

1 KIM A. BERRY – PRO SE
2 6465 Aspen Gardens Way
3 Citrus Heights, CA 95621
4 Phone: 916 213-0492

DRAFT JAN 30, 2005

5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

8 KIM ANDREW BERRY;

CIV S-04-2580 LKK-KJM-PS

9 Plaintiff,

10 vs.

**MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

11 THE STATE OF CALIFORNIA,
12 CALIFORNIA STATE ATTORNEY
13 GENERAL BILL LOCKYER,
14 CALIFORNIA STATE JUDICIARY,
and
DOES 1-5;

Date: February 23, 2005
Time: 10:00 am
Courtroom: 26
Judge: HON. KIMBERLY J.
MUELLER

15 Defendants

16
17 Plaintiff Kim Andrew Berry alleges the following:

18 **INTRODUCTION**

19 **A. This action is a proper original proceeding**

20 The State opens by fundamentally misrepresenting this instant action as an attempt
21 to "revers[e] a decision of the Court of Appeal for the Third Appellate District." On the
22 contrary, the State created a new Rule of Law (Complaint ¶ 28) on October 13, 2004
23 regarding sanctions against nonfrivolous appeals. When the State creates a new law,
24 either via legislation or first impression holding, this Court has original jurisdiction to
25

1 hear a Constitutional challenge by anyone with standing, provided those challenges are
2 not a collateral attack on pending or final State judgments.

3 The instant relief sought would merely enjoin the State from violating the Petition
4 Clause of the U.S. Constitution, under color of Family Code section 271, *in the future*.

5
6 **B. Plaintiff objects to Defendant’s opinions establishing the factual background in**
7 **this original proceeding**

8 Plaintiff accepts the entry of the State's opinions (“Berry I” and “Berry II”) for the
9 limited purposes of determining res judicata and establishing the State's new rule of law.

10 However, plaintiff objects to defendants' own opinions establishing the "factual
11 background" in this proceeding, because some are false and defendants biased those facts
12 in their own favor.¹ For example "Berry 1" Preface: "Husband recites his version of the
13 facts, but fails to paint the evidence in the light most favorable to the trial court’s orders.
14 Therefore, any evidentiary contentions Husband meant to make have been waived."

15 The State paints the civil action as a "flagrant attempt to undermine the MSA,"
16 ("Berry 1") ignoring that the primary defendant in the "abuse of process" complaint was
17 the law firm that committed perjury in an ex parte residence exclusion order, alleging that
18 plaintiff posted an "immediate threat to other occupants" of his residence when they knew
19 that he was and had been the only occupant. Plaintiff only brought a separate civil action
20 because family law provided no remedy against law firm. The civil complaint clearly
21 assigned primarily culpability to law firm.

22 Plaintiff suffered the harm of being ordered from his home of 10 years without
23 notice, and ordered to leave his possessions behind "until the hearing." In February 2000

24
25 ¹ For the purposes of a motion to dismiss, the court must construe the pleading in the light
most favorable to plaintiff, and resolve all doubts in plaintiff’s favor. See Jenkins v.
McKeithen, 395 U.S. 411, 421 (1969).

1 he lived from a stack of clothing in his trunk, slept under his desk at work, and bathed in
2 the public restroom. At the subsequent hearing he was informed that "his possessions"
3 were community property, and as such they would only be returned as his vindictive wife
4 saw fit, and he would be imprisoned without trial if he attempted to retrieve them. Wife
5 used her sole possession of the residence to shred financial records, including those that
6 would have established plaintiff's separate property claims.² To date the only punishment
7 the State has taken against the perjurous law firm is in ordering plaintiff to pay them
8 \$20,000 for daring to seek justice.

9 The State omits these details from their version of the facts, and never explains
10 why they condone the epidemic of perjury in family court ex parte restraining orders.

