medical disability in April 2004. The denial of my CCW permit was bigoted, retaliatory and violated City policy, state law and the U.S. Constitution. My federal lawsuit was filed in August 2006 after my attempt to resolve this matter in Small Claims Court failed. During my attempt to litigate this matter in Small Claims Court and federal court, the San Jose City Attorney's Office and Police officials engaged in brazen and persistent misconduct as stated by the following:

- Former Chief of Police Rob Davis, former Assistant Chief of Police Tuck Younis, City Attorney Richard Doyle and Deputy City Attorney Carl Mitchell refused to appear in Small Claims Court in response to their subpoenas in 2005 and 2006. This is contempt of court.

- Former Deputy City Attorney Michael Dodson, former Chief of Police Rob Davis, former Assistant Chief of Police Tuck Younis and former Deputy Chief of Police Adonna Amoroso conspired to present false testimony in the depositions of Younis and Amoroso in June 2007 relative to my federal lawsuit. This constitutes the criminal acts of conspiracy and subornation of perjury.

- Younis and Amoroso did, in fact, commit perjury in their depositions. Several of the perjured statements by Younis and Amoroso were used by City Attorney Richard Doyle, Assistant City Attorney Nora Frimann and Deputy City Attorney Michael Dodson in support of a summary judgment motion by the City that was filed in district court in October 2007. The clear intent of the summary judgment motion was to push a false narrative that police officials had denied my CCW permit only one time; and that they granted my permit immediately after receiving clarifying information regarding my work restriction. This is absolutely false. Police officials, as well as, officials from the City Attorney's Office denied my CCW permit several more times after receiving information that was crystal clear that I was entitled to a CCW permit or a hearing. The City Attorney's Office also presented false information to the courts that the issue regarding the denial of my CCW permit was resolved in Small Claims Court; therefore, my civil rights lawsuit was precluded on the basis of collateral estoppel. The City's summary

judgment motion was a complete hoax, a total fabrication. The offenses implicated are perjury and fraud on the court.

- Doyle, Frimann and Dodson conspired with my former attorney, Stuart Kirchick, to fraudulently dismiss Tuck Younis from my lawsuit by stipulation in August 2007 without my knowledge or consent; then misrepresented to the court that I had agreed to the dismissal. The dismissal provided me no benefit whatsoever. The purpose of the dismissal was to prevent the district court from ruling on the unconstitutional decision of Younis to deny me a CCW permit. I have evidence that strongly suggest that the dismissal of Younis resulted from a *quid pro quo* arrangement. This implicates the criminal acts of conspiracy, fraud, bribery and obstruction of justice. It should also be noted that Mr. Kirchick withheld other key evidence from the courts.

- The San Jose City Attorney's Office engaged in criminal misconduct by conspiring with U.S. District Court officials to falsify court documents and to stage a phony hearing on my Rule 60 motion filed in February 2013. My Rule 60 motion seeks relief from the judgment of the U.S. District Court granting the City's summary judgment motion. This implicates the criminal acts of conspiracy, fraud and obstruction of justice.

In addition to the criminal statutes violated, the misconduct by City officials as stated above is also a violation of the City's Code of Ethics. The Code of Ethics states that City officials and employees are obligated to uphold the Constitution of the United States and the Constitution of the State of California and to comply with Federal, State, and local laws and City policies. The Code of Ethics prohibits discrimination in any form. (A copy of the Code of Ethics is enclosed)

To support my claims of misconduct by the City Attorney's Office and federal court officials, I have enclosed the Rule 60 motion I filed with the district court in February 2013 and a second Rule 60 motion filed in September 2013. A motion to vacate judgment I filed in the Ninth Circuit Court of Appeals in September of this year (2014) and several other documents are also enclosed.

I am charging that the below listed City officials have engaged in a deliberate cover-up by failing to open an investigation into the misconduct of the San Jose City Attorney's Office as required by the City's Code of Ethics and other City policies. The crimes implicated are conspiracy and obstruction of justice:

- Mayor Chuck Reed and his former Agenda Services Manager (Sara Wright): Mayor Reed was advised of misconduct by the City Attorney's Office in letters dated April 25, 2010, February 27, 2012 and an email dated October 26, 2010. Sara Wright was advised in a letter dated April 2, 2012. Both Mayor Reed and Ms. Wright failed to respond to my request for an investigation. (Copies of the letters and email are enclosed)

- Current and former Council Members Rose Herrera, Nancy Pyle, Nora Campos, Judy Chirco, Kansen Chu, Ash Kalra, Sam Licardo, Madison Nguyen, Pierluigi Oliverio and Pete Constant: All were advised of the misconduct by the City Attorney's Office and police officials in letters dated August 4, 2010. None responded to my letters. (Copies of the letters are enclosed)

- Former City Manager Debra Figone: Ms. Figone was advised of the misconduct by the City Attorney's Office and police officials in a letter dated August 4, 2010. She did not respond to my letter. (A copy of the letter is enclosed)

- Office of Employee Relations and its former director Alex Gurza and Deputy Director Gina Donnelly: I filed a formal complaint with Employee Relations by letter dated August 3, 2010. In a response letter dated November 5, 2010, Ms. Donnelly somehow implied that an investigation into my complaint was contingent upon action taken by the courts and the State Bar of California. This is misleading. The initiation of an investigation into misconduct by any City official is the sole responsibility of the City. (Copies of the letters are enclosed)

- San Jose Ethics Commission - formerly San Jose Elections Commission (Members -Michael Smith, Rolanda Pierre-Dixon, Linda Edgeworth and Leon Louie): In May 2012, I filed a complaint with the Elections Commission by letter against the City Attorney's Office for violating the City's Code of Ethics. The Commission and its Evaluator, Hanson Bridgett LLP, acted outside the scope of their jurisdiction as stated by City Council Resolution No. 75640, paragraph F.4. The Resolution requires that the Evaluator refer any complaint where the Respondent is a classified or unclassified employee appointed by a City Council Appointee to the appointing authority for investigation and action. The Resolution states that the Commission shall take no further action on the complaint with regard to the employee. Attorneys for the City are unclassified employees appointed by the City Council. The Evaluator failed to make the required referral; and the Commission held a hearing on my complaint and closed it out knowing it was beyond the scope of the Commission's jurisdiction and in clear violation of Resolution 75640, paragraph F.4. In March 2013, I spoke to Cecilia McDaniel in the City Clerk's Office regarding the Commission's failure to make a referral. She could not provide an explanation. (Copies of the relevant documents are enclosed)

- Former City Clerk Dennis Hawkins and current City Clerk Toni Taber: Mr. Hawkins and Ms. Taber were well aware that the Elections Commission's closing of my complaint against the City Attorney's Office without a referral to the City Council violated City policy. Yet, they took no action.

From the facts and evidence as presented above, it is clear that City officials are covering up the misconduct by the City Attorney's Office. Not only is this an obstruction of justice, but as stated above, it is also a violation of City policy. The City's Code of Ethics states employees

who violate the Code of Ethics will be subject to disciplinary action, up to and including termination. It further states that the violation of the Code of Ethics by a City official, elected or appointed, constitutes official misconduct. As of today's date, October 16, 2014; no investigation has been conducted.

The most troubling aspect of this matter is that the following current and former City officials appeared to have profited financially as a result of their misconduct. They all received promotions or high paying positions outside the city:

- Former Deputy City Attorney Michael Dodson left the City to become a Senior Litigation Attorney with a private law firm in the Bay Area.
- Alex Gurza was promoted from Director of Employee Relations to Deputy City Manager.
- Nora Frimann was promoted from Chief Trial Attorney to Assistant City Attorney.
- Tuck Younis was promoted from Captain to Assistant Chief of Police. He then used the Assistant Chief's position as a stepping stone to become Chief of Police of Los Altos.
- Pete Oliver, a Deputy Chief of Police at the time of his involvement in this matter, is now the Chief of Investigations for the Santa Clara County District Attorney's Office.
- Cecilia McDaniel, who was a legal assistant to former Deputy City Attorney Michael Dodson, is now Deputy City Clerk.

It is very likely that other employees received some benefit for engaging in misconduct related to this matter as well.

City officials' refusal to take action against the City Attorney's Office is evidence of a double standard as it relates to the disciplinary process. For four plus years I have tried to initiate an investigation into misconduct by the City Attorney's Office to no avail. During this same time period approximately one hundred or more rank and file employees have been terminated from City employment for alleged misconduct. Much of the misconduct alleged was for some form of dishonestly and for reasons far less reprehensible than the dishonest and criminal misconduct of the City Attorney's Office and police administrators. It should also be noted that rank and file police officers were subjected to two comprehensible investigations in 2012 as a result of the pay job scandal. The City also solicited complaints against rank and file police officers in utility bills that were mailed in December 2012. Yet, City officials have rejected my many requests for an investigation into the criminal misconduct by the City Attorney's Office.

From the many scandals that have plagued the City during the Reed administration, it is clear that there is a culture of corruption at the very top level of San Jose city government. The scandals are also proof that there is no accountability on the part of City leaders. This is shocking since it was Mayor Reed who promised no lying, no cheating, and no stealing when he was first elected mayor. It was he who passed several Reed reforms promising openness and honesty in government. He also promised that he would eliminate corruption from City Hall. Yet, the Mayor and City Council have allowed the City Attorney's Office to be run like a criminal enterprise by allowing it to engage in brazen and persistent misconduct with impunity.

An article by Mercury News Reporter Scott Herhold published in 2006 also supports my complaint against the City Attorney's Office. In that article, Mr. Herhold implied that City Attorney Richard Doyle routinely uses unethical tactics during litigation involving the City. The article states that Mr. Doyle has a history of pushing bad cases and refusing to settle weak ones, costing the City millions of dollars. My case is a prime example of Mr. Doyle pushing a bad case by using unlawful tactics. He was given several opportunities to resolve my case without any litigation when there was no cost to me or the City. Yet, he chose to reject those opportunities and engage in protracted litigation that has cost the City several thousands of dollars, and is likely to cost thousands more. It is apparent that the unethical tactics by Mr. Doyle are unwritten City policy endorsed by Mayor Reed and the City Council. It is indefensible that the City has not initiated an investigation into the serious charges I make against the City Attorney's Office.

The action I would like the Civil Grand Jury to take is as follows:

- As already requested, conduct an immediate investigation into my allegations of misconduct by the City Attorney's Office and the cover-up by Mayor Reed, the City Council and other City officials.

- Make a recommendation for a criminal probe into the actions by City officials by the appropriate authority such as the State Attorney General's Office or the F.B.I.

- Make a recommendation that the City, by its own policy, initiate an administrative investigation into this matter through a neutral third party.

- Make recommendations for reforms in the City's complaint process whereby complaints of misconduct against top City officials are investigated in the same aggressive manner as complaints against rank and file City employees and officials, particularly police officers and fire fighters.

- Make a recommendation that the City and Police Department adopt a written policy regarding the issuance of concealed weapons permits to retiring police officers that provide basic due process protections that comply with state law.

I respectfully request to meet with the Civil Grand Jury in order provide additional evidence and insight into this matter.

Respectfully submitted,

Frederick Bates

c: Deputy District Attorney John Chase – County of Santa Clara
Special Agent in Charge David J. Johnson – F. B. I. (San Francisco Division)

GRAND JURY
SANTA CLARA COUNTY

November 13, 2014

Frederick Bates
[redacted]
Folsom, California 95630

Dear Mr. Bates:

The 2014-2015 Santa Clara County Civil Grand Jury has considered the matter of your complaint dated October 16, 2014, and believes that no action by the Grand Jury is warranted.

Sincerely,

Elaine Larson

Elaine K. Larson
Foreperson
2014-2015 Civil Grand Jury

EKL:bjh

SUPERIOR COURT BUILDING • 191 NORTH FIRST STREET, SAN JOSE, CALIFORNIA 95113 • (408) 882-2721 • FAX 882-2795

Frederick Bates
[redacted]
(408) [redacted]

December 19, 2014

Santa Clara County Civil Grand Jury
Attn: Elaine K. Larson - Foreperson
Superior Court
191 North First Street
San Jose, CA 95113

Re: Public corruption complaint against San Jose city officials

Dear Ms. Larson,

I received your letter dated November 13, 2014 stating that the Civil Grand Jury had considered my complaint dated October 16, 2014, and believes that no action by the Grand Jury is warranted. I respectfully disagree with the Grand Jury's decision to not take any action on my complaint against San Jose city officials for public corruption. I am disappointed that the Grand Jury did not honor my request for a meeting in order to provide additional insight and evidence into my complaint. I am also disappointed that the Grand Jury did not provide a reason for its decision; because it is clear my complaint has merit.

The actions I asked the Grand Jury to take are reasonable and necessary to hold San Jose city officials accountable, and to protect the interests of the public. Not taking any action gives the appearance that the Civil Grand Jury is tolerant of bigotry and corruption by City officials. It also tells City officials they do not have to respect the rights of current and former employees, or treat them with dignity and respect.

I stand by the claims I make in my complaint and I will continue to pursue a lawful course to expose the corruption by San Jose city officials and federal court officials. I have enclosed a copy of a letter dated December 12, 2014 that I sent to House Judiciary Chairman Bob Goodlatte making a second request for an inquiry into my complaint of public corruption against San Jose city officials and federal court officials.

Respectfully,

Frederick Bates

c: District Attorney Jeff Rosen – County of Santa Clara

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

May 24, 2014

District Attorney Jeffrey F. Rosen - County of Santa Clara
70 W. Hedding Street, West Wing
San Jose, CA 95110

Re: Public Corruption Complaint against San Jose City Officials and Federal Court Officials filed with the Santa Clara County Grand Jury

Dear Mr. Rosen,

Being that the District Attorney's Office works closely with the Grand Jury during investigations, I am forwarding you a copy of a letter and several documents I sent to the Grand Jury requesting an investigation into my complaint of public corruption against San Jose city officials and federal court officials pursuant to California Government Code Sections 3060-3075.

My complaint of public corruption specifically relates to the conduct of San Jose city officials and the courts during litigation I initiated against the City for denying me a concealed weapons (CCW) permit upon my medical disability retirement from the police department. However, it can be reasonably concluded from the conduct of city officials in this matter and the many scandals involving Mayor Reed and other top city officials that public corruption is widespread inside San Jose city government.

Relative to misconduct surrounding the denial of my CCW permit, your Chief of Investigations (Pete Oliver) should be able to confirm many of the details in my complaint letters. He was implicated as being involved in the decision to deny me a CCW permit and the decision to later grant me one because of Oliver's belief that the City would lose a lawsuit. If you have questions or request additional information, please feel free to contact me.

Respectfully,

Fred Bates

c: Santa Clara County Grand Jury

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

May 24, 2014

Santa Clara County Criminal Grand Jury
70 W. Hedding St., West Wing
San Jose, CA 95110

Re: Public Corruption Complaint against San Jose City Officials and Federal Court Officials

Dear Members of the Grand Jury,

I made complaints with the Federal Bureau of Investigation, the State Attorney General's Office and the U.S. House of Representatives Judiciary Committee against San Jose city officials and federal court officials for public corruption relative to a federal lawsuit I filed against the City of San Jose.

Copies of the complaint letters and supporting documents I sent to the above entities are enclosed. From these letters and documents, I believe that you will conclude that my complaints of public corruption have merit. My specific allegations are that San Jose city officials committed the criminal acts of conspiracy, perjury, witness tampering, obstruction of justice and possibly bribery. My allegations are that court officials of the U.S. District Court falsified court records, provided me with false information regarding a hearing and staged a phony judicial proceeding. I also made a complaint that the Ninth Circuit Court of Appeals refused to take action against the blatant misconduct of the San Jose City Attorney's Office. City officials and court officials are now engaged in a cover-up.

I respectfully request that the Grand Jury conduct an investigation into the actions of San Jose city officials pursuant to California Government Code Sections 3060-3075. The actions of federal court officials are more appropriately investigated by the F.B.I. I am also forwarding this information to the Santa Clara County District Attorney's Office. I can be contacted by letter or phone for additional details.

Respectfully submitted,

Fred Bates

c: District Attorney Jeffrey F. Rosen – County of Santa Clara
Attorney General Kamala D. Harris – State of California
Special Agent in Charge David J. Johnson – F. B. I. (San Francisco Division)
U.S. Attorney Melinda Haag – Northern District of California
U.S. Congressman Bob Goodlatte – Chairman of the House Judiciary Committee

County of Santa Clara

Office of the District Attorney

County Government Center, West Wing
70 West Hedding Street
San Jose, California 95110
(408) 299-7400
www.santaclara-da.org

Jeffrey F. Rosen
District Attorney

June 12, 2014

Frederick Bates
[redacted]
Folsom, CA 95630

Re: Complaint against San Jose City Officials and Federal Court Officials

Dear Mr. Bates:

I am the prosecutor in the District Attorney's Office assigned to prosecute and oversee the investigation of crimes committed by public officials and certain public employees. I also handle other matters involving official misconduct in cases where the District Attorney's Office has legal authority to do so. I am responding to the complaint that you have submitted to the District Attorney and the criminal grand jury alleging misconduct by numerous police officers, city officials, and court officials.

As a former law enforcement officer, you are likely aware that the District Attorney does not supervise or otherwise oversee the operations of any city or its agencies, including the police department. The District Attorney is responsible for investigating and prosecuting crimes. Therefore, we can review neither the initial decision concerning your concealed weapon permit, nor the subsequent court decisions related to that decision. We also cannot review or investigate whether other agencies or public officials properly investigated your complaints about this matter. Our concern is to determine whether there is a reasonable basis to believe that there is a prosecutable crime to be investigated.

The ¾ inch packet of materials that you submitted does not clearly list the crimes you believe were committed. Scattered throughout these materials were references to perjury, suborning or abetting perjury, and bribery ("quid pro quo"). Unfortunately, all of the acts constituting these alleged crimes seem to have occurred in the 2005 to 2007 time period (your materials are not clear on the exact dates). This is well beyond the 4-year statute of limitations period for prosecution of those crimes. Therefore, without evaluating the substance of your allegations, I must inform you that we are unable to open an investigation due to the running of the statute of limitations.

I am returning the packet of materials that you addressed to the criminal grand jury because that body does not receive complaints directly from members of the public. The criminal grand jury considers only those matters brought to its attention by the District Attorney's Office.

Very truly yours,

John Chase
Deputy District Attorney

Encls.

State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

April 4, 2006

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630

Dear Mr. Bates:

This letter is to acknowledge receipt of your complaint against a court commissioner. We are presently reviewing this information and you will be advised in writing, at a later date, of the Commission's action in this matter.

Very truly yours,

Bernadette M. Torivio
Executive Secretary

BMT:hs/

Confidential under California Constitution,
Article VI, Section 18, and Commission Rule 102

State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

May 16, 2006

Frederick Bates
1235 Muirkirk Court
Folsom, CA 95630

Dear Mr. Bates:

Your complaint dated March 31, 2006 about the conduct of a court commissioner was considered by the Commission on Judicial Performance at its May meeting. At that time, the commission determined not to take further action with respect to your complaint.

As you may be aware, on June 2, 1998, California voters approved Proposition 221, which gives the commission – together with the local courts – the authority to discipline subordinate judicial officers (court commissioners and referees). After reviewing your complaint, it was concluded that there is an insufficient basis to warrant the exercise of the commission's discretionary jurisdiction with regard to the oversight and discipline of subordinate judicial officers. (*See* California Constitution, article VI, section 18.1.) Therefore, no further action will be taken based on the information you have provided.

