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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF CALIFORNIA

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4 KIM BERRY,) Case No. CIV-S-04-2580-
5) LKK/KJM
6 Plaintiff,)
7 vs.) Sacramento, California
8) Wednesday, February 24, 2005
9 STATE OF CALIFORNIA, et al.,) 10:18 A.M.
10)
11) Hearing re: Defendant's
12 Defendants.) motion to dismiss.
13)

14 TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE KIMBERLY J. MUELLER
16 UNITED STATES MAGISTRATE JUDGE

17 APPEARANCES:

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1 SACRAMENTO, CALIFORNIA, WED., FEBRUARY 23, 2005, 10:18 A.M.

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3 (Call to order of the Court.)

4 THE CLERK: Calling Civil Case 04-2580-LKK/KJM, Berry
5 v. State of California. This is on calendar for defendants
6 motion to dismiss.

7 MS. OIE: Good morning, Your Honor. Susan Oie with
8 the Attorney General's Office for the defendants and moving
9 parties.

10 THE COURT: Good morning.

11 MR. BERRY: And Kim Berry in pro se.

12 THE COURT: Good morning.

13 MR. BERRY: Good morning.

14 THE COURT: Please be seated. I have reviewed the
15 parties' briefings and I don't have any particular questions.
16 However, it is my practice to give each party a brief
17 opportunity to clarify anything they think may not be fully set
18 forth in the briefs, with the understanding that I have read
19 the briefs carefully.

20 My initial reaction, just so you know, Mr. Berry, is
21 that the defendants -- the State's argument with regard to the
22 Rooker-Feldman doctrine is well taken, but I --

23 MR. BERRY: Which one? The --

24 THE COURT: The Rooker-Feldman doctrine. But I would
25 give you an opportunity to -- again, to say a few words to add

1 anything to what's in your briefs.

2 MS. OIE: Your Honor, I have nothing to add to what's
3 in the briefs.

4 THE COURT: So you'll submit on the brief?

5 MS. OIE: I'll submit on the brief.

6 THE COURT: Okay. Mr. Berry, is there anything you
7 would like to add to clarify?

8 MR. BERRY: Yes. Let me just review the Rooker
9 Feldman.

10 (Pause)

11 MR. BERRY: Okay. I would -- okay, just a moment.
12 Okay. In the -- I guess on page 4 of my response, the Gas
13 Associates v. Bill (phonetic), just that the question is do I
14 present some independent claim from the original trial
15 judgment, and what happened in state court is a judge had
16 threatened me if I pursued an appeal from his ruling, that he
17 was going to sanction me \$10,000. I found that to be
18 unconstitutional against the laws of the state and the
19 Constitution.

20 I went ahead and filed that appeal. It was not found
21 to be frivolous, or bad faith, or anything wrong with it, but
22 they said nonetheless, under the Family Code Section 271, it
23 was unnecessary litigation, and went through with that
24 sanction.

25 So the matter before the state court was just whether

1 or not that \$13,000 sanction should have been upheld, and they
2 did, and that was retrospectively. When I'm coming here now is
3 prospectively challenging the new rule of law that the state
4 created in -- on October 2004, holding that appeals can be
5 sanctioned -- good faith, nonfrivolous appeals can be
6 sanctioned in the State of California, and there is not a
7 single written decision, or authority holding such a thing.

8 And what's happening is the state is arbitrarily
9 holding a unpublished secret standard of justice against me.

10 So I guess back to the Rooker Feldman, the question
11 is, am I presenting an independent claim? Well, clearly, I am.
12 I'm challenging the constitutionality of a new rule of law
13 and --

14 THE COURT: I understand your position in that
15 regard.

16 MR. BERRY: Okay. The state did raise some red
17 herrings, one the MSAB in a red herring. There was no fee
18 shift provision in the MSA, and the MSA is not part of the new
19 rule of law that the state created.

20 I did want to present two new authorities, but if the
21 issue is only the Rooker Feldman, then these authorities
22 wouldn't apply. These had to do with res judicata, and with
23 the Younger.

24 THE COURT: If you have authorities, I will --

25 MR. BERRY: Okay. They're highlighted.

1 THE COURT: -- that you think may be relevant --

2 MR. BERRY: Okay.

3 THE COURT: -- I will take those.

4 MR. BERRY: I have two authorities highlighted in my
5 notes I brought today. They have to do with the Younger and
6 the res judicata.

7 THE COURT: And they are cited in your briefs?

8 MR. BERRY: They are not. Right. So you just have
9 to --

10 THE COURT: Okay. Why don't you just read
11 the -- they are cases?

12 MR. BERRY: Okay.

13 THE COURT: Why don't you read the case name with the
14 citation so that the Attorney General has that information, and
15 then if you'd like to provide copies to --

16 MR. BERRY: I will do that, okay.

17 THE COURT: -- Mr. Buzo.

18 MR. BERRY: And as far as the res judicata, there's,
19 of course, the question of jurisdiction, and no court has the
20 jurisdiction to make unconstitutional laws, and the fraud,
21 which I cited something.

22 But in 1935, the California Supreme Court held in In
23 Re: De Carlo Estate, 3 Cal. 2d, 225, that res judicata is not
24 to be applied so rigidly as to defeat the ends of justice. And
25 that's 1935, I can't attest that that's good case law anymore.

1 I did not find anything overruling that.

2 And then on the Younger, I have Wooley v. Maynard
3 (phonetic), 430 U.S. 705, 1977, where a person was charged with
4 a state statute, and served 15 days in jail, and then he
5 brought the case to the Federal District Court. This was under
6 USC 1983, seeking the same as I am, injunctive and declaratory
7 relief, and the U.S. Supreme Court said that "This suit is in
8 no way designed to annul the result of the state's trial..."
9 just as at issue here, "...since the relief sought is wholly
10 perspective, and is to preclude only further prosecution under
11 the statute that violates the constitutional rights."

12 THE COURT: Do you have a copy of the case there?

13 MR. BERRY: I do have. I have section --

14 THE COURT: So if you provide that, I'll -- I promise
15 you, I'll read it all.

16 MR. BERRY: Okay. And the Supreme Court clearly
17 upheld that because it was prospective, because it was a new
18 issue challenging the statute, there was no expectation that he
19 could have, or should have challenged the constitutionality
20 during the state criminal trial, and therefore he couldn't
21 bring that to the federal complaint.

22 If you are looking at the Rooker Feldman, I would
23 hope you would look real carefully at my page 4 of my argument
24 before you ruled in that matter.

25 THE COURT: I will.

1 MR. BERRY: Okay.

2 THE COURT: So if you'll provide that information to
3 Mr. Buzo.

4 Ms. Oie, do you care to respond to the citations just
5 provided?

6 MS. OIE: No, Your Honor. I'm not familiar with
7 them, but I don't think that they stand for anything that would
8 effect this case as stated by Mr. Berry at this point.

9 THE COURT: Okay. I will take this under submission.
10 I'll look at what you provided today, and I'll issue a
11 recommendation shortly.

12 MS. OIE: Thank you, Your Honor.

13 MR. BERRY: Thank you.

14 THE COURT: Thank you.

15 (Whereupon the hearing in the above-entitled matter was
16 adjourned at 10:24 a.m.)

17 --o0o--

18 CERTIFICATE

19 I certify that the foregoing is a correct transcript from
20 the electronic sound recording of the proceedings in the above-
21 entitled matter.

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23

Patricia A. Petrilla

August 30, 2005

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Patricia A. Petrilla, Transcriber

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