11 Plaintiff reasonably believed that, if the MSA barred wife from being a defendant,
12 the civil court would grant one leave to amend to drop wife and proceed against law firm.
13 Plaintiff had argued that the MSA was not a bar since the tort committed by law firm was
14 beyond the limited scope of a family law remedy, and the MSA did not extend to the law
15 firm. Yet family court awarded both wife and non-party law firm their fees, violating
16 plaintiff's absolute litigation privilege to having fee entitlements resolved within the
17 pendency of the civil action.

18 The State raised for the first time in "Berry II" that appellate sanctions may be
19 awarded under California Rules of Court, rule 870.2(c) (Memo 6:6), then denied
20 rehearing on their novel reading of a Rule pertaining to "statutory and contractual fees" -
21 even though rehearing was mandatory under state law.

22 The State's facts in the opinions are impermissibly biased in their favor, and
23 moreover are irrelevant to the subsequent arguments in this Motion to Dismiss.

24
25 ² These facts are alleged in the civil complaint, and were presumed true by the civil court
upon termination by sustained demurrer. Plaintiff contends that all versions of the cited
facts are irrelevant – at least for this motion.

1 **ARGUMENT**

2 **1.**

3 **THIS COURT HAS SUBJECT MATTER JURISDICTION**

4 **A. This action is not barred by the *Rooker-Feldman* Doctrine**

5 The State misrepresents the instant action as a request that this Court "reverse the
6 prior state court decisions addressing the same issues." This is false. No reversal is sought
7 - there is no collateral attack.

8 The Ninth Circuit recently clarified that "only when there is already a forbidden de
9 facto appeal in federal court does the 'inextricably intertwined' test come into play." Noel
10 v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003). Because plaintiff does not seek to set aside
11 the State's decision in "Berry II", the Ninth Circuit's holding in Noel is dispositive:
12 *Rooker-Feldman* does not bar plaintiff's federal court claims.

13 Noel's reasoning was based in part on the formulation of *Rooker-Feldman* that has
14 evolved in the Seventh Circuit over the past decade. GASH Assocs. v. Vill. Of
15 Rosemont, 995 F.2d 726 (CA7 1993), explained:

16 The *Rooker-Feldman* doctrine . . . rests on the principle that district
17 courts have only original jurisdiction. . . . The *Rooker-Feldman*
18 doctrine asks: is the federal plaintiff seeking to set aside a state
19 judgment, *or does he present some independent claim, albeit one*
20 *that denies a legal conclusion that a state court has reached in a*
21 *case to which he was a party?* If the former, then the district court
lacks jurisdiction; if the latter, then there is jurisdiction and state
law determines whether the defendant prevails under principles of
preclusion. *Id.*, at 728.

22 Contrary to the State's claim, this Court need not examine Family Code section
23 271 "as applied by the state court to the particular factual circumstances of the ["Berry
24 II"] case." (Memo 8:9) The "particular facts" are red herrings. This Court only need
25 consider whether Section 271 - as promulgated by the new Rule of Law (Complaint ¶ 28)

1 to empower judges to sanction good faith, nonfrivolous appeals from their own rulings –
2 violates the Petition Clause of the First Amendment.

3 The instant action is distinguished from Doe & Assocs. Law Offices v.
4 Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001) because at bar plaintiff is not seeking to
5 disturb any final or pending state orders.

6 Because plaintiff is NOT seeking to overturn any state court decisions, the
7 *Rooker-Feldman* doctrine does not deprive this Court of jurisdiction, and the State’s
8 argument must fail.

9
10 **B. This case does not fall within the Younger Abstention**

11 Younger abstention is inappropriate when a federal plaintiff cannot pursue its
12 federal contentions in the ongoing state proceeding. See Middlesex County Ethics
13 Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 435-37 (1982). Contrary to the State's
14 claims, there is no attempt to set aside their judgment, and no challenge to the state's
15 jurisdiction over the MSA. (Memo 10:8)

16 Younger Abstention requires that the federal plaintiff “have a full and fair
17 opportunity to litigate his constitutional claim” in the course of the state proceedings.
18 Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc. 477 U.S. 619, 627(1986).