The commission acknowledges your interest and concern with respect to the situation that gave rise to this matter. We do appreciate your time and effort in bringing this matter to the commission's attention.

Very truly yours,

Colette Brooks
Staff Counsel

CB:al/L0516bates

Confidential under California Constitution,
Article VI, Section 18, and Commission Rule 102

COMPLAINT ABOUT A CALIFORNIA COURT COMMISSIONER

Date: March 31, 2006

Name: Frederick Bates

Telephone: (916) 984-1466

Address: 1235 Muirkirk Ct.
Folsom, Ca. 95630

Name of Court Commissioner: Gregory Saldivar

Court: Superior Court of California, County of Santa Clara, Small Claims Division – Department 96

County: Santa Clara County

Name of case and case number: Frederick Bates vs The City of San Jose
Case number 4-05-SC – 015768

Basis of Complaint: I filed a Small Claims action against the City of San Jose seeking damages that resulted from the Police Department's violation of my "due process" rights. The Police Department denied me authorization to carry a concealed weapon (CCW) after I retired. The Department refused to grant me a hearing which is a requirement by state law. It was only after I sought legal representation that the Department reversed its' decision. I filed a claim with the City of San Jose in an attempt to recover the money I spent for attorney fees. The claim was denied and I then filed a Small Claims action.

My case was originally scheduled to be heard on December 13, 2005. The case was continued because the witnesses that I subpoenaed (Chief of Police Robert Davis, Assistant Chief Charles Younis, and San Jose City Attorney Richard Doyle) failed to appear. I was never notified by the witnesses or the court that the witnesses would not appear. My case was continued to January 30, 2006 at 1:00PM in Commissioner Saldivar's court. I subpoenaed Chief Younis a second time and I also subpoenaed City Attorney Carl Mitchell. Both witnesses were properly served and stated they would appear in court.

Assistant Chief Younis and City Attorney Carl Mitchell failed to appear for court on January 30, 2006. I was informed by the City's representative Jim Brennan that Chief Davis instructed Younis to attend a law enforcement function rather than appear in court, even though Davis knew Younis had been subpoenaed. Brennan also stated that City Attorney Carl Mitchell did not appear because he was claiming "attorney – client

privileges." Again, I was never notified by the witnesses or the court that the witnesses would not appear. When he first called my case, Commissioner Saldivar started to address the fact that Younis and Mitchell had failed to appear for court. He was informed by the Court Clerk that both witnesses had been properly subpoenaed. Rather than take action against the witnesses, he suddenly changed his focus and stated that he would take a look at my case.

Commissioner Saldivar stated that there were some problems with my case. He stated that attorney fees are not awarded in Small Claims Court. He asked me what other court costs I was seeking. Commissioner Saldivar asked me if this matter was covered by "Collective Bargaining" and he stated that there was no constitutional right to a CCW permit.

It is apparent that Commissioner Saldivar did not have a very good understanding of my case. He seemed to think that I was seeking attorney fees associated with preparing and filing my case. I was, in fact, seeking to recover damages that I suffered when the City and Police Department violated my rights to "due process" when they denied me a hearing. The damages that I suffered were the fees I paid an attorney in order to assert my rights. Commissioner Saldivar never gave me the opportunity to explain this position. The information that I have read and the opinions I have received from legal professionals, including the Small Claims Adviser, suggest that it was appropriate for me to seek to recover damages in Small Claims Court. It is my hope that the Commission on Judicial Performance will clarify this issue. It should be noted that the City and Police Department later admitted that they were wrong in denying me a hearing and they reversed their decision to deny me authorization to carry a concealed weapon.

Commissioner Saldivar's question regarding "Collective Bargaining" was not relevant. "Collective Bargaining" has no bearing on my right to seek damages in Small Claims Court for a violation of my constitutional rights. While his statement that there is no constitutional right to a CCW permit is factually correct, it disregards the fact that the Police Department must grant constitutionally protected rights to "due process" when denying an officer authorization to carry a concealed weapon. They failed to do this which resulted in me suffering monetary damages. The due process guidelines are outlined in 12027.1 of the Penal Code.

My complaint against Commissioner Saldivar is that he was acting in bad faith when he failed to make a reasonable effort to get all the facts in my case by not allowing me to at least present my side of the issue. He disregarded my fundamental rights to "due process" when he stated that there is no constitutional right to a CCW permit. And what concerns me the most is that he did not faithfully discharge his judicial duties by not taking any action against the witnesses who displayed such contempt for me and the judicial system

by absolutely refusing to appear in court a single time even though they were properly subpoenaed.

I believe that Commissioner Saldivar was reluctant to take action against these witnesses because they were high ranking City officials. There may be other motives as well. The actions by these witnesses make a complete mockery of the judicial system and they were clearly an effort to frustrate my attempt to seek justice in this matter. A great deal of time and money was spent by me to ensure that each witness was properly served. Additional expenses were incurred by me since it was necessary to drive from the Sacramento area where I reside to the Bay Area twice for my court appearances. The level playing field that I expected when filing my case did not exist because the City and Police Department seemed to have improperly influenced this process. Commissioner Saldivar seemed a bit irritated that I had filed my case. The manner in which he spoke when rendering his judgment was somewhat insensitive. He said that I would get "zero" from the court. The whole experience left me feeling powerless and humiliated.

This whole experience has undermined my confidence in the judicial system. While I understand a decision in court may or may not go in my favor, the least I expected was that Commissioner Saldivar would hear all the facts before rendering a judgment. This appeared to be the situation in the case just prior to mine. In that case, Commissioner Saldivar gave the plaintiff (unknown name) the opportunity to make as many statements necessary in order to prove their claim even though Commissioner Saldivar believed the case had no merit.

The Commissioner (unknown name) in Department 97 that handled my first appearance on December 13, 2005 also gave me the opportunity to present my case. As stated before, I was unable to proceed because the witnesses failed to appear. I believe the actions of Commissioner Saldivar taken collectively shows that he was biased against me, and his intent was to dispose of my case as quickly as possible in a manner that was favorable to the City of San Jose.

The response that I received from Judge Danner, the Presiding Judge of the Superior Court, was nothing more than an attempt to justify Commissioner Saldivar's actions. His response was deft at not addressing the concerns that I articulated. It appears that the depth of Judge Danner's investigation was nothing more than simply reading my letter. It is my hope that the Commission on Judicial Performance will review this matter seriously and take whatever action it deems necessary.

These statements are made truthfully to the best of my ability.

Name: Ludmil Batov Date: 3-31-06

I first became aware of the Commission on Judicial Performance from my search of the internet. I was also advised by Judge Danner of my right to have the Commission on Judicial Performance review my complaint.

There were several other persons present in the courtroom at the time of my case, including court personnel. The only witness that I have a name of is Jim Brennan who represented the City of San Jose in this matter. His phone number is (408) 535-1934.

Enclosed are copies of my complaint letter to Judge Danner and his responding letter.

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
INTAKE
James E. Towery, Chief Trial Counsel

1149 SOUTH HILL STREET, LOS ANGELES, CALIFORNIA 90015-2299

TELEPHONE. (213) 765-1000
FAX: (213) 765-1168
http://www calbar.ca.gov

September 23, 2010

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630

RE: Inquiry Number: 10-15876
Respondent: Michael J. Dodson and Stuart D. Kirchick

Dear Mr. Bates:

Your complaint against Michael J. Dodson and Stuart D. Kirchick, received on July 6, 2010, has been reviewed by a staff attorney to determine whether they violated the State Bar Act and/or the Rules of Professional Conduct and whether there is a basis for investigation for prosecution of their alleged conduct.

You alleged that you sued the City of San Jose, California, for their denial of your right to carry a concealed weapon when you retired on medical disability as a police officer. You alleged that Mr. Dodson, who represented the City, knowingly made false statements in his filings with the court, and that Mr. Kirchick, your attorney, failed to refute those false statements. With regards to Mr. Kirchick also, you alleged that you spoke to him several times pointing out to him the City's false claims in their Appellate Brief, but that Mr. Kirchik failed to competently represent you when he failed to mention to the Circuit Panel that there were two letters clearly refuting Mr. Dodson's false statements.

After careful review and after taking into consideration all relevant factors, the State Bar has concluded that the matter does not warrant action. The matter which you complain about is a civil dispute outside of the State Bar's jurisdiction. You may wish to address Mr. Dodson's alleged false statements to the court hearing your next argument. If there is a finding of misconduct against Mr. Dodson, please resubmit your complaint along with a copy of that finding for our consideration at that time. With regards to Mr. Kirchik, the evidence is insufficient to show that he wilfully failed to competently represent you. Although you may be dissatisfied with his handling of your matter and his decision not to use the evidence you produced for him, the State Bar may not substitute an attorney's legal or professional opinion as to how to handle any particular case. Therefore, we are closing your complaint at this time.

You may wish to consult with other legal counsel regarding any available remedies. You may contact your local or county bar association to obtain the names of attorneys to assist you in this matter. The local bar association or county bar association in your area is: Sacramento County Bar Association, 901 H Street, Suite 101, Sacramento, CA 95814 (916) 564-6707.

No further consideration will be given to your complaint by the Office of Intake unless you present, **in writing**, new evidence or new allegations of misconduct. **Telephonic requests will not be accepted.** If you do not agree with the decision to close your complaint based on the information originally submitted

to the State Bar, you **must** file a verified accusation against the attorney with the California Supreme Court, pursuant to rule 9.13, subsection (d) through (f), California Rules of Court, **within 60 days of the date of this letter**. The Clerk of the Supreme Court has instructed us to advise you that no specific form is used by the Supreme Court for the filing of a verified accusation against an attorney. You may obtain specific information by contacting the Clerk's office at: California Supreme Court, Clerk's Office, 350 McAllister Street, San Francisco, CA 94102, (415) 865-7000. Please be aware that if you file a verified accusation against the attorney, the Office of the Chief Trial Counsel will only reopen its file in this matter if the California Supreme Court issues an order granting your request.

OFFICE OF THE CHIEF TRIAL COUNSEL/INTAKE

Item No. 7 of complaint against Stuart Kirchick: I hired Mr. Kirchick to represent me in a lawsuit I filed against the City of San Jose for civil rights violations in August 2006 because the police department denied me a CCW permit when I retired on a medical disability. The City filed a Motion for Summary Judgment in District Court based on the issues of qualified immunity and collateral estoppel. The District Court granted the City's Motion for Summary Judgment based on both issues. I appealed the District Court's order granting the City's Motion for Summary Judgment. During the appellate process, the attorney for the City (Michael Dodson) made false statements about the date the City reversed its' initial decision to deny me a CCW permit. On the issue of collateral estoppel, Mr. Dodson misrepresented the decision in my small claims action against the City as being a final judgment on the merits of my claim, knowing fully that there was no actual litigation and the decision in Small Claims Court only referred to attorney fees. (see complaint packet for Mr. Dodson for additional information)

My attorney, Stuart Kirchick, made no attempt to refute the false statements by Mr. Dodson regarding the date the City reversed the decision to deny me a CCW permit, even though he was well aware the statements were false. I spoke to Mr. Kirchick several times and wrote him a letter pointing out the City's false claims in their Appellate Brief (letter enclosed). In its' qualified immunity argument during my appeal, the City argued that the initial denial of my CCW permit was an honest mistake by a police administrator (Deputy Chief Amoroso) who believed my work restriction meant I had a psychological disability. Amoroso used the automatic denial rule of Penal Code Section 12027.1 (e) for psychological disabilities as authority for the denial. Yet, Mr. Kirchick failed to point out to the Circuit Panel that several months later a second police official (Captain Tuck Younis) received a letter from my doctor clarifying that my work restriction did not mean I had a psychological disability; and that Younis twice denied me a CCW permit without a hearing after receiving the clarifying letter. This was a clear violation of the due process hearing requirement of Penal Code Section 12027.1, therefore, a violation of my civil rights. Several months later, Younis used the same letter as the basis for granting me a CCW permit after I notified the City of my intent to take legal action. It should be noted that Mr. Kirchick had entered a stipulation with the City removing Younis from the lawsuit without consulting with me shortly after Younis gave his deposition (see documentation). That stipulation makes no sense whatsoever. It only benefited the City, while undermining my case. Mr. Kirchick knowingly aided the City in concealing the unlawful conduct of Captain Younis. Mr. Kirchick failed to mention to the Circuit Panel two letters I submitted to him that clearly proves that there was no actual litigation or final judgment on the merits of my claim in my small claims action (letters enclosed). Mr. Kirchick also failed to contact me and advise me of my right to petition for a rehearing after the City's Motion for Summary Judgment was affirmed by the Ninth Circuit Court of Appeals. The facts are clear that Mr. Kirchick engaged in unethical conduct and that he failed to act competently and in my best interest. I last spoke to Mr. Kirchick immediately after the appellate hearing on November 6th, 2009. We had a conversation about the hearing and the decision by the District Court.

Date:

_____

Frederick Bates

Item No. 7 of complaint against Michael Dodson: I filed suit against the City of San Jose for civil rights violations in August 2006 when the police department denied me a CCW permit after I retired on a medical disability in April 2004. The City filed a Motion for Summary Judgment in District Court based on the issues of qualified immunity and collateral estoppel. The District Court granted the City's Motion for Summary Judgment based on both issues. I appealed the District Court's order granting the City's Motion for Summary Judgment. Michael Dodson represented the City of San Jose during the Motion for Summary Judgment in District Court and during the appeals hearing in the Ninth Circuit Court of Appeals on November 6th, 2009. In clear violation of the rules of The State Bar of California, Mr. Dodson made knowingly false statements about the date the City reversed its' initial decision to deny me a CCW permit. On the issue of collateral estoppel, Mr. Dodson misrepresented the decision in my small claims action against the City as being a final judgment on the merits of my claim, knowing fully that there was no actual litigation and the decision in Small Claims Court only referred to attorney fees. (It is important to note that I made a complaint with the Bar because attorneys for the City failed to appear in Small Claims Court on their subpoenas)

I have included the letter and exhibits I sent to Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals that states in detail the case against Mr. Dodson. The evidence is overwhelming that Mr. Dodson knew that information he presented to the court was totally false and misleading. I have also sent a copy of the letter that Judge Kozinski sent to me instructing me to notify the appropriate state and local authorities.

Date:

_____

Frederick Bates

CARMEN A. KISSINGER
ASSISTANT CLERK ADMINISTRATOR
JORGE NAVARRETE
ASSISTANT CLERK ADMINISTRATOR
MARY JAMESON
AUTOMATIC APPEALS SUPERVISOR

EARL WARREN BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

October 29, 2010

Mr. Fred Bates
1235 Muirkirk Court
Folson, CA 95630

Dear Mr. Bates:

A complainant in a State Bar disciplinary proceeding who is dissatisfied with the results thereof may file in the California Supreme Court a verified accusation against the attorney. (Bus. and Prof. Code, § 6108.) It is proper for the court to dismiss an accusation unless it appears therefrom "(1) that the accuser has set forth specific charges which, if proved, would constitute grounds for disciplinary action; (2) that the same specific charges have been previously presented in written form to the State Bar for the purpose of invoking its disciplinary powers; and (3) that following such presentation to the State Bar, it has arbitrarily failed or refused to grant a hearing on such specific charges or has arbitrarily failed or refused, after a hearing, to take appropriate action." (*In re Walker* (1948) 32 Cal.2d 488, 490.)

If you think that an accusation against your attorney is warranted and wish to file one, an original and ten copies in proper form should be presented to this court, together with proof of service of three copies on the General Counsel, State Bar of California, 180 Howard Street, San Francisco, CA 94105, and one copy on the State Bar Court, 1149 South Hill Street, Los Angeles, CA 90015.

While there is no form approved by the Judicial Council, your petition must be verified and conform as closely as possible to rule 8.204 of the California Rules of Court, regarding briefs. **Please also include the correspondence from the State Bar indicating its action in the matter.**

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

By: A. Allen, Deputy Clerk

Aa/
Rec.

In the
Supreme Court of the State of California

SUPREME COURT
FILED

NOV 22 2010

Frederick K. Ohlrich Clerk

Deputy

Verified Accusation:

The State Bar of California Inquiry Number: 10-15876

Respondents: Michael J. Dodson, SBN 159743
and
Stuart D. Kirchick, SBN 144145

DECLARATION OF FREDERICK BATES IN SUPPORT OF VERIFIED ACCUSATION

I Frederick Bates hereby declare under penalty of perjury that the accusations against attorneys Michael J. Dodson and Stuart D. Kirchick contained herein are true and are made in good faith. This declaration was executed on November 20, 2010 in Folsom, California.

Date: NOVEMBER 20, 2010

Frederick Bates

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630
(408) 472-4387

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Rule 3.1

Rule 3.3 (a) (1)

Cases

In re Walker (1948) 32 Cal. 2d 488, 490

I. Statement of Accusations against Michael J. Dodson

Mr. Dodson knowingly made false statements and misrepresented facts relative to the issues of qualified immunity and collateral estoppel during hearings in District Court on November 9th, 2007, and in the Ninth Circuit Court of Appeals on November 6th, 2009.

II. Statement of Accusations against Stuart D. Kirchick

Mr. Kirchick failed to competently represent me during the hearing in the Ninth Circuit Court of Appeals on November 6th, 2009.

III. Memorandum In Support of Accusations

A. Statement of Facts

I (Frederick Bates) retired from the San Jose Police Department on a medical disability in April 2004. I was denied a CCW (carrying a concealed weapon) permit by Deputy Chief Adonna Amoroso because of my work restriction to "avoid psychological stress." In August 2004, I asked Captain Tuck Younis in Police Personnel to reopen my CCW case. My doctor submitted a letter to Younis, on or about August 25, 2004, explaining that my work restriction should not preclude me from carrying a concealed weapon. With that clarifying information, the police department willfully denied my CCW privileges twice more without a hearing in September 2004. I was ultimately granted a CCW permit in December 2004 after notifying the City of my intent to take legal action.

Subsequently, I sued the City in Small Claims Court seeking to recover the retainer I paid an attorney to assist me in securing my CCW permit. Judgment was entered in favor of the City. The Small Claims Court ruled that attorney fees are not awarded in Small Claims Court. No final judgment was made on the merits of my claim

that the City had violated my rights to due process. I then filed a lawsuit in Federal District Court in August 2006 against the City alleging civil rights violations. Michael Dodson represented the City during my lawsuit. Stuart Kirchick represented me. On July 7, 2008, the District Court granted the City's "Motion for Summary Judgment" based on the City's defense of qualified immunity and collateral estoppel. I appealed, and the motion granting summary judgment was affirmed by the Ninth Circuit Court of Appeals on November 20, 2009.

B. Michael Dodson Made False Statements Relevant to the Issue of Qualified Immunity

It is undisputed that the City denied me a CCW permit upon my retirement in April 2004, due to my work restriction to "avoid psychological stress." It is also undisputed that Captain Tuck Younis received a letter from my doctor on or about August 25, 2004, stating that my work restriction should not preclude me from carrying a concealed weapon (Exhibit A).

In the City's Appellate Brief and during the Panel Hearing on November 6th, 2009, Mr. Dodson argued that the City, upon receiving the clarifying letter regarding my work restriction, reversed its' earlier decision and granted me a permit to carry a concealed weapon in August 2004. Mr. Dodson further argued that approximately **four months** elapsed between the time of my disability retirement, in April 2004, and me obtaining a permit to carry a concealed weapon in August 2004 (Exhibit E).

These claims by Mr. Dodson that I was granted a permit to carry a concealed weapon in August 2004, and that I was without my CCW permit for approximately four months, were made with the knowledge they are false. These false claims by Mr. Dodson are a clear violation of Rule 5-200 of the California Rules of Professional Conduct,

Business and Professions Code 6068 (d) and ABA Model Rule 3.3 (a) (1) that prohibits an attorney from misleading a judge by making a false statement.

The evidence is irrefutable that the above claims by Mr. Dodson are false. In the City's responses to claims in my lawsuit listed under "First Cause of Action Against Individual Defendants," paragraph 8, the City admit that Captain Younis received the letter from my doctor on or about August 25, 2004. In regards to paragraph 9, the City admit that on or about September 24, 2004, Younis advised a director of the police union that I did not have the right to appeal the denial of my CCW authorization. In regards to paragraph 11, the City admit that "Toward the end of December 2004, defendant Younis informed plaintiff that the department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff" (Exhibit B). Mr. Dodson's position now that the decision was changed in August 2004 is ludicrous, since it was he who wrote the City's response to my lawsuit. These admissions are clear evidence that the City violated my rights to a due process hearing from August 2004 to December 2004.

I submit the demand letter that I sent to the City dated October 5, 2004, as further proof that the decision to grant me a CCW permit was not made in August 2004, as Mr. Dodson now claim. The letter is date stamped as being received in Chief of Police Rob Davis' office on October 7, 2004. The language in the letter clearly states that the City was in possession of the letter, dated August 25, 2004, clarifying my work restriction and that I was not privileged to carry a concealed weapon as of October 5, 2004 (Exhibit C).

I informed the City in my claim for damages that the decision to reverse the denial of my CCW permit was made in the latter part of December 2004 (Exhibit F). During my deposition, I informed Mr. Dodson that I was in possession of **notes**

indicating that Captain Younis called me on December 14, 2004, and informed me that the department had unilaterally reversed its' decision to deny me a CCW permit (Exhibit G). In his deposition, Captain Younis stated that he had no recollection about the date he informed me that the department had reversed the decision to deny me a CCW permit (Exhibit I). This further questions the credibility of Mr. Dodson's claim that I was granted my CCW permit in August 2004.

During the hearing in District Court, Mr. Dodson informed the court that it was **eight** or **nine** months that I was without my CCW permit, and not the **four** months he now claim (Exhibit H). The police department never intended to grant me a CCW permit, even though the department knew that I had no psychological disability (Exhibit I).

Mr. Dodson's false statements were made in order to conceal from the Ninth Circuit Panel the important fact that I was deprived of a CCW permit for a total of **eight** months from April 2004 until December 2004. The last four of those months, August 2004 to December 2004, **the police department deprived me of a CCW permit without a hearing, even though the police department was in possession of the letter stating I did not have a psychological disability.** This is a clear violation of the hearing requirement of 12027.1 of the California Penal Code.

Since Mr. Dodson argued that the initial decision to deny me a CCW permit was made due to confusion about my work restriction, he chose to falsely state that the City granted me a CCW permit soon after receiving the letter clarifying my work restriction in August 2004. It is important to note that City policy specifies that any confusion or questions about work restrictions are to be cleared by the City's Medical Director. The policy was designed to prevent police officials from reaching the wrong conclusions

about work restrictions (Exhibit D). The policy was not disclosed by the City during discovery. The policy highlights the significance of a memo written by the City's Medical Director, Dr. Rajiv Das, giving a detailed explanation that my work restriction to avoid stress was prescribed because of my hypertension (Exhibit R). This memo by Dr. Das along with my outstanding performance appraisals makes any notion that I had a psychological disability because of my work restriction ridiculous (Exhibit S). The denial of my CCW permit was a willful and malicious act of retribution and discrimination by City officials with an axe to grind.

C. Michael Dodson Misrepresented the Decision in Small Claims Court Relevant to the Issue of Collateral Estoppel

Mr. Dodson intentionally misled both the District Court and the Appellate Court into believing there was a final judgment on the merits of my claim in Small Claims Court; the basis of my claim being that the City violated my rights by denying my CCW permit without a hearing. In the City's Motion for Summary Judgment filed in District Court by Mr. Dodson on 10/12/07, he argued: On January 30, 2006 the Small Claims Court entered a judgment for the City and against Plaintiff. Now, Plaintiff attempts to re-litigate this same issue although there has already been final judgment on the merits. In the Circuit Court Hearing, Mr. Dodson again asserted that the decision in my small claims action "prevents re-litigation of the issues" because of collateral estoppel (Exhibit P).

The only evidence submitted to the District Court by Mr. Dodson in order to support this final judgment claim was a one (1) page "Notice of Entry of Judgment" from the Small Claims Court that stated, "Defendant does not owe plaintiff any money on plaintiff's claim" (Exhibit T). It was Mr. Dodson's clear intent to have this document

mislead the courts into believing there were litigation and a final judgment on the merits of my claim in Small Claims Court.

Mr. Dodson knew for certain there was no litigation or a final judgment in my small claims hearing. The City's legal adviser, Jim Brennan, was present for the entire proceeding. Mr. Dodson knew that the proceeding in Small Claims Court was extremely short, approximately two (2) minutes. I informed Mr. Dodson in my deposition that I was not allowed to testify (Exhibit M). Mr. Dodson is well aware that Mr. Brennan also did not testify, and that witnesses that I subpoenaed from the police department and City Attorney's Office refused to appear in court.

The commissioner rendered a judgment that attorney fees are not awarded in Small Claims Court. This fact is corroborated in a letter from the Presiding Judge of the Santa Clara County Superior Court to me (Exhibit L). This is clear evidence that Mr. Dodson knowingly misrepresented the decision in Small Claims Court to mean my claim had been litigated and there was a final judgment on the merits of my claim. A copy of the letter I sent to the Presiding Judge of the Santa Clara County Superior Court expressing my concerns about what happened in Small Claims Court was sent to the City Attorney's Office. The letter specifically states that I was not allowed to present my case, and that I did not **"have my day in court"** (Exhibit K). Certainly, Mr. Dodson could not have believed my small claims action had collateral estoppel effect after reading my letter.

D. Stuart Kirchick Failed to Competently Represent Me

Mr. Kirchick repeatedly failed to perform legal services with competence in clear violation of Rule 3-110 (A) of California Rules of Professional Conduct.

First, Mr. Kirchick entered a stipulation with the City to remove Captain Tuck Younis from my lawsuit in August 2007, even though it was Younis who denied me a CCW permit without a hearing after receiving the letter clarifying my work restriction (Exhibit Q). This move was highly prejudicial to my case, since the actions by Younis were a clear violation of my due process rights guaranteed by Penal Code Section 12027.1. This move made no sense whatsoever, and it benefited the City greatly.

Mr. Kirchick left unchallenged the false claims by Mr. Dodson in the Circuit Hearing that the City had granted me a CCW permit in August 2004, and that I was without my permit for four months. As has already been discussed, it was a total of eight months that I was without my CCW permit, the last four of those months the City was in possession of the letter clarifying that I did not have a psychological disability. I informed Mr. Kirchick in an email and phone calls that the City's Appellate Brief contained these erroneous facts (Exhibit N).

Mr. Kirchick failed to mention to the Circuit Panel or the District Court the letter I sent to the Presiding Judge of the Superior Court and the judge's responding letter that clearly prove that I did not have a fair opportunity to litigate my small claims case and that no final judgment was made on the merits of my claim (Exhibits K and L). I submitted those letters to Mr. Kirchick prior to the hearing in District Court. Mr. Kirchick was presented with ample opportunities to mention those letters to the Circuit Panel. In one instance, Mr. Kirchick was asked by a panelist if the issues of my case were dealt with in Small Claims Court. In another instance, one panelist stated he was a "little dubious on the collateral

estoppel," yet Mr. Kirchick failed to mention the letters. This is an example of gross negligence and incompetence. Mr. Kirchick also failed to contact me and advise me of my right to petition the Circuit Court of Appeals for a rehearing after judgment was rendered.

IV. CONCLUSINS

The summary judgment motion filed by Mr. Dodson was frivolous and totally without merit. Mr. Dodson perpetrated an absolute fraud on the courts. Based on the facts and evidence presented, I respectfully request that this Honorable Court impose the appropriate discipline on Mr. Dodson and Mr. Kirchick for their misconduct.

Respectfully submitted,

Date: NOVEMBER 20, 2010

Frederick Bates

EXHIBITS

Exhibit A: Copy of letter from Dr. Jonathan Ng to Captain Tuck Younis

Exhibit B: Relevant pages of plaintiff Frederick Bates "Complaint For Damages Due to Deprivation of Civil Rights Under Color of Law-Denial of Due Process" and page two of Defendant City of San Jose response.

Exhibit C: Copy of Demand Letter from Attorney Stuart Kirchick to Chief of Police Davis.

Exhibit D: Copy of San Jose Police policy regarding compliance with work status restrictions.

Exhibit E: Copy of page 4 of the City's Answering Brief.

Excerpt for hearing in Ninth Circuit Court of Appeals

Exhibit F: Copy of "Claim Against The City Of San Jose."

Exhibit G: Copy of pages 57 and 58 of Frederick Bates deposition.

Exhibit H: Copy of page 17 of the transcript of the hearing in District Court.

Exhibit I: Copy of pages 6-9, 26-29 and 30-33 of the deposition of Captain Tuck Younis.

Exhibit K: Copy of letter sent by Frederick Bates to Judge Danner of the Superior Court of Santa Clara County.

Exhibit L: Copy of letter from Judge Alden Danner to Frederick Bates.

Exhibit M: Copy of pages 83 and 84 of Frederick Bates deposition.

Exhibit N: Copy of an email Frederick Bates sent to Attorney Stuart Kirchick.

Exhibit P: Copy of page 12 of City's Motion for Summary Judgment.

Excerpt from hearing in Ninth Circuit Court of Appeals.

Exhibit Q: Copy of declaration of Captain Tuck Younis in support of the City's Motion for Summary Judgment.

Exhibit R: Copy of memo from City Medical Director Rajiv Das to Police and Fire Retirement Board.

S188383

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re the Accusation of FREDERICK BATES Against an Attorney.

The petition is denied.

SUPREME COURT
FILED

JAN 12 2011

Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

May 24, 2014

Attorney General's Office
California Department of Justice
Attn: Attorney General Kamala D. Harris
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Public Corruption Complaint against San Jose City Officials

Dear Ms. Harris,

In a letter dated May 24, 2014, I made a complaint with the Federal Bureau of Investigation against San Jose city officials and federal court officials for public corruption relative to a federal lawsuit I filed against the City of San Jose. A copy of my letter to the F. B. I. is enclosed. I respectfully request that your office also conduct an investigation into this matter based on my letter. In addition to being a violation of federal laws, the misconduct of San Jose city officials also violate public corruption laws of the State of California.

From my letter to the F. B. I., it is clear that San Jose City Attorney Richard Doyle, Assistant City Attorney Nora Frimann, former Deputy City Attorney Michael Dodson, former Chief of Police Robert Davis, former Assistant Chief of Police Tuck Younis and former Deputy Chief of Police Adonna Amoroso engaged in criminal misconduct relative to the testimony of Younis and Amoroso in their depositions. False testimony from the depositions of Younis and Amoroso were then used in support of a summary judgment motion. Doyle, Frimann and Dodson also conspired with my former attorney (Stuart Kirchick) to obstruct justice by filing a fraudulent stipulation of dismissal of Tuck Younis from my lawsuit.

It is also clear from my letter that officials from the U.S. District Court and the San Jose City Attorney's Office conspired to falsify district court records and to stage "pretense litigation" on a Rule 60 motion for relief from judgment I filed in February 2013. It is unmistakable that their intent was to obstruct justice by making it appear that a legitimate hearing was held on my motion. It is clear from the contradicting accounts of the hearing as stated by the official transcript and the Civil Minutes that no legitimate hearing was held.

As equally troubling as the misconduct by the above officials is its cover-up by San Jose Mayor Chuck Reed and his former Agenda Services Manager (Sara Wright), the San Jose City Council, former City Manager Debra Figone, former City Clerk Dennis Hawkins, current City Clerk Toni Taber, the San Jose Elections Commission and its Evaluator (the Hanson-Bridgett Law Firm) and the San Jose Office of Employee Relations and its former director (Alex Gurza). All were contacted by me and informed of the misconduct by the City Attorney's Office and police officials.

No investigation by the City has ever been initiated. This is a blatant violation of city policy that requires an investigation of misconduct by any city official. This is evidence of a culture of corruption at the top level of San Jose city government, particularly when viewed in light of Pensiongate and other recent scandals involving Mayor Reed and other top city officials. It should also be noted that an article by San Jose Mercury News Reporter Scott Herhold in 2006 seemed to imply that City Attorney Richard Doyle routinely use unethical tactics during litigation involving the City. The Mayor and City Council should have been put on notice because the article states that Doyle has a history of pushing bad cases or refusing to settle weak ones; costing the City millions of dollars. My case is a prime example of Doyle pushing a bad case by using unlawful tactics. He was given several opportunities to resolve my case without any litigation when there was no cost to me or the City. Yet, he chose to reject those opportunities and get involved in protracted litigation that has cost the City thousands of dollars. The article states that Doyle has "lived by the sword" and that it should be no surprise if he didn't one day die by the sword. It is apparent that the unethical tactics by Doyle are unwritten city policy endorsed by the Mayor and City Council.

What makes this matter more serious from the perspective of public corruption is that several top officials appear to have gained profit because of their misconduct in this matter. Tuck Younis was promoted from Captain to Assistant Chief of Police. He then used the Assistant Chief's position as a stepping stone to become Chief of Police of Los Altos. Nora Frimann was promoted from Chief Trial Attorney to Assistant City Attorney. Alex Gurza was promoted from Director of Employee Relations to Deputy City Manager. Another former police administrator implicated in this matter, Pete Oliver, is now the Chief of Investigations for the Santa Clara County District Attorney's Office. I feel confident that an investigation will reveal that others also prospered from their roles in this matter.

The total lack of accountability by City leaders as it relates to this affair is evidence of a double standard in the City's disciplinary process. During the four plus years I have waited for the City to act on my misconduct complaints, nearly one hundred rank and file employees have been dismissed from city employment for alleged misconduct. Many of those employees were charged with some form of dishonesty. Yet, the blatant dishonesty and criminal misconduct by

former police administrators and current officials of the San Jose City Attorney's Office have gone unpunished. This unabashed corruption on the part of Mayor Reed and the City Council is disgraceful. It is clear that the leaders of the City have placed themselves above the law.

An investigation into this matter is of the utmost importance because a conviction for public corruption would require any public official to be removed from office; and it would disqualify that official from holding public office in the future. This has added significance because several members of the San Jose City Council are candidates for the position of San Jose Mayor. I have also made a request for an investigation into this matter with the Santa Clara County Grand Jury and the Santa Clara County District Attorney's Office.

In addition to a copy of the letter and supporting documents I sent to the F. B. I., a copy of the article by Mercury News Reporter Scott Herhold is enclosed. Please contact me if you have questions or need more details.

Respectfully submitted,

Fred Bates

c: Santa Clara County Grand Jury
Santa Clara County District Attorney's Office

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

April 25, 2010

RECEIVED

MAY - 5 2010

CHAMBERS OF
HON. ALEX KOZINSKI
U.S. COURT OF APPEALS

Re: Frederick Bates v. City of San Jose, 08-16757

Honorable Alex Kozinski, Chief Judge
United States Court of Appeals for the Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

Dear Judge Kozinski:

This letter is a follow-up to a letter I sent to Molly Dwyer (Clerk of Court) on February 1st of this year (2010). In that letter, I made allegations that the City of San Jose had engaged in misconduct relevant to the hearing in my appeal that was heard on November 6th, 2009. Apparently my letter was misconstrued as a petition for a re-hearing by personnel in the Clerk's Office. In the second paragraph of that letter, it clearly states the purpose of the letter (see enclosed letter). My intent was for the Clerk's Office to forward that letter to the proper authority for handling of my complaint of misconduct.

Let me make it clear that the purpose of the current letter is to make a complaint to this court that Deputy San Jose City Attorney, Michael Dodson, violated California State Bar Rules by making false and misleading statements to this court during my appeal of the District Court's Order Granting the City's Motion for Summary Judgment. Mr. Dodson blatantly lied about the date the City reversed an earlier decision to deny me a CCW permit knowing it would lead this court to believe the City had acted quickly and in good faith to correct the earlier bad decision. Mr. Dodson also misrepresented the decision in a small claims action as being a final judgment on the merits of my claim, knowing fully that the court's decision only referred to attorney fees. These false and misleading statements were highly prejudicial and deprived me of a fair hearing. The exhibits enclosed are for the sole purpose of substantiating my claims of misconduct.

The central issue in my lawsuit against the City of San Jose was a work restriction to avoid psychological stress. After I retired on a medical disability from the police department in April 2004, I was denied a CCW permit by Deputy Chief Adonna Amoroso because she interpreted the above mentioned work restriction to mean I had a psychological disability. Amoroso did not provide me a hearing per the automatic denial rule of California Penal Code Section 12027.1(e). It is undisputed that on or about August 25, 2004, Captain Tuck Younis received a letter from my doctor clarifying my work restriction, stating that I did not have a psychological disability.

Mr. Dodson argued convincingly to this court in the City's appellate brief and during oral argument that Amoroso made an honest mistake when she denied me a CCW permit because she was confused about my work restriction. Mr. Dodson further argued that upon receiving the clarifying information regarding my work restriction, the City reversed its' earlier decision and granted me a permit to carry a concealed weapon in August 2004. Mr. Dodson argued that approximately four months elapsed between the time of my disability retirement, in April 2004, and me obtaining a permit to carry a concealed weapon in August 2004 (Exhibit A and Exhibit G).

These claims by Mr. Dodson that I was granted a permit to carry a concealed weapon in August 2004 and that I was without my CCW permit for approximately four months were made with the knowledge they are absolutely false. As stated above, it is undisputed that the letter clarifying my work restriction was received by the department in August 2004. The City is well aware that the decision to deny me a CCW permit was not reversed until December 2004. The evidence will clearly show that the decision was not reversed in August 2004, as Mr. Dodson claims.

Mr. Dodson chose to falsely state the date the decision was reversed in order to hide the fact that from August 2004, to December 2004, I was denied a CCW permit without a hearing even though the letter from my doctor made it clear I had no psychological disability. Therefore, the automatic denial rule of Penal Code Section 12027.1(e) no longer applied in my situation. Furthermore, the police department denied my specific requests for a hearing on or about September 10, 2004, and on or about September 24, 2004 (Exhibit B1, page 3). The City was well aware that the actions by the department in denying me a CCW permit without a hearing, after receiving the clarifying letter from my doctor, violated the hearing requirement of California Penal Code Section 12027.1. Unlike the situation with Amoroso, there was no confusion about my work restriction. The police department never intended to grant me a CCW permit even with the letter stating I did not have a psychological disability. Captain Younis confirms this fact in his deposition (Exhibit D, pages 6, 7, 29 and30). The City has always known that the main issue in this case is what the department did after it received the clarifying letter in August 2004. Even though stated in the record, my attorney apparently was ineffective at emphasizing this fact during the hearing.