19 But plaintiff was precluded from fully arguing whether Section 271 violated the
20 Petition Clause until the State determined the scope of 271 – which it did in first
21 impression "Berry II". Among the preclusions was that, at that time, no authority had
22 carved an exception to Flaherty, so arguing the conflict of higher state precedent was the
23 stronger argument. Dickerson v. United States, 530 U.S. 428, 443 (2000) ("The doctrine
24 [of *stare decisis*] carries such persuasive force that [the Court has] always required a
25 departure from precedent to be supported by some special justification.")

1 The State demeans plaintiff by reducing the instant Constitutional question to a
2 "domestic relations" matter. In view that Justice Holmes qualified Ohio ex re. Popovici v.
3 Alger, 280 U.S. 379 (1930) by closing with, "*In the absence of any prohibition in the*
4 *Constitution* or laws of the United States it is for the State to decide how far it will go,"
5 Holmes is in accord with plaintiff's position. (emphasis added).

6 To the extent that the State of California established new law in "Berry II", the
7 instant case is an *original jurisdiction challenge to that new law*, and this Court has
8 jurisdiction to rule upon its constitutionality prospectively.

9
10 **2.**

11 **THE COMPLAINT STATES FACTS UPON WHICH RELIEF**
12 **CAN BE GRANTED**

13 **A. This instant action is not barred by Res Judicata**

14 *Res Judicata* is only a bar when "the issue decided in the prior adjudication [is]
15 *identical* with the one presented in the [instant] action." Levy v. Cohen (1977) 19 Cal.3d
16 165, 171. At bar the issues are vastly different:

- 17
- The prior adjudication was whether a judge's sanction against an appeal
18 violated the rules and precedent that prevailed during that pendency.
 - In contrast, the instant action challenges the State's new rule of law
19 (Complaint ¶ 28) prospectively.
- 20

21 The prior adjudication, first impression issue of "Berry II" was:

22 Whether In re Marriage of Flaherty (1982) 31 Cal.3d 637,
23 California Rules of Court Rule 27(e), and Code of Civil Procedure
24 907 preclude appellate fee sanctions against nonfrivolous appeals
25 under the lower standard of the Family Code Section 271 statute.

1 Plaintiff could not have challenged the constitutionality of the State's new law that
2 permits sanctions against good faith, nonfrivolous appeals, because the State first
3 established that new Rule of Law on October 13, 2004 - long after plaintiff had submitted
4 his arguments. Prior to that date, the State's prevailing rule of law required a finding of
5 *frivolous* or *bad faith*, consistent with Rule 27(e) and Flaherty.

6 For example, In re Marriage of Schulze (1997) 60 Cal.App.4th 519, 533 upholds
7 that, while family court may award section 2030 fees against an appeal, it cannot order
8 Section 271 sanctions against nonfrivolous appeals:

9 Finally, it is clear that this is not a frivolous appeal, and there is no
10 basis on which to award Andrea her attorney fees on appeal as a
11 matter of appellate law. (E.g., Code Civ. Proc., § 907.) Andrea still,
12 however, may have a claim for her appellate fees, or some portion of
13 them, as a matter of family law in light of the disparity of incomes
14 between the two parties. (E.g., § 2030, subd. (a).) Schulze (emphasis
15 added)

16 If the new Rule of Law had prevailed in April 2001 when Judge Mize threatened
17 to sanction plaintiff if he did not drop the appeal from his own ruling, plaintiff would
18 have had standing to bring this federal challenge – or a basis for dropping the appeal. But,
19 absent the new rule of law, the judge was merely abusing his discretion, which was not a
20 federal cause of action.

21 Plaintiff properly gave the State every opportunity to craft an interpretation of
22 Section 271 in a manner consistent with the Constitution. Federal jurisdiction is now ripe
23 under the 14th Amendment because the State “*established, altered, modified, or clarified*”
24 the rule for appellate sanctions in a manner that abridges the Petition Clause. Poe v.
25 Ullman, 367 U.S. 497, 526 (1961) (“[N]ormally this Court ought not to consider the
Constitutionality of a state statute in the absence of a controlling interpretation of its
meaning and effect by the state courts.”)