The evidence is overwhelming that Mr. Dodson knew that the information he presented to this court regarding the date the City reversed its' earlier decision and granted me a CCW permit was totally false. The best evidence against Mr. Dodson is the City's earlier admissions that were written by him. In the City's responses to claims in my complaint listed under "First Cause Of Action Against Individual Defendants," relevant paragraphs 8, 9 and 11 (Exhibit B1), the City admitted that Captain Younis received the letter from my doctor on or about August 25, 2004. The City admitted that on or about September 24, 2004, Younis advised a director of the police union that I did not have the right to appeal the denial of my CCW authorization. Also in that response, the City admitted that "Toward the end of December 2004, defendant Younis informed plaintiff that the

department unilaterally reversed their decision to deny him a CCW permit and finally issued it to plaintiff." (Exhibit B2) These admissions made freely by the City shows without a doubt my civil rights were violated. The City's position now that the decision was changed in August 2004 is ludicrous.

The demand letter that I sent to the City dated October 5, 2004, time stamped by the Chief's Office as being received on October 7, 2004, is further proof that the decision to grant me a CCW permit was not made in August 2004. The language in the letter clearly states that I was not privileged to carry a concealed weapon as of October 5, 2004, and it demanded the City reissue me an ID card granting me authority to carry a concealed weapon (Exhibit E).

During my deposition, I informed Mr. Dodson that my notes indicated that Captain Younis called me on December 14, 2004 and informed me that the department had unilaterally reversed its' decision to deny me a CCW permit (Exhibit C, pages 57 and 58). In his deposition, during which Mr. Dodson was present, Younis stated he had no recollection when the decision was made (Exhibit D, pages 31and 32). This further discredits Mr. Dodson's claim that the decision was reversed in August 2004, after the police department received the letter from my doctor.

During the hearing in the District Court, Mr. Dodson stated that it was eight or nine months that I was without my CCW permit (Exhibit F, page 17), not the four months he now claims.

On the issue of collateral estoppel, Mr. Dodson misled this court regarding the judgment the City won against me in a small claims action during which I attempted to recover the retainer I paid an attorney to assist me in securing my CCW permit. Mr. Dodson argued that the judgment represented a final judgment on the merits of my claim that my civil rights were violated. The City is well aware that there was no actual litigation on the merits of my claim. The proceeding lasted approximately two minutes. The commissioner's decision was that attorney fees are not awarded in small claims court. This fact is corroborated in a letter I received from the Presiding Judge of the Santa Clara County Superior Court (Exhibit I).

The City's legal adviser, Jim Brennan, was present for the entire small claims proceeding. Mr. Brennan is aware that I did not testify and that he also did not testify. Mr. Brennan is also aware that no evidence was presented in that proceeding and that no witnesses testified. As a matter of fact, the witnesses I subpoenaed from the police department and City Attorney's Office failed to appear. A copy of the letter I sent to the Presiding Judge of the Santa Clara County Superior Court expressing my concerns about what happened in Small Claims Court was sent to the City Attorney's Office and the City Manager's Office. The letter expressly states that I was not allowed to present my case, and that I did not "have my day in court" (Exhibit H). The City's defense of collateral estoppel was made with the express intent of misleading this court to believe there was a final

judgment, when clearly there was not. It is in the record of the District Court that I made claims of not receiving a fair hearing in Small Claims Court (Exhibit K, pages 5, 10, 17). Again, for unexplained reasons, my attorney failed to emphasize this crucial information.

The misconduct in this matter by Mr. Dodson was motivated by the simple fact that the City could not defend the four month period from August 2004 to December 2004 during which the police department denied me a CCW permit without a hearing after receiving a letter from my doctor in August 2004 stating that I had no psychological disability. Unlike the situation with Deputy Chief Amoroso, they could not claim qualified immunity because of some confusion with my work restriction, so Mr. Dodson chose to lie about the date the decision was changed. It is very clear that the department's conduct was willful and malicious.

Again, it is unquestionable that Mr. Dodson lied about the date the City reversed the decision to deny me a CCW permit and that he knowingly misrepresented the judgment in the small claims case. It is relatively clear from the record that this court relied on these misrepresentations by Mr. Dodson to reach its' decision. The actions by Mr. Dodson are not only unethical, but demonstrate a reckless disregard for the truth. Pursuant to Federal Rules of Civil Procedure and Circuit Rules this court can address Mr. Dodson's unprofessional conduct.

It should be noted that I have no longer retained legal counsel, and that my attorney of record in this case was not consulted and has no knowledge of this letter. I have decided to represent my own interests in this matter. Please direct any correspondence solely to me at the above listed address.

Respectfully submitted,

Frederick Bates

cc: Honorable William Fletcher, Senior Circuit Judge
Honorable John Noonan, Senior Circuit Judge
Honorable Kevin T. Duffy, U. S. District Judge, sitting by designation
Honorable Chuck Reed, San Jose Mayor
Mr. Richard Doyle, San Jose City Attorney
The State Bar of California

Enclosures (13)

Any attorney who causes a case to be docketed in this Court or who enters an appearance in this Court, and who is not already admitted to the Bar of the Court, shall simultaneously apply for admission. *(Rev. 7/93)*

CIRCUIT RULE 46-2. ATTORNEY SUSPENSION, DISBARMENT OR OTHER DISCIPLINE

(a) **Conduct Subject to Discipline.** This Court may impose discipline on any attorney practicing before this Court who engages in conduct violating applicable rules of professional conduct, or who fails to comply with rules or orders of this Court. The discipline may consist of disbarment, suspension, reprimand, counseling, education, a monetary penalty, restitution, or any other action that the Court deems appropriate and just.

(b) **Initiation of Disciplinary Proceedings Based on Conduct Before This Court.** The Chief Judge or a panel of judges may initiate disciplinary proceedings based on conduct before this Court by issuing an order to show cause under this rule that identifies the basis for imposing discipline.

(c) **Reciprocal Discipline.** An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction. When this Court learns that a member of the bar of this Court has been disbarred or suspended from the practice of law by any court or other competent authority or resigns during the pendency of disciplinary proceedings, the Clerk shall issue an order to show cause why the attorney should not be suspended or disbarred from practice in this Court.

(d) **Response.** An attorney against whom an order to show cause is issued shall have 28 days from the date of the order in which to file a response. The attorney may include in the response a request for a hearing pursuant to FRAP 46(c). The failure to request a hearing will be deemed a waiver of any right to a hearing. The failure to file a timely response may result in the imposition of discipline without further notice. *(Rev. 12/1/09)*

(e) **Hearings on Disciplinary Charges.** If requested, the court will hold a hearing on the disciplinary charges, at which the attorney may be represented by counsel. The Court may refer the matter to an appellate commissioner or other judicial officer to conduct the hearing. In appropriate cases, the court may appoint an attorney to prosecute charges of misconduct.

(f) **Report and Recommendation.** If the matter is referred to an appellate commissioner or other judicial officer, that judicial officer shall prepare a report and recommendation. The report and recommendation shall be served on the attorney, and the attorney shall have 21 days from the date of the order within which to file a response. The report and recommendation together with any response shall be presented to a three-judge panel. *(Rev. 12/1/09)*

(g) **Final Disciplinary Action.** The final order in a disciplinary proceeding shall be issued by a three-judge panel. If the court disbars or suspends the attorney, a copy of the final order shall be furnished to the appropriate courts and state disciplinary agencies. If the order imposes a sanction of $1,000 or more, the court may furnish a copy of the order to the appropriate courts and state disciplinary agencies. If a copy of the final order is distributed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
CHIEF JUDGE

(626) 229-7140
FAX: 229-7444
alex@kozinski.com

May 7, 2010

Dear Mr. Bates:

I am returning the letters and materials you sent me on April 25. I have no authority to consider complaints against state officials. You must file any such complaints with the appropriate state or local authorities.

Sincerely,

125 SOUTH GRAND AVENUE • PASADENA • CALIFORNIA 91105

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

March 19, 2018

Chief Judge Sidney R. Thomas
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA

Re: Frederick Bates v. City of San Jose et al; Originating Case Number 06-05302 RMW, Associated Appeals Case Numbers 08-16757, 13-16397, 14-15080 and 16-16581; Originating Case Number 15-05729 NC, Associated Appeals Case Numbers 16-16094 and 17-16413

Dear Judge Thomas,

I am requesting that you initiate an investigation into misconduct by officials with the City of San Jose, the Ninth Circuit Court of Appeals, and the U.S. District Court for the Northern District of California – San Jose Division during the litigation of two lawsuits I filed against the City of San Jose for discrimination based on my disability and race. I also demand that the judgments in both lawsuits that are biased in favor of the City and were obtained by fraud on the court and other fraudulent acts be vacated; because they are by settled law null and void.

During the litigation of my first lawsuit (06-05302 RMW) filed against the City in August 2006, the City in collusion with my attorney and the district court filed a motion for summary judgment that is a total fabrication that was facilitated by a fraudulent stipulation of dismissal of the main defendant without my knowledge or consent. This fraudulent stipulation caused harm to my cause of action because the evidence, as well as, admissions by my attorney and the City proves that the defendant that was dismissed violated my constitutional rights. The stipulation of dismissal does not bind me by law. The City's summary judgment motion was granted based on the fraudulent stipulation of dismissal and on the district court's violation of the federal full faith and credit statue and settled preclusion law; because preclusive effect was given to a small claims judgment that was the basis of the City's collateral estoppel defense with no record that shows what issue(s) were litigated and determined in the small claims court.

In February 2013, I filed a Rule 60 motion seeking relief from the bogus judgment granting the City's motion for summary judgment. Relative to my motion, district court officials falsely entered into the court's docket that my motion pertained to "costs taxed" when it is unmistakable that the grounds for my motion were fraud on the court and the court's violation of the full faith and credit statute. Additionally, the district court staged a fake hearing on my Rule 60 motion. It is alleged that the City was granted a dispositive motion to dismiss during that hearing based on a transcript that appears to be a fabrication. No word for word account of the City's motion to dismiss appears in the dubious transcript or any place in the record of the court. When confronted with this matter, the court could not give a credible explanation at all relative to a hearing actually taking place. Upon my appeal, the Ninth Circuit Court of Appeals affirmed the district court even though the evidence of misconduct by the district court is compelling. I

United States Court of Appeals
for the Ninth Circuit

P.O. Box 31478
Billings, Montana 59107-1478

CHAMBERS OF
SIDNEY R. THOMAS
CHIEF JUDGE

TEL: (406) 373-3200
FAX: (406) 373-3250

August 8, 2018

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630

RE: Complaint of Judicial Misconduct

Dear Mr. Bates:

Judicial misconduct proceedings are intended to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or is unable to discharge the duties of office because of a mental or physical disability. See Judicial-Conduct Rule 1. Your letter dated March 19, 2018, raising allegations against the Ninth Circuit Court of Appeals and the Northern District of California, has been reviewed under Judicial-Conduct Rule 5. Your letter fails to make any showing that any judges at either court have engaged in cognizable misconduct. Because I find no probable cause to believe that misconduct has occurred, I will not identify a complaint. See In re Complaint of Judicial Misconduct, 644 F.3d 844 (9th Cir. Jud. Council 2011); Judicial-Conduct Rules 2(b) and 5(a).

No further action will be taken in this matter.

Sincerely,

Sidney R. Thomas

SRT: nj

Frederick Bates
1235 Muirkirk Ct.
Folsom, CA 95630
(408) 510-9174

August 30, 2018

Chief Judge Sidney R. Thomas
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 31478
Billings, Montana 59107-1478

Re: Letter sent to Chief Justice John Roberts

Dear Judge Thomas,

Enclosed is a copy of a letter I sent to Chief Justice Roberts dated August 13, 2018. Along with the letter, I sent copies of the letter and attachments I sent to you dated March 19, 2018 making allegations of misconduct against San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals. Subsequent to my mailing of the documents to Chief Justice Roberts, I received your letter stating that no action would be taken relative to my misconduct allegations. In your letter you stated that my complaint letter fails to make any showing that any judges at either court engaged in cognizable misconduct. Therefore, you found that there is no probable cause to believe that misconduct has occurred. You made a decision that you would not identify a complaint and that no further action will be taken in this matter.

Your letter does not address the compelling facts and evidence in my attachments that prove criminal misconduct on the part of judges and other court officials occurred during the litigation of my two lawsuits against the City of San Jose. Furthermore, the courts refused to follow the laws relating to collateral estoppel, stipulation of dismissals, summary disposition, and engaged in extensive fraud in order to rule in favor of the City.

As to the issue of collateral estoppel, the Supreme Court has ruled that the first question a federal court must answer when determining the preclusive effect of a state court judgment is whether or not courts from the state that rendered the judgment would give preclusive effect to that judgment. The District Court and the Ninth Circuit Court of Appeals intentionally avoided answering that question as it relates to the small claims court judgment from California relied upon by the City for collateral estoppel in my first lawsuit. Because it is clear from California preclusion law that courts in California would not give preclusive effect to that judgment. The most obvious reason is that there is no record that is "sufficiently clear" as to what was litigated and determined in the Small Claims Court.

As to the issue of stipulation of dismissals, one of the most important rights that a plaintiff has is the right to dismiss a complaint or a defendant. By law that right is inviolable. Yet, the District Court allowed the City to take away that right from me by drafting and filing a stipulation of dismissal of Defendant Tuck Younis in my first lawsuit. Not only did I not authorize the dismissal, I had no knowledge of it prior to its filing. The stipulation of dismissal caused harm to my overall case against the City and it destroyed my cause of action against

Younis. This is a violation of FRCP 41 and is an obstruction of justice; because the dismissal of Younis was to prevent the courts from ruling on his actions that violated my civil rights. In the City's answer to my complaint for damages, they admit that Younis denied me a CCW permit, without a hearing that is required by law, after receiving information from my doctor that the City said was "crystal clear" that I did not have a psychological disability. California law requires law enforcement agencies to grant an officer a hearing before a three member hearing board when denying an officer a CCW permit except for cases of psychological disability. It is clear that Younis was dismissed from my lawsuit with the knowledge that he had violated my constitutional right to a due process hearing; and that his dismissal was entered with the specific intent to obstruct the due administration of justice. It should be noted that Younis filed a declaration in support of the City's summary judgment motion falsely stating under oath that Defendant Chief of Police Rob Davis played no role whatsoever in the denial and later granting of my CCW permit. This is a clear-cut case of perjury because the authority to issue CCW permits rested with Davis. More compelling is that Chief Davis received the same clarifying information from my doctor as Younis, as well as, information about the hearing requirement of California law, 12027.1 of the Penal Code. Chief Davis failed to act upon the information he received and continued to deny me a CCW permit without a hearing. Davis played a significant role in the repeated denials of my CCW permit, without a hearing, after receiving the clarifying information from my doctor that I did not have a psychological disability.

As to the issue of summary dispositions, not a single summary affirmance of the District Court's judgments in my lawsuits meets the requirements for summary disposition as set by United States v. Hooton. But particularly egregious is the summary disposition in my second lawsuit where I was not allowed to file an opening brief. It is clear from the Hooton case that an appellant must be allowed to file an opening brief that states the issues on appeal.

As to the issue of fraud, the City's motion for summary judgment in my first lawsuit is a total fabrication. Yet, the motion was granted. Relative to my Rule 60 motion filed in February 2013, seeking relief from the order granting the City's summary judgment motion, the District Court falsified court docket entries and staged a fake hearing on my Rule 60 motion. The court fabricated a transcript and civil minutes for that hearing that contradict each other as to what allegedly occurred during the hearing, and filed a fake order denying my motion that simply states that my motion was untimely and that I failed to present evidence supporting my theories for relief.

It is clear from your decision to take no action in this matter that a cover-up is occurring and that there is no interest in finding a reasonable, fair and lawful resolution to this embarrassing situation. This is the last correspondence that you and the courts can expect from me. But you can be assured that I will never give up my rights in this matter, and it is my intent to take some very drastic action in the near future to address the injustice I have suffered.

Sincerely,

Frederick Bates

c: San Jose City Council

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

September 17, 2018

Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
Attention: The Honorable Chief Justice John Roberts

Re: Criminal misconduct complaint letter and attachments filed with Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas

Dear Chief Justice Roberts,

Enclosed are copies of a complaint letter and attachments that I filed with Chief Judge Thomas regarding misconduct by San Jose city officials and officials with the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals that occurred during the litigation of two lawsuits I filed against the City of San Jose for discrimination based on my race and disability. I am black/African American. I received a response from Judge Thomas regarding my complaint in a letter dated August 8, 2018. Judge Thomas stated he would take no action relative to my complaint despite compelling evidence of criminal misconduct by San Jose city officials and the courts. My follow-up letter to Judge Thomas' letter dated August 30, 2018 is enclosed as well. Please take note that I sent you copies of the complaint letter and attachments I sent to Judge Thomas in a packet addressed to the Administrative Office of the United States Courts prior to my receiving Judge Thomas' response letter.

Because of Judge Thomas' refusal to take action on my complaint, I respectfully request that you and the other justices on the Supreme Court review the letters and attachments as they present credible evidence of very serious criminal misconduct perpetrated with the intent to cover up racism and bigotry by San Jose city officials. I ask that you take special note of Attachment II. It is inarguable from the discussion presented in Attachment II that the judgments of the U.S. District Court and the Ninth Circuit Court of Appeals in my two lawsuits against the City of San Jose are not consistent with well established statutory law and precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals. These judgments are intentionally erroneous and are now being enforced by the courts with the knowledge they are based on fraud. It is indisputable that the judgments are void and unenforceable under the law.

Additionally, the evidence of bias in favor of the City of San Jose is so pervasive and blatant that it gives the appearance that the courts are advocating for the City instead of being impartial and disinterested as is required by the due process clause of the Fifth Amendment. What is quite disturbing is that Magistrate Judge Nathanael Cousins ruled in my second lawsuit against the City of San Jose that City officials had no obligation to investigate my racial and disability discrimination complaints, even though, an investigation is mandated by City policy and state law. The case cited by Judge Cousins as precedent to dismiss my case, while not

binding precedent, contradicts Judge Cousins' ruling and supports a finding that San Jose city officials were obligated to investigate my complaints. Surprisingly, the Ninth Circuit Court of Appeals summarily affirmed Judge Cousins' ruling clearly violating precedent set by United States v. Hooton that establishes the requirements for summary disposition.

As evidence of my claims of pervasive bias by the courts in favor of the City of San Jose, I have included a copy of a motion I filed for U.S. District Judge Ronald M. Whyte to recuse himself from proceedings in my case. It should be noted that Judge Whyte refused to recuse himself. Other evidence of blatant bias is statements made by a judge during an appeals hearing in the Ninth Circuit Court of Appeals in November 2009. That hearing was in regards to my appeal of Judge Whyte's ruling granting the City of San Jose's motion for summary judgment in my first lawsuit. During that hearing, the judge (presumably Judge William Fletcher) asked "why did you make a federal case of this." Judge Fletcher then asked "why doesn't he just drop the darn thing?" He was clearly referring to my lawsuit against the City. Judge Fletcher also established in that hearing that there was no record whatsoever from the proceeding in small claims court for the small claims judgment the City relied upon for collateral estoppel. Judge Fletcher said he was doubtful about collateral estoppel because there had to have been actual litigation in my small claims case. There was in fact no litigation in my small claims case because the small claims commissioner dismissed my complaint with an implied finding that it was defective. Yet, Judge Fletcher and the rest of the panel hearing my appeal affirmed Judge Whyte's ruling dismissing my case as to the City based on collateral estoppel.

It is instantly recognizable that the small claims judgment has no preclusive effect under California preclusion law because there is no record that is sufficiently clear as to what was litigated and determined. Therefore, a federal court cannot give preclusive effect to the judgment based on the Full Faith and Credit Act. Attachment II mentioned above also details several other reasons why the small claims judgment has no preclusive effect. It is clear from Judge Fletcher's biased statements and the subsequent ruling of the Ninth Circuit Court of Appeals affirming Judge Whyte's clearly erroneous ruling granting the City's motion for summary judgment that the judgment in my first lawsuit must be vacated. The blatant bias shown by the courts offends democracy and the rule of law.

I respectfully request that the Supreme Court review all of the documents that I have submitted and take immediate action to address this matter which is one of the greatest abuses of power and cover-ups by government officials in recent memory. And it is certainly one of the biggest frauds and cheating scandals in the history of our judiciary. Our democracy cannot survive when our federal courts show such contempt for the Constitution and the rule of law by engaging in blatantly biased and criminal misconduct. Please be aware that I have also made complaints with several Members of Congress, the F.B.I. and Department of Justice. I look forward to hearing from you regarding this matter. Copies of my complaints with the House Judiciary Committee and the Department of Justice are also included with this letter.

Sincerely,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

August 13, 2018

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
Attention: The Honorable Chief Justice John Roberts

Re: Criminal misconduct complaint letter and attachments filed with Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas

Dear Chief Justice Roberts,

Enclosed are copies of a complaint letter and attachments I filed with Chief Judge Thomas regarding misconduct by San Jose city officials and officials with the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals that occurred during the litigation of two lawsuits I filed against the City of San Jose for discrimination based on my race and disability. I am black/African American. So far, I have not received a response from Judge Thomas regarding my complaint letter and attachments.

I respectfully request that you and other members of the Judicial Conference review the letter and attachments as they present credible evidence of very serious criminal misconduct perpetrated with the intent to cover up racism and bigotry by San Jose city officials. I ask that you take special note of Attachment II. It is inarguable from the discussion presented in Attachment II that the judgments of the U.S. District Court and the Ninth Circuit Court of Appeals in my two lawsuits against the City of San Jose are not consistent with well established statutory law and precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals. These judgments are intentionally erroneous and are now being enforced by the courts with the knowledge they are based on fraud. It is indisputable that the judgments are void and unenforceable under the law.

Additionally, the evidence of bias in favor of the City of San Jose is so pervasive and blatant that it gives the appearance that the courts are advocating for the City instead of being impartial and disinterested as is required by the due process clause of the Fifth Amendment. What is quite disturbing is that Magistrate Judge Nathanael Cousins ruled in my second lawsuit against the City of San Jose that City officials had no obligation to investigate my racial and disability discrimination complaints, even though, an investigation is mandated by City policy and state law. The case cited by Judge Cousins as precedent to dismiss my case, while not binding precedent, contradicts Judge Cousins' ruling and supports a finding that San Jose city officials were obligated to investigate my complaints. Surprisingly, the Ninth Circuit Court of Appeals summarily affirmed Judge Cousins' ruling clearly violating precedent set by United States v. Hooton that establishes the requirements for summary disposition.

As evidence of my claims of pervasive bias by the courts in favor of the City of San Jose, I have included a copy of a motion I filed for U.S. District Judge Ronald M. Whyte to recuse

himself from proceedings in my case. It should be noted that Judge Whyte refused to recuse himself. Other evidence of blatant bias is statements made by a judge during an appeals hearing in the Ninth Circuit Court of Appeals in November 2009. That hearing was in regards to my appeal of Judge Whyte's ruling granting the City of San Jose's motion for summary judgment in my first lawsuit. During that hearing, the judge (presumably Judge William Fletcher) asked "why did you make a federal case of this." Judge Fletcher then asked "why doesn't he just drop the darn thing?" He was clearly referring to my lawsuit against the City. Judge Fletcher also established in that hearing that there was no record whatsoever from the proceeding in small claims court for the small claims judgment the City relied upon for collateral estoppel. Judge Fletcher said he was doubtful about collateral estoppel because there had to have been actual litigation in my small claims case. There was in fact no litigation in my small claims case because the small claims commissioner dismissed my complaint with a finding that it was defective. Yet, Judge Fletcher and the rest of the panel hearing my appeal affirmed Judge Whyte's ruling dismissing my case as to the City based on collateral estoppel.

It is unmistakable that the small claims judgment has no preclusive effect under California preclusion law because there is no record that is sufficiently clear as to what was litigated and determined. Therefore, a federal court cannot give preclusive effect to the judgment based on the Full Faith and Credit Act. Attachment II mentioned above also details several other reasons why the small claims judgment has no preclusive effect. It is clear from Judge Fletcher's biased statements and the subsequent ruling of the Ninth Circuit Court of Appeals affirming Judge Whyte's clearly erroneous ruling granting the City's motion for summary judgment that the judgment in my first lawsuit must be vacated. The blatant bias shown by the courts offends democracy and the rule of law.

I respectfully request that the Judicial Conference review all of the documents that I have submitted and take immediate action to address this matter which is one of the greatest abuses of power and cover-ups by government officials in recent memory. And it is certainly one of the biggest frauds and cheating scandals in the history of our judiciary. Please be aware that I have also made complaints with several Members of Congress, the F.B.I. and Department of Justice. I look forward to hearing from you regarding this matter. Copies of my complaints with the House Judiciary Committee and the Department of Justice are also included with this letter.

Sincerely,

Frederick Bates

c: The Honorable Sidney R. Thomas – Chief Judge of the Ninth Circuit Court of Appeals
Congressman Bob Goodlatte – Chairman of the House Judiciary Committee
Jeff Sessions – Attorney General of the United States

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

July 29, 2017

Federal Bureau of Investigation
450 Golden Gate Avenue
San Francisco, CA 94102-9523
Attn: John F. Bennett – Special Agent in Charge

Re: Public Corruption Complaint:

Dear Mr. Bennett,

Enclosed are letters and documents I sent to the Department of Justice, the FBI Headquarters, and the House Judiciary Committee requesting an investigation into my complaint of public corruption against San Jose city officials, and officials with the Ninth Circuit Court of Appeals and the US District Court for the Northern District of California – San Jose Division. Please take note that I made a similar complaint with the FBI's San Francisco Field Office in May 2014. At that time, the San Francisco Field Office was headed by Special Agent in Charge David J. Johnson. Apparently no action was taken in regards to my complaint. Therefore, I decided to address this matter with FBI Headquarters and the Department of Justice.

The facts and evidence are incontrovertible that San Jose city officials and federal court officials committed public corruption crimes relative to two lawsuits I filed against the City for violating my civil rights. The letters and documents enclosed are for your information. However, if you do decide to initiate an investigation into this matter, you will have my full cooperation. Additional information regarding this matter can be found at the following links:
https://www.facebook.com/groups/624131267713226/

http://crnctz.blogspot.com/2015/08/exposing-cover-up-of-cheating-scandal.html

Sincerely yours,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

October 30, 2017

Mr. Christopher Wray – Director of the Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

Re: Public Corruption Complaint

Dear Mr. Wray,

The purpose of this letter is to bring to your attention a letter and several documents I sent to Attorney General Jeff Sessions regarding a public corruption complaint I filed with the Department of Justice, the FBI and the House Judiciary Committee against San Jose city officials, officials with the US District Court – San Jose Division and the Ninth Circuit Court of Appeals. So far, I have not received a response regarding my complaint, even though, I make allegations that San Jose city officials and federal court officials engaged in very serious criminal misconduct during the litigation of two lawsuits I filed against the City for civil rights violations. The evidence of their crimes is indisputable and overwhelming.

Enclosed is a copy of my letter sent to the Attorney General and several documents that support my public corruption complaint against the above officials, as well as, my claim that the judgments in my two lawsuits are null and void because they violate black letter law. It should be noted that I filed a similar complaint in 2014 with the FBI and the Department of Justice. As with my current complaint, I received no response from the FBI or the Department of Justice.

The purpose of this letter is to appeal directly to you to initiate an investigation into the public corruption crimes that are alleged in my complaint. I am well aware that the FBI has no authority to order the courts to reverse the void judgments in my cases. Nevertheless, I will give you this warning just as I gave the Attorney General. There will be a showdown with me and the courts unless the clearly void judgments in my two cases are reversed as is required by law. I will accept nothing less because in our democracy disputes in court are to be settled based on the rule of law. To achieve this outcome, I will make this a messy affair, even if it means I will go to jail. It is also very likely I will bring this matter to the attention of President Trump in a very public way being that his administration is beset by the dubious Russia collusion investigation, whereas, this very real collusion between the courts and San Jose city officials to obstruct justice is being ignored by the FBI and the Justice Department. This despicable and embarrassing spectacle has gone on far too long. Enough is enough. Additional details can be found at these links: https://www.facebook.com/groups/624131267713226/
http://crnctz.blogspot.com/2015/08/exposing-cover-up-of-cheating-scandal.html

Sincerely,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

April 16, 2018

Mr. Christopher Wray – Director of the Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

Re: Supplement to Public Corruption Complaint Letter Dated July 24, 2017

Dear Mr. Wray,

Here is a copy of a letter I sent to Attorney General Jeff Sessions that document additional crimes by the Ninth Circuit Court of Appeals not covered in my complaint letter dated July 24, 2017. The new crimes I am alleging are based on the court's handling of a motion for reconsideration I filed on September 27, 2017. The new crimes I am alleging are fraud and obstruction of justice. Also included are a copy of a letter and three attachments I sent to Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas also calling for an investigation into the misconduct that occurred during the litigation of my two lawsuits against the City of San Jose for civil rights violations. The attachments contain indisputable facts and evidence of public corruption crimes committed by San Jose city officials and the courts.

In a letter to you dated October 30, 2017, I warned that there would be a confrontation between me and the courts if this matter is not resolved fairly. In spite of this warning, I have not received a response from the F.B.I. or the Department of Justice regarding my many complaints against San Jose city officials and the courts. It is clear that my complaints have not been taken seriously, even though the facts and evidence I presented against the officials that stand accused cannot be disputed. This suggests to me that the F.B.I. and Department of Justice is complicit in the cover-up that is occurring by officials at all levels of government. Should this be the case, I give you my word that I will take matters into my own hands.

Sincerely,

Frederick Bates

c: Attorney General Jeff Sessions

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

March 18, 2019

Council of the Inspectors General on Integrity and Efficiency
1717 H Street, NW, Suite 825
Washington, DC 20006
Attn: Michael Horowitz – Inspector General

Re: Public Corruption Complaints

Dear Mr. Horowitz,

I respectfully request that you open an investigation into the conduct of the Federal Bureau of Investigation (F.B.I.) and the Department of Justice based on their failure to open an investigation into public corruption complaints I filed against San Jose city officials and officials with the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals. My complaints, in the form of letters, allege that these officials committed several felonies during the litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American. The crimes I allege against these officials include conspiracy to obstruct justice and obstruction of justice, subornation of perjury and perjury, bribery, and fraud. Accompanying my complaint letters to the F.B.I. and Department of Justice was credible evidence supporting my allegations. Here is a list of my complaint letters with the dates and the parties to whom they were directed, as well as dates of meetings with F.B.I. officials:

May 24, 2014 – Letter to Special Agent in Charge David J. Johnson – San Francisco F.B.I. Field Office
May 24, 2014 – Letter to Melinda Haag – U.S. Attorney for the Northern District of California
June 17, 2015 – Email letter to F.B.I. San Francisco Field Office that documents a phone contact with an F.B.I. employee in the San Francisco Field Office and a meeting with an F.B.I. agent in the Jackson Mississippi Field Office
July 24, 2017 – Letter to U.S. Department of Justice-Washington, D.C. (To Whom It May Concern)
July 27, 2017 – Letter to F.B.I. Headquarters-Washington, D.C. (To Whom It May Concern)
July 29, 2017 – Letter to Brian Stretch – U.S. Attorney's Office-Northern District of California
July 29, 2017 – Letter to Special Agent in Charge John F. Bennett - San Francisco F.B.I. Field Office
August 18, 2017 – Documentation of meeting with F.B.I. Special Agent in Sacramento, CA Field Office

October 24, 2017 – Letter to Attorney General Jeff Sessions
October 30, 2017 – Letter to F.B.I. Director Christopher Wray
April 16, 2018 - Letter to F.B.I. Director Christopher Wray
April 16, 2018 - Letter to Attorney General Jeff Sessions

Included with this letter are copies of the above letters and evidence attached to each that proves they were delivered to the above officials. For this reason, I am making a complaint against each for failure to take action and for engaging in a cover-up. I am well aware that the F.B.I. and the Department of Justice does not normally intervene in matters involving the courts based on the separation of powers doctrine. However, when there is credible evidence that court officials have engaged in public corruption, as is the case here, the F.B.I. and Department of Justice is obligated to investigate the crimes involved in order to protect the integrity of our judicial system. Clearly, the officials that received my complaint letters had a legal and moral duty to take action.

What is clear to me from the contact I had with F.B.I. agents and the lack of response to my complaint letters is that there seems to be no interest in opening an investigation into this matter, even though this is one of the greatest abuses of power and breaches of the public trust by government officials in recent memory. And it is certainly one of the biggest frauds on the court and cheating scandals in the history of our judiciary.

Along with the copies of the complaint letters noted above is an attachment that contain facts and evidence that corroborate the obstruction of justice/public corruption crimes I allege against San Jose city officials and officials with the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals. Also included is a pdf file on a flash drive containing a complaint letter and documents I sent to Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals. The letter and documents sent to Judge Thomas provides more facts and evidence to support my allegations.

Additionally, I am requesting an investigation of San Jose city officials for conducting an investigation of me in September 2018 that was malicious, retaliatory and meant to intimidate me and to violate my rights to free speech based on two emails I sent City officials relative to the criminal misconduct of City officials and the courts during litigation of the two lawsuits I filed against the City. The details surrounding the investigation by the City are also enclosed in a separate attachment. Please advise me of what action you will take in this matter.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

April 8, 2019

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Attn: Attorney General William P. Barr

Re: Complaint made with the Inspector General against the Department of Justice and the Federal Bureau of Investigation

Dear Attorney General Barr,

The purpose of this letter is to inform you of a complaint I made with Inspector General Michael Horowitz alleging that the Department of Justice under former Attorney General Jeff Sessions and current F.B.I. Director Christopher Wray engaged in a cover-up of several public corruption crimes involving San Jose city officials, my attorney, and officials with the U.S. District Court and the Ninth Circuit Court of Appeals during litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American. The crimes I allege include conspiracy to obstruct justice and obstruction of justice, subornation of perjury and perjury, bribery and fraud. Additionally, I made a complaint that the San Jose Police Department opened a malicious investigation of me, based on two emails I sent to San Jose city officials, in an attempt to suppress my right to freedom of speech. Along with my letter to the Inspector General were two attachments and exhibits that support my allegations.

In your letter dated March 24, 2019 that states the principal conclusions reached by Special Counsel Robert S. Mueller III, you explained the principles of federal prosecution that guide the Department of Justice charging decisions. You explained that it is necessary to have an underlying crime with respect to obstruction. You stated that: **Generally speaking, to obtain and sustain an obstruction conviction, the government would need to prove beyond a reasonable doubt that a person, acting with corrupt intent, engaged in obstructive conduct with a sufficient nexus to a pending or contemplated proceeding.** There are several instances where San Jose city officials and federal court officials engaged in obstructive conduct during proceedings related to my lawsuits that fits well with the guideline just stated. An example of such obstructive conduct is that attorneys for the City of San Jose conspired with my attorney to file a fraudulent stipulation of dismissal of a defendant I sued in his individual capacity in order to divest the district court of power to rule on the bigoted actions of the defendant that clearly violated my rights. I did not authorize the dismissal, and I had no knowledge of it prior to its filing. The stipulation provided me no benefits and it destroyed my cause of action because it was filed with prejudice. As the plaintiff, only I had the right to authorize the dismissal of the defendant. The requirement for an underlining crime for obstruction of justice is met because of the conspiracy and fraud allegations. Clearly the intent of these parties was corrupt because they wanted to deprive the district court of it constitutional authority to adjudicate my cause of action

against the defendant and the City of San Jose on the merits. The actions were intended to be obstructive and, in fact, did obstruct justice because the district court was powerless to rule on the actions of the defendant, even though my attorney and attorneys for the City of San Jose had argued that the defendant had violated my rights by violating a state law guaranteeing me due process. Additionally, the unauthorized dismissal of the defendant allowed the City to push a false narrative on several material issues throughout the litigation of my first lawsuit.

Another example of obstructive conduct is that U.S. District Court officials and attorneys for the City of San Jose conspired to stage a fake hearing on a Rule 60 motion I filed. Several docket entries were falsified in order to mischaracterize the grounds for my motion. I was given information by a court clerk that my motion would be decided on the papers and that there would be no hearing on my motion. I was informed that I did not have to appear in court on the scheduled hearing date. Despite the information I was given, a hearing on my mischaracterized motion was held according to the civil minutes and the transcript. However, the civil minutes and the transcript totally contradict each other as to what happened during the hearing. The transcript reflects that the City was granted a motion to dismiss, disposing of my motion, because I followed the court's instructions and did not appear in court. No word for word account of the City's motion to dismiss appears anywhere in the record. In a written statement based on my inquiry, the court denied that the City made a motion. The civil minutes, however, reflect that my motion was submitted on the papers and that the court would enter a written ruling at a later date.

There are several other examples in the letter and documents I sent to the Inspector General where San Jose city officials, my attorney, and officials with the U.S. District Court and the Ninth Circuit Court of Appeals engaged in obstructive conduct that fits within the charging guideline of the Department of Justice for obstruction. There is credible evidence that several San Jose city officials and my attorney received compensation (quid pro quo) for their participation in this conspiracy to obstruct justice. Copies of the letter and documents I sent to the Inspector General are included in two pdf documents on the enclosed flash drive. It seems highly unusual that the F.B.I and Department of Justice would take no action in a case such as this, where government officials have acted with a willful and wanton disregard for the rule of law. It is my hope that you will review this information and take the necessary steps to address what is clearly a cover-up by the Department of Justice and the F.B.I., as well as, the Courts and several Members of Congress. Please advise me of what actions you will be taking relative to this egregious conduct that threatens to destabilize our judicial system and our constitutional republic.

Sincerely,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

May 6, 2019

The Honorable Nancy Pelosi – Speaker of the U.S. House of Representatives
1236 Longworth H.O.B.
Washington, DC 20515

Re: Complaint made with the Inspector General against the Department of Justice and the Federal Bureau of Investigation

Dear Speaker Pelosi:

I am writing to inform you of a complaint I made with Inspector General Michael Horowitz alleging that the Department of Justice under former Attorney General Jeff Sessions, and the F.B.I. under current director Christopher Wray engaged in a cover-up of several public corruption crimes committed by San Jose city officials, my attorney, and officials with the U.S. District Court and the Ninth Circuit Court of Appeals. The crimes committed by these officials occurred during the litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American.

In a letter dated June 18, 2018, I sought your help in opening an investigation into the same criminal misconduct committed by San Jose city officials and officials with the U.S. District Court and the Ninth Circuit court of Appeals. I received no response from you, even though, the crimes I allege undermines our judicial system and the rule of law. A copy of the letter is enclosed. At the time of my June 2018 letter, you were the Ranking Member of the House of Representatives. Now that you are the Speaker, I am again asking for your help in opening an investigation into this matter.

With this letter is a flash drive containing copies of letters and documents I sent to Inspector General Horowitz and Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals. The letter and documents sent to the Inspector General details the criminal acts of San Jose city officials, my attorney, and federal court officials. The letter and documents sent to Chief Judge Thomas establishes that the judgments by the courts in my discrimination lawsuits against the City of San Jose are fraudulent and are void under the law. Yet, the courts refuse to vacate them as is required by law. Also included are copies of letters I sent to the House Judiciary Committee and Chairman Jerrold Nadler, and Attorney General William Barr.

I respectfully remind you Speaker Pelosi that your party has subjected President Trump and individuals associated with his administration to countless investigations based on the investigation of Special Counsel Robert Mueller, even though, the Special Counsel found no evidence of collusion and was not able to reach a decision on obstruction. Members of your party are now calling for the resignation or impeachment of the Attorney General; accusing him of being in collusion with the President because of the letter he wrote summarizing the findings of Special Counsel Mueller. Yet, you and members of your party have not opened an investigation into my public corruption complaints against San Jose city officials, the U.S. District Court and

the Ninth Circuit Court of Appeals. Your party's lack of a response to my complaints shows that the investigations into the President are politically motivated and are not based on a desire to protect our constitutional republic. As is stated in my June 2018 letter to you, many of the crimes I allege against San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals are felonies and involves a case-fixing scheme in order to cover-up racism and bigotry by San Jose city officials. Congress has the same obligation under the Constitution to provide oversight over the federal courts as it does President Trump.

I strongly encourage you to review carefully the June 2018 letter I sent to you, as well as, the other documents submitted with this letter. The documents present incontrovertible facts and evidence corroborating my allegations that San Jose city officials, my attorney, officials with the U.S. District Court and the Ninth Circuit Court of Appeals committed several crimes during the litigation of the two racial and disability discrimination lawsuits I filed against the City of San Jose. The clear intent of these officials was to undermine the judicial process and to obstruct justice. If I do not receive a response from you, I will assume that it is your intent to continue the cover-up of this matter. I will then be forced to make an ethics complaint against you, as well as, seek other reasonable and lawful means to obtain justice.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

April 19, 2019

U.S. House of Representatives Judiciary Committee
2141 Rayburn House Office Building
Washington, DC 20515
Attn: Chairman Jerrold Nadler

Re: Complaint made with the Inspector General against the Department of Justice and the Federal Bureau of Investigation

Dear Chairman Nadler and Members of the House Judiciary Committee,

The purpose of this letter is to inform the Committee of a complaint I made with Inspector General Michael Horowitz alleging that the Department of Justice, under former Attorney General Jeff Sessions, and the F.B.I., under current director Christopher Wray, engaged in a cover-up of several public corruption crimes committed by San Jose city officials, my attorney, and officials with the U.S. District Court and the Ninth Circuit Court of Appeals during the litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American.

It is also apparent that the House Judiciary Committee, as well as, other Members of Congress is engaged in a cover-up of the public corruption crimes of the officials noted above. My claim of a cover-up by the House Judiciary Committee and other Members of Congress is based on the lack of a response to several complaint letters I sent to the Committee and members of the House and Senate. Copies of letters that I recently sent to Members of Congress requesting an investigation into the criminal misconduct of San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals are enclosed. Also included is a flash drive containing copies of letters and documents that I sent to the Inspector General and Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals that details the crimes committed and corroborating evidence.

A copy of a letter I sent to Attorney General William Barr is included as well. In my letter to the Attorney General, I note the principles of federal prosecution that guide the Department of Justice charging decisions. The principles were explained by the Attorney General in his letter that states the principal conclusions reached by Special Counsel Robert Mueller. Attorney General Barr stated: **Generally speaking, to obtain and sustain an obstruction conviction, the government would need to prove beyond a reasonable doubt that a person, acting with corrupt intent, engaged in obstructive conduct with a sufficient nexus to a pending or contemplated proceeding.** There are several instances where San Jose city officials and federal court officials engaged in obstructive conduct during proceedings related to my lawsuits that are well within the guideline just stated. Yet, there has not been an investigation into these crimes that are a breach of the public trust that completely undermines our judicial system.

Chairman Nadler you stated recently that the Constitution charges Congress with holding the President accountable for alleged official misconduct. The Constitution also charges Congress with holding members of our federal judiciary accountable for official misconduct as well. It is my hope that the House Judiciary Committee and Congress will finally take my complaints seriously and open an investigation into this matter. I respectfully remind the Committee of its numerous investigations into the Trump administration, in many cases, without any specific allegations or evidence of any wrongdoing. This is the exact opposite of my specific allegations of criminal misconduct against San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals. The crimes I allege against these officials are very serious and they are felonies under federal law. The evidence I am presenting in order to substantiate the crimes I allege is indisputable and overwhelming.

I am asking that the House Judiciary Committee review the enclosed documents and open an investigation into the public corruption crimes committed by San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals. I respectfully request a timely response from the Committee advising me of what actions it will take in regards to this very serious matter. Please be aware of my intent to make an ethics complaint against the House Judiciary Committee and other Members of Congress based on the deliberate indifference shown towards my prior complaints.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

April 27, 2018

Congressman Adam Schiff
2372 Rayburn House Office Building
Washington, D.C. 20515

Re: Public corruption complaint against officials with the City of San Jose, the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals

Dear Congressman Schiff,

The purpose of this letter is to bring to your attention public corruption complaints I filed with the F.B.I., the Department of Justice, the House Judiciary Committee, and Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals against officials with the City of San Jose, the U.S. District Court – San Jose Division and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City. Please be aware that I have also notified several other members of Congress seeking their help in opening an investigation into my complaints. The members of Congress include, Senators Feinstein, Harris, McCain and Graham; Speaker Paul Ryan, House Judiciary Chairman Bob Goodlatte and Congresswoman Zoe Lofgren. So far I have only received one response from Senator Feinstein that does not address my request for an investigation.

I have enclosed copies of my complaints that contain indisputable facts and evidence that San Jose city officials conspired with district court officials to obstruct justice during the litigation of my first lawsuit by falsifying court dockets, creating a false document regarding a fraudulent stipulation of dismissal and staging a fake hearing on a Rule 60 motion I filed and then creating a false transcript of that purported hearing. It should be noted that I was told by a court official over the phone and in person that there would be no hearing on my motion. As to my second lawsuit, Ninth Circuit Court of Appeals officials terminated an appeal I filed challenging the district court's denial of my motion for relief from judgment without allowing me to file an opening brief. It is unmistakable that the judgments in both of my lawsuits are flagrantly biased, based on fraud, and are inconsistent with federal statutory law, the U.S. Constitution and binding precedent of the Supreme Court and Ninth Circuit Court of Appeals. The judgments are void and unenforceable by law. Yet, the judgments are being enforced by the courts. I find this to be intolerable.

I am well aware that I do not reside in your congressional district and that you are not my representative in Congress. I am bringing this matter to your attention out of extreme anger and frustration because of the lack of response my complaints have gotten by members of Congress, the Judiciary Committee, the F.B.I. and D.O.J. I am counting on you to take action on my complaints based on a statement you made during the impeachment of former district judge Thomas Porteous Jr. During those proceedings, you stated that litigants have the right to expect a judge hearing their case will be fair and impartial, and avoid even the appearance of impropriety.

Not only were the judges in my cases biased, they made no attempt at all to avoid the appearance of impropriety.

My anger and frustration also results from the fact that as a black/African American that grew up in the South during Jim Crow I have been treated with less respect and dignity by San Jose city officials and the federal courts than I was treated by the segregationist government officials I encountered. I am desperate to obtain a fair resolution to this matter. To that end, I am willing to take some extreme measures. This is not a threat to engage in violence. But going to jail in protest of this blatantly racist and bigoted violation of my rights by San Jose city officials and the courts is clearly an option for me. At this point, I feel I have nothing to lose.

It is absolutely stunning that many of the same members of Congress I notified about my complaints called President Trump a racist based on an alleged comment he made about African countries in a private meeting. But they have done nothing in regards to my complaints, even though I allege that San Jose city officials discriminated against me based on my race and disability, and that these officials committed several crimes relating to public corruption. It is also stunning that San Jose city officials and courts within the Ninth Circuit are willing to grant privileges to undocumented immigrants and refugees while at the same time I am being deprived of my rights that are guaranteed by law. Many of the members of Congress I just mentioned in this letter, including you, support the pro immigrant efforts of San Jose city officials and the federal courts. Certainly, one would think that I should be treated with the same respect and dignity as non-citizens. After the humiliating experience of living in the South during Jim Crow, I have paid my dues.

It is clear that there is a cover-up occurring of this scandal, not only to hide the racist conduct of San Jose city officials, but also to hide the fact that the Ninth Circuit Court of Appeals and many district courts within the circuit are engaging in a huge case fixing scheme. It is my hope that you will take advantage of the small window of opportunity that's left to address my complaints, otherwise, I will make good on my promise to take care of this matter in my own way. Please read the enclosed documents, especially the letter and attachments I sent to Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas. They prove without a doubt that the judgments in my cases are void; that criminal misconduct occurred during the litigation of my cases; and they contain my demands that must be met in order for this matter to be resolved.

Sincerely,

Frederick Bates

Frederick Bates
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Fo----------
(408)---------

August 12, 2019

Office of Congressional Ethics
U.S. House of Representatives
P.O. Box 895
Washington, DC 20515-0895

Re: Ethics Violations by Members of the House of Representatives

Dear Members of the Office of Congressional Ethics:

I respectfully request that your office conduct an investigation into ethics violations and criminal misconduct by the following Members of the House of Representatives and/or their staffs: Speaker of the House Nancy Pelosi, Chairman of the House Judiciary Committee Jerrold Nadler, and Chairman of the House Intelligence Committee Adam Schiff. I am alleging that Speaker Pelosi, Chairman Nadler, Chairman Schiff, and/or members of their staffs are engaged in a cover-up of racism and criminal misconduct by San Jose city officials, officials with the U.S. District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals that occurred during litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American. Speaker Pelosi, Chairman Nadler, and Chairman Schiff failed to take action on letters I submitted to each detailing the racist and criminal acts perpetrated by San Jose city officials and officials with the U.S. District Court and Ninth Circuit Court of Appeals. The criminal misconduct by San Jose city officials and the courts include bribery, conspiracy to obstruct justice and obstruction of justice, subornation of perjury and perjury, fraud, and witness tampering. These criminal acts involve creating a false document relative to a fraudulent stipulation of dismissal, falsifying court records, staging a phony hearing on a motion I filed and creating a fraudulent transcript and civil minutes for that hearing that contradict each other. Furthermore, the rulings of the courts in each of my lawsuits are biased in favor of the City of San Jose and they are wholly inconsistent with the indisputable facts and well established law.

On the website of the Office of Congressional Ethics, it states that the Office of Congressional Ethics of the House of Representatives is an independent, non-partisan entity charged with reviewing allegations of misconduct against Members, officers, and staff. It is sufficiently clear that this matter is within the jurisdiction of the Office of Congressional Ethics. It is also well established that **the First Amendment of the U.S. Constitution guarantees the right of the people to petition the government for a redress of grievances**. The definition of redress by Merriam-Webster is to set right or remedy an unjust or unfair situation.

It is important to note that there are no pending actions in court relative to my two lawsuits because the courts have entered their final judgments. Nothing precludes Congress from conducting investigations into my allegations against the courts based on Congress' constitutional authority/obligation to provide oversight. It is important to keep in mind that my allegations against the courts and the City of San Jose involve very serious **criminal**

misconduct. In order to support my allegations of criminal misconduct by San Jose city officials and the courts are two attachments in pdf format on a flash drive that's included in this packet. One attachment contain copies of a letter and documents sent to Inspector General Michael Horowitz alleging that former Attorney General Jeff Sessions and F.B.I. Director Christopher Wray, along with several other officials in the Department of Justice and F.B.I. are engaged in a cover-up of the criminal misconduct of San Jose city officials and federal court officials. The other attachment contains copies of a letter and documents I sent to Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals that is undeniable proof that the judgments in my two lawsuits against the City of San Jose are based on fraud; and that they are in violation of the Constitution and well established precedent and statutory law. The judgments are by law null and void. Yet, the courts refuse to vacate them. Also on the flash drive are copies of the complaint letters I sent to Speaker Pelosi, Chairman Nadler, and Chairman Schiff; along with copies of complaint letters I sent to Senator Lindsey Graham, Senator Dianne Feinstein, Senator Chuck Grassley, Senator Kamala Harris, Attorney General William Barr, Chief Justice John Roberts, and Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas.

The conduct of San Jose city officials and federal court officials is an egregious abuse of power that violates the public trust. What makes their conduct truly appalling is that their intent is to cover up racism, bigotry and corruption. The evidence of racism by San Jose city officials is indisputable because they state in court papers that the City's anti-discrimination policies does not protect me, a black person, and that they had no duty to investigate my racial discrimination complaints against City officials. Even though San Jose city policy specifically states that discrimination complaints will be investigated, the courts ruled in favor of the City stating that there were no set of facts that I could allege to make my racial discrimination claim viable. It is worthy to note that state law and precedent also establish that City officials had a duty to investigate my discrimination complaints, and that they can be held liable individually under Section 1983 based on their deliberate indifference. Further evidence of bias by the courts and indifference to the City's racist conduct is that the court in one proceeding exhibited hostility toward my discrimination lawsuit by asking why I was making this a federal case and why I didn't just drop the darn thing (my lawsuit). Bias is also indicated by the fact that the courts ruled in favor of the City in my first lawsuit despite City officials' admission that they had violated City policy and a state law that implicates a constitutionally protected interest. This flagrant bias against me by the courts also makes the judgments in my lawsuits null and void.

In covering up this clear case of bigotry and public corruption, Speaker Pelosi, Chairman Nadler, and Chairman Schiff have violated the ethics rules of the House of Representatives, as well as the oath they took to protect and uphold the Constitution. A credible criminal case for collusion and obstruction of justice can also be made against Speaker Pelosi, Chairman Nadler, and Chairman Schiff because the intentional cover-up of a crime is in itself a crime. An investigation into this matter is warranted in order to protect the integrity of our judicial system and to set right this unjust situation. Please inform me of what action the Office of Congressional Ethics will take in regards to my complaint.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

July 24, 2017

U.S. House of Representatives – Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Letter to the Department of Justice Regarding Public Corruption Complaint

Dear Members of the Judiciary Committee:

Enclosed is a copy of a letter and several documents I sent to the Department of Justice requesting an investigation into my public corruption complaint against several San Jose city officials, officials with the U.S. District Court – San Jose Division, and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City of San Jose for violating my civil rights. My lawsuits resulted after I was denied a CCW permit upon my medical disability retirement from the City's police force. It should be noted that I also made complaints of public corruption against San Jose city officials and federal court officials in letters to the full Judiciary Committee, to the former chairman (Congressman Lamar Smith) and the current chairman (Congressman Bob Goodlatte) in June 2011, March 2012, May 2014, and December 2014. It appears that no action was taken by the Judiciary Committee in response to my letters.

In my prior letters, as well as my letter to the Department of Justice, I make some very serious allegations of criminal misconduct surrounding the litigation of my lawsuits against the City of San Jose. Among the criminal acts I allege relative to my first lawsuit are that San Jose city officials and district court officials conspired to obstruct justice with the City's filing of a fabricated motion for summary judgment facilitated by a fraudulent stipulation of dismissal of a defendant. I also alleged that district court officials falsified official court records, staged a phony hearing on a Rule 60 motion I filed in February 2013, then fabricated a transcript that is entered in the record as an official government document. There is no credible evidence that a hearing actually took place. I was informed by a court official that there would be no hearing and that the court would render its decision based on the papers filed. Additionally, the district court violated the Full Faith and Credit Act (28 U.S.C. Section 1738) in giving preclusive effect to a small claims judgment the City relied upon for collateral estoppel. As to my second lawsuit, I alleged that San Jose Mayor Sam Liccardo and members of the San Jose City Council conspired to obstruct justice by refusing to conduct an investigation into my discrimination and misconduct complaints against the City Attorney's Office as is mandated by City policy and state law. I also alleged that U.S. Magistrate Judge Nathanael Cousins obstructed justice and denied me due process with his ruling dismissing my second lawsuit without leave to amend, thereby, violating Federal Rules of Civil Procedure 15(a) and case law. Judge Cousins also denied my motion for relief from judgment. Many of the criminal acts I allege against the above officials are supported by evidence that is indisputable and overwhelming.

Particularly troubling is the rulings of the courts as they relate to issue preclusion and the stipulation of dismissal of a defendant. It is unarguable that federal courts have no discretion when determining the preclusive effect of a state court judgment based on 28 U.S.C. Section 1738 (the Full Faith and Credit Act) and well settled precedent. The same applies to a stipulation of dismissal of a defendant under FRCP 41. Yet, the courts failed to follow the Full Faith and Credit Act by giving preclusive effect to the small claims judgment referred to above based on issue preclusion. The Full Faith and Credit Act is a command by Congress to the federal courts to give the same preclusive effect to state court judgments as would a court in the rendering state, no more and no less. The Full Faith and Credit Act also implements Article IV, Section 1 of the Constitution. The small claims judgment in question in this matter is from California. In California, issue preclusion does not apply to small claims judgments, unless the record is sufficiently clear that the issue sought to be foreclosed upon was litigated and determined. There is absolutely no record at all from the Small Claims Court. Furthermore, there was no litigation of the issue I raised during the proceedings in my small claims action against the City of San Jose. The Small Claims Court commissioner made an immediate ruling that he had no authority to grant the compensation I was seeking, implying that my case was filed in the wrong court. It is indisputable that the judgment of the court as it relates to issue preclusion is void. Yet, the courts have stubbornly resisted my efforts to have the judgment reversed through several letters and motions. The same goes for the fraudulent stipulation of dismissal of the defendant that I did not authorize. FRCP 41 and case law leaves no doubt that only I, as the plaintiff, had the right to dismiss the defendant in my lawsuit. The courts have simply made a conscious and calculated decision to defy the authority of Congress by failing to follow Section 1738 and FRCP 41. This is a direct attack on our Constitution which provides for co-equal branches of government based on the separation of powers doctrine. The independence with which courts are allowed to operate does not allow them to disregard laws passed by Congress.

In our democracy, it is imperative that disputes between citizens and the government be settled on a level playing field in the courts. In Marshall v. Jerrico, the Supreme Court held that the Fifth Amendment Due Process Clause entitles a party in a lawsuit to a tribunal that is impartial and disinterested in both civil and criminal cases. The Supreme Court goes on to state that it guards the neutrality requirement jealously. In the impeachment proceedings of district court judge Thomas Porteous Jr., Congressman Adam Schiff stated that litigants have the right to expect a judge hearing their case will be fair and impartial, and avoid even the appearance of impropriety. Not only were the judges in my cases biased, they made no attempt at all to avoid the appearance of impropriety. In the words of one court, justice ought to look like justice. What the courts did in my cases does not look like justice. It looks like cheating, because it is cheating. Additionally, many of the rulings by the courts were meant to punish me for exercising my right to free speech because of my social media activity condemning San Jose city officials and the federal courts for their misconduct as described above. The right to free speech has also been jealously guarded by the Supreme Court.

Being that the Judiciary Committee has jurisdiction over the lower federal courts, I respectfully request that an investigation be conducted into this matter based on the above allegations and based on the letter and documents I sent to the Department of Justice. The facts and evidence presented to the Department of Justice clearly shows that the Ninth Circuit Court of Appeals and the U.S. District Court, in collusion with San Jose city officials, committed

several crimes relating to public corruption, and that the courts fixed every decision in my lawsuits. A rigged court system, as is the case here, undermines our democracy just as the Russian interference into the past presidential election. It is unmistakable that the Ninth Circuit Court of Appeals and the U.S. District Court for the Northern District of California – San Jose Division are rogue courts that operate beyond the independence granted to them by the Constitution based on separation of powers.

I further request that the Judiciary Committee contact me at the above address or by phone and inform me of what action the Committee will take relative to this matter. If I do not receive a response, I will assume that the Judiciary Committee has again not taken me serious. I will then be forced to seek a just resolution through other reasonable means that will in all likelihood lead to a dramatic showdown with the courts. This could include acts of civil disobedience.

Additional information that should greatly assist this Committee can be found at the following links:

https://www.facebook.com/groups/624131267713226/
http://crnctz.blogspot.com/2015/08/exposing-cover-up-of-cheating-scandal.html

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Magnolia, MS 39652
(408) [redacted]

September 1, 2017

The Honorable Paul Ryan – Speaker of the U.S. House of Representatives
1233 Longworth HOB
Washington, D.C. 20515

Re: Public Corruption Complaint

Dear Mr. Speaker,

Enclosed are copies of letters and documents I sent to the House Judiciary Committee, the Department of Justice and FBI making a complaint of public corruption against several San Jose city officials, and officials with the US District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City of San Jose.

I respectfully request that you seek an investigation into my public corruption complaint by the Department of Justice, the FBI, and Congress because public corruption undermines our institutions of government just as the meddling into our past presidential election by the Russians. Congress and several agencies of the government have gone to great lengths to ensure that future presidential elections are not marginalized by the interference of nations hostile to our democracy. Yet, there has been very little done to ensure Americans that they will have a level playing field when settling disputes with the government in our federal courts. It is undeniable that the US District Court and San Jose city officials conspired to obstruct justice in my two lawsuits by falsifying court records, by creating false documents, by staging a fake hearing on a Rule 60 motion I filed, and by creating a fraudulent transcript for that hearing. It is also undeniable that the courts failed to follow federal laws relating to issue preclusion and a stipulation of dismissal that places strict limitations on their discretion.

The misconduct of San Jose city officials and the courts in my lawsuits represent one of the most egregious breaches of the public trust imaginable, as well as, a case of brazen and persistent cheating. These officials have made a conscious decision to place themselves above the law. I respectfully request that you take note of your opposition to President Trump's decision to pardon former Arizona sheriff Joe Arpaio because law enforcement officials have a special responsibility to respect the rights of everyone in the United States. Certainly this responsibility applies to Judges and other officials in our federal courts. Please take the time to review the enclosed documents. I am confident you will find my complaint has merit. I look forward to hearing from you regarding this very serious matter.

Sincerely yours,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630

May 13, 2019

Senator Lindsey Graham - Chairman of the Senate Judiciary Committee
290 Russell Senate Office Building
Washington, DC 20510

Re: Complaint made with the Inspector General against the Department of Justice and the F.B.I.

Dear Chairman Graham:

In a letter dated September 1, 2017, I informed you of a complaint I made with the F.B.I. and the Department of Justice against several San Jose city officials and officials with the U.S. District Court and Ninth Circuit Court of Appeals for public corruption based on crimes they committed during the litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American. I received no response from you in regards to my letter. Please be aware that I also informed several other Members of Congress about my public corruption complaints as well. So far, there has not been an investigation initiated into my complaints by the F.B.I., the Department of Justice or Congress.

The purpose of this letter is to inform you and the Senate Judiciary Committee of my complaint with Inspector General Michael Horowitz that several officials with the F.B.I. and the Department of Justice are engaged in a cover-up of the crimes committed by San Jose city officials and the federal court officials mentioned above. With this letter is a copy of the September 2017 letter I sent to you, as well as, copies of letters I sent to former Senate Judiciary Committee Chairman Chuck Grassley, Attorney General William Barr, Speaker of the House Nancy Pelosi, and House Judiciary Committee Chairman Jerrold Nadler.

Also enclosed is a flash drive containing letters and documents I sent to Inspector General Horowitz and Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals. The letter and documents sent to the Inspector General detail the criminal acts of San Jose city officials and the federal court officials. The letter and documents sent to Chief Judge Thomas establishes that the judgments by the courts in my discrimination lawsuits against the City of San Jose are fraudulent and are void under the law. Yet, the courts refuse to vacate them as is required by law.

I respectfully request that you present this matter before the entire Senate Judiciary Committee for investigation and action based on the compelling evidence of criminal misconduct by San Jose city officials and officials with the U.S. District Court and Ninth Circuit Court of Appeals, as well as, the cover-up of the crimes of these officials by the F.B.I. and the Department of Justice. Please advise me of the action that will be taken regarding my complaints.

Sincerely,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

September 1, 2017

Senator Lindsey Graham
290 Russell Senate Office Building
Washington, D.C. 20510

Re: Public Corruption Complaint

Dear Senator Graham,

Enclosed are copies of letters and documents I sent to the House Judiciary Committee, the Department of Justice and FBI making a complaint of public corruption against several San Jose city officials, and officials with the US District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City of San Jose. During litigation of my first lawsuit, the US District Court and attorneys for the City of San Jose falsified court records, created fraudulent documents, staged a fake hearing on a Rule 60 motion I filed seeking relief from an order by the district court granting the City's summary judgment motion, then created a fraudulent transcript for that hearing. All of these fraudulent acts were committed with the specific intent to obstruct justice. Additionally, the Ninth Circuit Court of Appeals and the US District Court violated 28 USC Section 1738 (the Full Faith and Credit Act) and FRCP 41 which governs a stipulation of dismissal. These two laws passed by Congress must be strictly adhered to by the courts with no room for discretion. This egregious conduct by San Jose city officials and the courts motivated by bigotry and hate is an attack on our democracy and shows utter contempt for the rule of law.

Even though I informed California Senators Dianne Feinstein and Kamala Harris of this matter since I am a California resident, I decided to bring this matter to your attention because of your long history of honesty and integrity and a willingness to protect our institutions of government. This is evident by your strong stance for sanctions against Russia for interfering in our past presidential election. You strongly encouraged President Trump to sign the sanctions bill punishing Russia and stated that his failure to do so would be "betraying democracy." Likewise, a failure to hold accountable the San Jose city officials and federal court officials for their involvement in this criminal conspiracy that undermines our judicial system would also be "betraying democracy." The documents enclosed shows, without a doubt, that my public corruption complaint has merit. I look forward to hearing from you regarding this matter.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 23, 2018

Senate Judiciary Committee
Dirksen Senate Office Building, Room 224
Washington, D.C.
Attn: Chairman Chuck Grassley

Re: Public corruption complaint against San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals

Dear Chairman Grassley,

The purpose of this letter is to bring to the Senate Judiciary Committee's attention several public corruption crimes committed by current and former San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals during the litigation of two racial and disability discrimination lawsuits I filed against the City of San Jose. I am black/African American. The public corruption crimes committed by the above officials include conspiracy, obstruction of justice, subornation of perjury and perjury, tampering with a witness, bribery and fraud. Additionally, the courts entered judgments in my two lawsuits that were intentionally erroneous and biased in favor of the City of San Jose. The judgments violate several laws and binding precedent. The misconduct of the above officials undermines our judicial system and deprived me of basic due process.

During the Judge Kavanaugh confirmation hearings, the focus on due process was at the forefront of discussions by Republican senators on this Committee and President Trump. Senator John Kennedy stated that **this is no country without due process**. Senator Lindsey Graham and other Republicans made impassioned statements in the hearings and during interviews in defense of Judge Kavanaugh's right to the due process requirement that one is innocent until proven guilty. President Trump stated in a tweet that due process, fairness and commonsense are now on trial.

Enclosed with this letter are copies of letters and attachments I sent to Chief Justice John Roberts and Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas. The letters and attachments details the deprivations of my due process rights at the hands of the Ninth Circuit Court of Appeals and the U.S. District Court. Also enclosed are copies of complaint letters I submitted to the F.B.I., the Department of Justice, and the House Judiciary Committee that list the crimes committed by San Jose city officials and federal court officials involved in the litigation of my lawsuits.

Please be aware that I have brought this matter to the attention of three members on this Committee (Senators Dianne Feinstein, Lindsey Graham and Kamala Harris) by letter in 2017. I only received a response from Senator Feinstein stating that she was unable to help me with this matter, even though the checks and balances provision of the Constitution provide for oversight of the federal courts by Congress. Other members of Congress I notified by letter include

Speaker of the House Paul Ryan, House Judiciary Committee Chairman Bob Goodlatte, Congresswoman Zoe Lofgren and Congressman Adam Schiff. Copies of the letters I sent to Members of Congress are included in this packet.

A true test of democracy is how disputes are settled in the courts between the government and citizens. If judges make decisions that are intentionally biased in favor of the government, contradict the facts and well established law, we do not have a democracy. If Congress fails to exercise oversight over the federal courts when they engage in misconduct as is required by the Constitution, then we do not have democracy. The documents I am presenting to this Committee reveals without a doubt that two judges in the U.S. District Court – San Jose Division (Judge Ronald M. Whyte and Judge Nathanael Cousins) entered judgments in my two lawsuits against the City of San Jose that they knew were biased in favor of the City and were inconsistent with statutory law and binding precedent. It is also clear that district court officials engaged in extensive fraud during the litigation of a Rule 60 motion I filed seeking to reverse Judge Whyte's ruling granting the City of San Jose's motion for summary judgment in my first lawsuit. Additionally, several appeals I filed in the Ninth Circuit Court of Appeals seeking to reverse the biased and void judgments of Judge Whyte and Judge Cousins were affirmed with summary dispositions that are inconsistent with Ninth Circuit precedent. The actions of these officials not only deprived me of basic due process, but they are a direct attack on our constitutional democracy and the rule of law. What is truly shocking is that Congress, the F.B.I. and Department of Justice have failed to hold these officials accountable.

I respectfully request that the entire Judiciary Committee review the documents enclosed. The documents tell a compelling story of blatant discrimination, public corruption and **case-fixing** in the U.S. District Court and the Ninth Circuit Court of Appeals. I also ask that the Senate Judiciary Committee notify me as to what action(s) it will take relative to this matter.

Sincerely,

Frederick Bates

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

August 11, 2017

Senator Dianne Feinstein
One Post Street, Suite 2450
San Francisco, CA 94104

Re: Public Corruption Complaint

Dear Senator Feinstein,

Enclosed are copies of letters and documents I sent to the Judiciary Committee, the Department of Justice and FBI making a complaint of public corruption against several San Jose city officials, and officials with the US District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City of San Jose. Please take note that I informed you of a similar complaint I made with the FBI and Judiciary Committee in a letter in June 2011. Apparently no investigation or inquiry was made into my complaint in spite of the facts and evidence I presented supporting my claims.

In response to my June 2011 letter, I believe that your office stated that it would be inappropriate for an elected official to get involved with litigation in the courts because of the importance of an independent judiciary that's necessary to the proper functioning of government. While this is normally the case, it does not apply to cases where it is sufficiently clear that a court is engaged in serious criminal misconduct that undermines our institutions of government as I am alleging in my complaints. The checks and balances provision of the separation of powers doctrine exit to ensure that one branch of government show proper respect for the other branches of government. It is undeniable from facts presented in my complaint that the courts violated 28 USC Section 1738 (the Full Faith and Credit Act) and FRCP 41 which governs a stipulation of dismissal. These two laws passed by Congress must be strictly adhered to by the courts. There is no room for discretion. Additionally, officials with the US District Court and the City of San Jose falsified court records, created fraudulent documents, staged a fake hearing on a Rule 60 motion I filed, and then created a fraudulent transcript for that hearing. All of these fraudulent acts were committed with the specific intent to obstruct justice.

Certainly, the independence with which courts are allowed to operate does not render Congress or the Executive Branch impotent to address public corruption in our judicial system that undermines our democracy. Rather, Congress and the Executive Branch are obligated to intervene. I respectfully request that you seek an investigation into this matter.

Sincerely,

Frederick Bates

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON THE JUDICIARY
— RANKING MEMBER
SELECT COMMITTEE ON
INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND
ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

August 15, 2017

Mr. Fred Bates
1235 Muirkirk Ct
Folsom, California 95630

Dear Mr. Bates:

Thank you so much for contacting my office and sharing your concerns with me. I appreciate your trust and am sorry to hear of your difficulties.

I sympathize with your concerns and your desire to have your problems resolved. It appears that your case is a legal matter and you need the kind of assistance which can be provided by legal counsel. If you are not already working with an attorney, you may want to contact the local Bar Association, Legal Aid Societies, or similar groups which can assist you in finding an attorney.

As a United States Senator I cannot intervene in, or comment on, a matter that is within the jurisdiction of the courts. This policy preserves the separation of powers doctrine, delineated in the Constitution to the branches of government, and upholds the integrity of our system of justice.

I appreciate your writing to me and do wish I could be more helpful to you. If there is any way my office can assist you with problems with the federal government, please get back in touch with me.

Sincerely,

Dianne Feinstein
United States Senator

DF:emc

FRESNO OFFICE:
2500 Tulare Street
Suite 4290
Fresno, CA 93721
(559) 485-7430

LOS ANGELES OFFICE:
11111 Santa Monica Boulevard
Suite 915
Los Angeles, CA 90025
(310) 914-7300

SAN DIEGO OFFICE:
750 B Street
Suite 1030
San Diego, CA 92101
(619) 231-9712

SAN FRANCISCO OFFICE:
One Post Street
Suite 2450
San Francisco, CA 94104
(415) 393-0707

Frederick Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

August 7, 2017

Senator Kamala Harris
501 I Street, Suite 7-600
Sacramento, CA 95814

Re: Public Corruption Complaint

Dear Senator Harris,

Enclosed are copies of letters and documents I sent to the Judiciary Committee, the Department of Justice and FBI making a complaint of public corruption against several San Jose city officials, and officials with the US District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals relative to two lawsuits I filed against the City of San Jose. It should be noted that when you were Attorney General, I sent you a letter in May 2014 requesting an investigation into public corruption by many of the same officials named in my current complaint. No investigation was completed.

I respectfully request that you seek an investigation into my current public corruption complaint by the Department of Justice, the FBI, and Congress because public corruption undermines our institutions of government just as the meddling into our past presidential election by the Russians. Congress and several agencies of the government have gone to great lengths to ensure that future presidential elections are not marginalized by the interference of nations hostile to our democracy. Yet, there has been very little done to ensure Americans that they will have a level playing field when settling disputes with the government in our federal courts. It is undeniable that the US District Court and San Jose city officials conspired to obstruct justice in my two lawsuits by falsifying court records, by creating false documents, by staging a fake hearing on a Rule 60 motion I filed, and by creating a fraudulent transcript for that hearing. It is also undeniable that the courts failed to follow federal laws relating to issue preclusion and a stipulation of dismissal that places strict limitations on their discretion.

The misconduct of San Jose city officials and the courts in my lawsuits represent one of the most egregious breaches of the public trust imaginable, as well as, a case of brazen and persistent cheating. These officials have made a conscious decision to place themselves above the law. I respectfully remind you that you retweeted a tweet by Senator Blumenthal a few days ago directed to the President stating that "**no one is above the law**." It is my hope that you take the same view concerning my public corruption complaint.

Sincerely yours,

Frederick Bates

Frederick Bates
1235 Muirkirk Ct
Folsom, CA 95630
(408) 510-9174

July 10, 2019

U.S. Senate Select Committee on Ethics
220 Hart Building
United States Senate
Washington, DC 20510

Re: Ethics Violations by Members of the Senate Judiciary Committee/Petition for Redress of Grievance

Dear Members of the Senate Select Committee on Ethics:

The purpose of this letter is to bring to your attention ethics violations by the following members of the Senate Judiciary Committee: Senator Lindsey Graham, Senator Chuck Grassley, Senator Dianne Feinstein, and Senator Kamala Harris. I am also asking that the Select Committee on Ethics open an investigation into my allegation. My allegation that the just named Senators violated Senate Ethics Rules are based on their failure to take action on complaint letters I submitted to each detailing criminal misconduct by San Jose city officials, officials with the U.S. District Court for the Northern District of California – San Jose Division and the Ninth Circuit Court of Appeals during litigation of two lawsuits I filed against the City of San Jose for racial and disability discrimination. I am black/African American. Furthermore, the rulings of the courts in each of my lawsuits are biased in favor of the City of San Jose and they are wholly inconsistent with the indisputable facts and well established law.

On the website of the Senate Select Committee on Ethics under Constituent Service, it states that the First Amendment of the U.S. Constitution "guarantees the right of the people... to petition the government for a redress of grievances." It also states that responding to inquiries of petitioners and assisting them before executive or independent government officials and agencies is an appropriate exercise of the representational function of each Member of Congress, as well as an important function of congressional oversight. The definition of redress by Merriam-Webster is to set right or remedy an unjust or unfair situation.

Not only has there been no action taken on my complaint letters to Senators Graham, Feinstein, Grassley, and Harris, I have only received a response from Senator Feinstein acknowledging receipt of my letter. This is inconsistent with the obligation of elected officials to respond to inquiries of petitioners as noted above. What makes this matter so egregious is that the accused Senators are making a conscious decision to conceal from the public the criminal misconduct of San Jose city officials and officials with the U.S. District Court and the Ninth Circuit Court of Appeals that was perpetrated in order to cover up racism, bigotry and corruption.

Also on the website for the Senate Select Committee it states that the general advice of the Ethics Committee concerning pending court actions is that Senate offices should refrain from intervening in such legal actions in most cases until the matter has reached a resolution in the

courts. In other words, the judicial system should be allowed to function without interference from outside sources. It is important to note that there are no pending actions in court relative to my two lawsuits because the courts have entered their final judgments. Nothing precludes Congress or the Senate Judiciary Committee from conducting investigations into my allegations against the courts based on Congress' constitutional authority/obligation to provide oversight. It is important to keep in mind that my allegations against the courts and the City of San Jose involve very serious **criminal misconduct**. The criminal misconduct I am alleging includes bribery, conspiracy to obstruct justice and obstruction of justice, subornation of perjury and perjury, fraud, and witness tampering. These criminal acts involve creating a false document relative to a fraudulent stipulation of dismissal, falsifying court records, staging a phony hearing on a motion I filed and creating a fraudulent transcript and civil minutes for that hearing that contradict each other.

In order to support my allegations of criminal misconduct by San Jose city officials and the courts are two attachments in pdf format on a flash drive that's included in this packet. One attachment contain copies of a letter and documents sent to Inspector General Michael Horowitz alleging that former Attorney General Jeff Sessions and F.B.I. Director Christopher Wray, along with several other officials in the Department of Justice and F.B.I. are engaged in a cover-up of the criminal misconduct of San Jose city officials and federal court officials. The other attachment contains copies of a letter and documents I sent to Chief Judge Sidney R. Thomas of the Ninth Circuit Court of Appeals that is undeniable proof that the judgments in my two lawsuits against the City of San Jose are based on fraud; and that they are in violation of the Constitution and well established precedent and statutory law. The judgments are by law null and void. Yet, the courts refuse to vacate them. Also on the flash drive are copies of the complaint letters I sent to Senators Graham, Feinstein, Grassley, and Harris; along with copies of complaint letters I sent to Speaker of the House Nancy Pelosi, House Judiciary Committee Chairman Jerrold Nadler, House Intelligence Committee Chairman Adam Schiff, and Attorney General William Barr.

The conduct of San Jose city officials and federal court officials is an egregious abuse of power that violates the public trust. What makes their conduct truly appalling is that their intent is to cover up racism and bigotry. The evidence of racism by San Jose city officials is indisputable because they state in court papers that the City's anti-discrimination policies did not protect me, a black person, and that they had no duty to investigate my racial discrimination complaints against City officials. Even though San Jose city policy specifically states that discrimination complaints will be investigated, the courts ruled in favor of the City. It is worthy to note that state law and precedent also establish that City officials had a duty to investigate my discrimination complaints, and that they can be held liable individually under Section 1983 based on their deliberate indifference. Further evidence of bias by the courts and indifference to the City's racist conduct is that the court in one proceeding exhibited hostility toward my discrimination lawsuit by asking why I was making this a federal case and why I didn't just drop the darn thing (my lawsuit). Bias is also indicated by the fact that the courts ruled in favor of the City in my first lawsuit despite City officials' admission that they had violated City policy and a state law that implicates a constitutionally protected interest. This flagrant bias against me by the courts also makes the judgments in my lawsuits null and void. I want to make it clear that I am alleging that Senator Graham, Senator Grassley, Senator Feinstein, and Senator Harris are

intentionally covering up this matter. It is sufficiently clear that these Senators are in violation of the Ethic Rules of the Senate, as well as, the oath they took to protect and uphold the Constitution. A credible criminal case for collusion and obstruction of justice can also be made against these Senators because the intentional cover-up of a crime is in itself a crime. An investigation into this matter is warranted in order to protect the integrity of our judicial system and to set right this unjust situation. Please inform me of what action the Senate Select Committee will take in regards to my allegation.

Sincerely,

Frederick Bates

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 24, 2014

David Louie - ABC7 Broadcast Center
900 Front Street
San Francisco, CA 94111

Re: Mayor Reed's call for an investigation of POA President Jim Unland

Dear Mr. Louie,

My name is Fred Bates. I am a retired sergeant with the San Jose Police Department. I do not in any way represent the San Jose POA. It is also not my intent to take sides in the dispute between Mayor Reed and the POA. I am writing because I am incensed that the Mayor has called for an investigation of POA President Jim Unland for comments he made to police cadets. Yet, Mayor Reed and several other City Officials, including mayoral candidate Sam Licardo, have ignored my many requests for an investigation into criminal misconduct by the City Attorney's Office and the courts relative to a lawsuit I filed against the City.

Among the charges I make is that two police administrators (Adonna Amoroso and Tuck Younis) were told by City officials to commit perjury during their depositions; and that City officials paid off my former attorney, Stuart Kirchick, to stipulate to the dismissal of Younis from my lawsuit without my knowledge or approval in order to protect Younis from liability. This lends credibility to the claim by former officer Aaron Ettinger that he was offered money to lie by Mayor Reed's political strategist Victor Ajlouny. I also charged that Deputy City Attorney Richard North conspired with U.S. District Court officials to stage a phony hearing on a Rule 60 motion I filed in February 2013; and that they entered a fraudulent judgment afterwards in favor of the City. This gives the appearance of a quid pro quo. This is case-fixing and cheating.

Enclosed are complaint letters I filed with the Santa Clara County Civil Grand Jury, the F.B.I and the District Attorney's Office against Mayor Reed, the City Council and several other City officials for public corruption. Also enclosed are letters and documents that prove my complaints are credible.

It is unmistakable that Mayor Reed, Sam Licardo and the other named City officials are engaged in a criminal cover-up. I stand by my allegations and I challenge City officials to rebut them publicly. I also encourage City officials to open an investigation into my complaints, just as they are contemplating with Jim Unland. The citizens of San Jose have a right to know about my public corruption claims against City officials because this is really the tip of the iceberg.

Sincerely,

Fred Bates

Public Corruption Complaint against San Jose City Officials

From: mrb10364evr@aol.com

To: david.louie@abc.com

Date: Monday, November 17, 2014 at 10:01 AM PST

Hi Mr. Louie,

I am somewhat shocked and disappointed that your media outlet chose not to run a story regarding my public corruption complaints against San Jose city officials and the federal courts. From the evidence I sent you, it is clear that these officials engaged in criminal misconduct. It is also clear that Mayor Reed, Mayor Elect Sam Licardo and several other City officials are engaged in a criminal cover-up by failing to conduct an investigation into this matter as is required by City policy. Alllegations against government officials of this magnitude needs to be made public, just as the recent claims against police officials were made public. While I support and respect your right to freedom of the press, I am hoping that you will provide me some insight into your decision to not cover my story. At the very least, the public is entitled to some type of response from these officials as to these allegations.

Respectfully,

Fred Bates

Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

From: mrb10364evr@aol.com

To: David.Louie@abc.com

Date: Thursday, October 30, 2014 at 08:03 AM PDT

Thanks!

-----Original Message-----
From: Louie, David <David.Louie@abc.com>
To: mrb10364evr <mrb10364evr@aol.com>
Sent: Wed, Oct 29, 2014 7:33 pm
Subject: Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

I received the package. Thanks very much. I hope to have some time tomorrow to look things over.

From: "mrb10364evr@aol.com" <mrb10364evr@aol.com>
Date: Wednesday, October 29, 2014 at 7:28 PM
To: David Louie <david.louie@abc.com>
Subject: Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

No problem..I left the package at the door around 1:35P..I really appreciate your interest in this matter..dont hesitate to contact me by email or my cell (408) 510-9174 if you have any questions.

-----Original Message-----
From: Louie, David <David.Louie@abc.com>
To: 'mrb10364evr@aol.com' <mrb10364evr@aol.com>
Sent: Wed, Oct 29, 2014 9:57 am
Subject: RE: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

Mr. Bates,

I really don't want to inconvenience you if you are driving down from Folsom to drop the documents off. I can have our newsroom staff FedEx your package. Just let me know. Thanks.

David

From: mrb10364evr@aol.com [mailto:mrb10364evr@aol.com]
Sent: Wednesday, October 29, 2014 8:59 AM
To: Louie, David
Subject: Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

Ok..I will drop it off today.. In the mean time, I have attached a copy of the complaint I filed with the Civil Grand Jury and a letter I sent to the SJPOA, Mayor Reed, Sam Licardo and Dave Cortese.

-----Original Message-----
From: Louie, David <David.Louie@abc.com>
To: mrb10364evr <mrb10364evr@aol.com>
Sent: Tue, Oct 28, 2014 11:12 pm
Subject: Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

If you could leave another set of documents, that would be great. We are located at 255 West Julian Street, Suite 507, San Jose. It's the Davidson Building on Julian at Highway 87. When we're out on a story, there is no one to answer the door, but it's safe to leave a package at the #507 door. Sorry for the inconvenience.

David

From: "mrb10364evr@aol.com" <mrb10364evr@aol.com>
Date: Tuesday, October 28, 2014 at 10:59 PM
To: David Louie <david.louie@abc.com>
Subject: Re: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

I sent it to 900 Front Street, San Francisco..I didnt know you were located in San Jose.. If you need me to, I can drop off a duplicate in San Jose tomorrow (Wednesday)..thanks for your interest..

-----Original Message-----
From: Louie, David <David.Louie@abc.com>
To: 'mrb10364evr@aol.com' <mrb10364evr@aol.com>
Sent: Tue, Oct 28, 2014 4:52 pm
Subject: RE: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

Hi Mr. Bates,

Where did you send the package? I have not received anything at our San Jose Bureau. I'm looking forward to seeing the information you've sharing.

David

From: mrb10364evr@aol.com [mailto:mrb10364evr@aol.com]
Sent: Monday, October 27, 2014 5:01 PM
To: Louie, David
Subject: Package I sent you regarding public corruption complaint I filed against San Jose city officials in May 2014

Mr. Louie, I am writing to find out if you received the package I sent you. It was scheduled to be delivered on Saturday (10/25/14) by 3:00P. I am attaching a copy of the cover letter. Please contact me. The matter I bring up is far more serious than the complaint against POA President Jim Unland. San Jose city officials have gone to great lenghts to keep it hidden. I hope that you will make it public just as you did the complaint against Unland. Please contact by email or my cell # (408) 510-9174.

Thanks in advance!

Fred Bates

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 21, 2014

NBC Bay Area – KNTV
Investigative Unit
2450 North First Street
San Jose, CA 95131

Re: The District Attorney's Office is playing politics by refusing to investigate criminal misconduct by San Jose city officials.

To the Investigative Unit:

The District Attorney's Office is playing politics by refusing to conduct an investigation into a complaint I filed on May 24, 2014 against San Jose city officials for public corruption. My complaint alleges that the City Attorney's Office engaged in brazen and persistent criminal misconduct during litigation of a lawsuit I filed against the City for civil rights violations; and that Mayor Reed, the City Council and several other City officials are engaged in a cover-up with help from federal court officials. Enclosed is a copy of a complaint I recently filed with the Santa Clara County Civil Grand Jury against San Jose city officials for public corruption because of the District Attorney's Office failure to take action. Several supporting documents are included that clearly prove that my complaint is credible.

It is undeniable the evidence I presented to the District Attorney's Office prove that the City Attorney's Office engaged in criminal misconduct; and that City officials have failed to conduct an investigation into my complaint against the City Attorney's Office as is required by the City's Code of Ethics and other policies. It is also clear that U.S. District Court officials staged a phony hearing and falsified court records in order to make a ruling in favor of the City on a Rule 60 motion I filed in February 2013. These allegations are extremely serious and fall well within the category of public corruption because several City officials seemed to have gained financial profit by receiving promotions or high paying positions outside the City based on their misconduct relative to my case.

District Attorney Jeff Rosen took office in January 2011 with the mandate to reform and restore integrity to the DA's Office. However, the DA's Office refusal to investigate my complaint cast suspicion on the integrity of the DA's Office. The DA's Office stated reason for not opening an investigation because of the statute of limitations is totally bogus.

It is quite clear to me that there is a conflict of interest for the DA's Office in this matter because of the DA's Office apparent desire to protect its Chief of Investigations (Pete Oliver) who has been implicated in misconduct relative to my case. A second and perhaps more significant reason exist as well. Mr. Rosen has endorsed Councilmember Sam Licardo for mayor of San Jose. Clearly Mr. Licardo's role in covering up the criminal misconduct of the City

Attorney's Office and the federal courts could be damaging to his campaign. This is playing politics and not in keeping with the commitments he made to the people of Santa Clara County.

Mr. Rosen calls himself "The People's DA." Yet, he has failed to look out for the best interest of the people. Rather, he has chosen to protect corrupt City officials by refusing to conduct an investigation into the blatant case-fixing and cheating by the City Attorney's Office and the courts; and the criminal cover-up by Mayor Reed, the City Council and other City officials. This cheating scandal by the City Attorney's Office and the federal courts has cost tax payers several thousands of dollars; and is likely to cost thousands more.

It is time to bring this spectacle to an end and hold accountable City officials that have engaged in misconduct in this matter. I am asking that the District Attorney's Office reconsider its political decision to not open an investigation and to present this matter to the Criminal Grand Jury.

I can be contacted at the above number if you have any questions.

Fred Bates

Fred Bates

Retired Sergeant, SJPD

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 17, 2014

Scott Herhold
4 North Second St. Suite 800
San Jose, CA 95113

Dear Mr. Herhold,

Enclosed is a copy of a complaint I filed with the Santa Clara County Civil Grand Jury against San Jose city officials for public corruption. My complaint alleges that the City Attorney's Office engaged in brazen and persistent criminal misconduct during litigation of a lawsuit I filed against the City for civil rights violations; and that Mayor Reed, the City Council and other City officials are engaged in a cover-up with the help of federal court officials. City officials have refused to initiate an investigation into this matter as is required by the City's Code of Ethics and other policies. The courts have staged a phony hearing and falsified court records in order to make rulings in the City's favor that are clearly erroneous and in violation of federal law. It should be noted that complaints with the Santa Clara County District Attorney's Office, the State Attorney General's Office, the Federal Bureau of Investigation and the U.S. House of Representatives Judiciary Committee have so far been to no avail.

I bring this matter to your attention because of your familiarity with questionable conduct by the City Attorney's Office. In 2006, you wrote an article stating that City Attorney Rick Doyle should resign. It is my hope that you will again call for Mr. Doyle to step down because of the reckless and irresponsible conduct by the City Attorney's Office during litigation in my case. It is also my hope that you will call for an investigation into my allegations; and call for Mayor Reed, the City Council and other City officials that stand accused to respond to my allegation of a cover-up. This will be in keeping with the City's promise of transparency, openness and honesty in government. I stand by the claims I make in my complaints with all of the above listed entities. I challenge the Mayor, the City Council and other City officials charged to rebut my claims.

This matter has dragged on far too long and has been very costly for tax payers for no reason other than plain bigotry and the desire for retribution by City officials. It clearly shows that there is a culture of corruption in San Jose City Hall, and that a change in leadership is necessary. The current leadership has placed itself above the law. Their actions in this matter, as well as others, have been a total disgrace. I can be contacted at the above number or I will gladly meet with you if you have questions.

Sincerely,

Fred Bates

Fred Bates

From: Fred Bates [j @aol.com]
Sent: Thursday, October 23, 2014 1:38 PM
To: 'sherhold@mercurynews.com'
Subject: Public corruption complaint against Mayor Reed and San Jose city officials

Hi Mr. Herhold,

My name is Fred Bates. I am a retired sergeant with the San Jose Police Department. I sent you a packet that was delivered to the Mercury News on Monday (10/20/14). That packet contained a complaint letter I filed with the Santa Clara County Civil Grand Jury making a complaint against Mayor Reed, the City Council and several other City officials for public corruption. Complaint letters I filed with other entities and other supporting materials were enclosed as well. I am somewhat shocked that you have not contacted me regarding the serious allegations in my complaints. Certainly, the documents I submitted prove my complaints against San Jose city officials and the courts are credible. While I respect your right to freedom of the press, I believe it is only fair that you allow me the same opportunity to make public my complaints against Mayor Reed and the other City officials, just as the complaint against POA President Jim Unland was made public. I stand by my complaints. At, the very least, you should ask the Mayor and other City officials to respond publicly to my complaints; just as Jim Unland. You should also ask Mayor Reed why he has not called for a special investigator and the US Attorney to investigate my complaints just as he is doing with the complaint against Unland. I find it to be outrageous that the Mayor can use the power of his office to investigate dubious complaints against those he has a dispute with; while protecting himself and other City officials from investigation for serious wrongdoing. I respectfully request that you respond to this email, I am sure you will find my life story as equally or more compelling as that of Elyse Rivas.

Thanks!

Fred Bates
[redacted]
Folsom, CA 95630
(408) [redacted]

October 28, 2014

San Jose Inside – The Fly

On October 25, 2014, I left a message for "The Fly" stating that Mayor Reed, mayoral candidate Sam Licardo and other City officials are covering up criminal misconduct relating to a case-fixing and cheating scandal involving the City Attorney's Office and the U.S. District Court. As I promised, here is the proof of the criminal misconduct by the City Attorney's Office and the District Court, as well as, proof of the cover-up by Mayor Reed, Sam Licardo and several other City officials. This scandal has cost the City by my conservative estimate, over one hundred thousand dollars in legal costs. It is very likely to cost the City thousands more. Of course you can verify this with City officials. In your opinion piece endorsing Sam Licardo published on October 15, 2014, you state that San Jose and Santa Clara County have implemented reforms to ensure public transparency in response to scandals, secret deals, corruption and theft of public funds. Please give the Mayor and Mr. Licardo a call; it is unlikely they will refute my claims. Please contact me at the above number for additional details.

Edil Bates

Fred Bates
Retired sergeant - SJPD

List of Government Officials Notified about Misconduct by San Jose City Officials and Federal Court Officials

Federal Officials

U.S. Senator Diane Feinstein – State of California
U.S. Senator Barbara Boxer – State of California
Congressman Bob Goodlatte – State of Virginia (Chairman of the House Judiciary Committee)
Congressman Lamar Smith – State of Texas (former chairman - House Judiciary Committee)
Congresswoman Zoe Lofgren – State of California (Member of House Judiciary Committee)
Former Congressman Dan Lundgren – State of California (former member of House Judiciary Committee)
Judicial Council of the Ninth Circuit
Chief Judge Alex Kozinski – Ninth Circuit Court of Appeals
Senior Circuit Judge John Noonan – Ninth Circuit Court of Appeals
Circuit Judge William Fletcher – Ninth Circuit Court of Appeals
Clerk of Court Molly Dwyer – Ninth Circuit Court of Appeals
Deputy Clerk of Court Jerry Rosen – Ninth Circuit Court of Appeals
Case Administrator Brad Ybaretto – Ninth Circuit Court of Appeals
Clerk of Court Richard Wieking – U.S. District Court – Northern District of California
Special Agent in Charge David J. Johnson – F. B. I. (San Francisco Office)
Melinda Haag – U.S. Attorney for the Northern District of California

California State Officials

California State Supreme Court
Attorney General Kamala D. Harris – State of California
C. Hallinan – California Department of Justice (Public Inquiry Unit)
California Commission on Judicial Performance
State Bar of California

San Jose City Officials

Mayor Chuck Reed
Vice Mayor Madison Nguyen
Councilmember Rose Herrera
Councilmember Kansen Chu
Councilmember Ash Kalra
Councilmember Sam Licardo
Councilmember Pierlugi Oliverio
Councilmember Pete Constant
Former councilmember Nancy Pyle
Former councilmember Nora Campos
Former councilmember Judy Chirco

Former city manager Debra Figone
Former city manager Les White
City Attorney Richard Doyle
Former Assistant City Attorney George Rios
Former city clerk Dennis Hawkins
Sara Wright – former Agenda Services Manager for Mayor Reed
Toni Taber – City Clerk
Cecilia McDaniel – Office of the City Clerk
Office of Employee Relations
San Jose Elections Commission – Michael Smith, Erica Crosgrove, Linda Edgeworth, Rolanda Pierre-Dixon and Leon Louie

Santa Clara County Officials

Judge Alden Danner – former Presiding Judge Superior Court of California, Santa Clara County
Santa Clara County Criminal Grand Jury
District Attorney Jeffrey F. Rosen
Deputy District Attorney John Chase
Santa Clara County Civil Grand Jury

Additional List of Government Officials Notified about Misconduct of San Jose City Officials and Federal Court Officials

Federal Officials

U.S. Senator Lindsey Graham – State of South Carolina
U.S. Senator Chuck Grassley – State of Iowa
Former Senator and Current Vice President Kamala Harris – State of California
Congresswoman Nancy Pelosi – State of California
Congressman Jerrold Nadler – State of New York
Congressman Adam Schiff – State of California
Former Congressman Paul Ryan – State of Wisconsin
U.S. House of Representatives – Committee on the Judiciary
U.S. Supreme Court Chief Justice John Roberts
Former Chief Judge of the Ninth Circuit Court of Appeals Sidney R. Thomas
Former Attorney General Jeff Sessions
Former Attorney General William Barr
Inspector General Michael Horowitz
F.B.I. Director Christopher Wray
Special Agent in Charge John F. Bennett – San Francisco Field Office

San Jose City Officials

Current and Former Members of the City Council
Mayor Sam Liccardo
Councilmember Rose Herrera
Councilmember Charles (Chappie) Jones
Councilmember Ash Kalra
Councilmember Raul Peralez
Councilmember Manh Nguyen
Councilmember Magdalena Carrasco
Councilmember Pierluigi Oliverio
Councilmember Tam Nguyen
Councilmember Donald Rocha
Councilmember Johnny Khamis