1 **B. The State lacks Eleventh Amendment immunity**

2 Whereas plaintiff alleges that the State's creation and enforcement of the new rule
3 of law violates the Petition Clause of the First Amendment, the State is abridging Section
4 One of the Fourteenth Amendment:

5 Section 1. . . . No State shall make or enforce any law which shall
6 abridge the privileges or immunities of citizens of the United
7 States; nor shall any State deprive any person of life, liberty, or
8 property, without due process of law; nor deny to any person
9 within its jurisdiction the equal protection of the laws.

10 Section Five of the Fourteenth Amendment precludes the State's Eleventh
11 Amendment Immunity in this instance, writing, "*The Congress shall have power to*
12 *enforce, by appropriate legislation, the provisions of this article.*" This enforcement may
13 be executive, legislative, or judicial, and does not impermissibly invade State
14 sovereignty. See Fitzpatrick v. Bitzer, 427 U.S. 445, 453-455 (1976) (Ninth Circuit
15 accord Mitchell v. Franchise Tax Board, 98-56475 (2000))

16 Plaintiff disputes that "all defendants are entitled to immunity under the Eleventh
17 Amendment," because comparable relief has been sought and granted in prior cases by
18 this same Court against the State, and the same defendant has a pattern of consent to the
19 jurisdiction of this Court to both make declarations on the propriety of state legislation
20 and to be enjoined from enforcing the same, for example:

21 In American Bankers Assoc., et al. v. Bill Lockyer, et al. (NO. CIV. S-02-1138
22 FCD JFM), this same Court directed same defendant Bill Lockyer:

23 Accordingly, plaintiffs' motion for summary judgment and for a
24 permanent injunction is GRANTED. A permanent injunction shall
25 issue prohibiting defendants from enforcing [California Civil Code
section 1748.13] against all federally chartered credit card issuers.
IT IS SO ORDERED. DATED: December __, 2002, FRANK C.
DAMRELL, Jr., UNITED STATES DISTRICT JUDGE

1 Denying jurisdiction now to PRO SE would be impermissibly arbitrary.

2 The State has waived its Eleventh Amendment immunity to this jurisdiction. This
3 pattern of waiver distinguishes the instant case from Alabama v. Pugh, 438 U.S. 781
4 (1978) in that Article I, 14, of the Alabama Constitution, provides that "the State of
5 Alabama shall never be made a defendant in any court of law or equity." Ibid at 782.

6 The landmark case of Ex parte Young, 209 U.S. 123 (1908), held that "*the*
7 *Eleventh Amendment does not prevent federal courts from granting prospective*
8 *injunctive relief to prevent a continuing violation of federal law.* Id., at 155-156, 159. We
9 have refused to extend the reasoning of Young, however, to claims for retrospective
10 relief." Green v. Mansour, 474 U.S. 64, 68 (1985). (emphasis added) At issue, and
11 contrary to the State's misrepresentation, only prospective relief is sought.

12 Because plaintiff is seeking only prospective relief on an issue within section Five
13 of the Fourteenth Amendment, Eleventh Amendment immunity does not apply.

14
15 **C. Plaintiff disputes defendant State Judiciary's Absolute Immunity, and seeks leave**
16 **to amend to cure any deficiency**

17 Plaintiff does not believe that he has a statutory remedy under section 1983 for the
18 relief sought (Memo 13:5). Nor does plaintiff believe the State's contention at Memo 13:2
19 that "it is clear that [section 1983] is the only avenue available to [plaintiff] for alleging a
20 claim against the State Judiciary."

21 In the case Gerling Global Reinsurance Corp. of America, et al., v. Harry Low, in
22 his capacity as the Insurance Commissioner of the State Of California [CIV. S-00-0506
23 WBS JFM], it appears that this Court enjoined a similar state agency absent a section
24 1983 remedy:

1 Plaintiffs have also argued that [Cal. Ins. Code § 13801(e)] is
2 unconstitutional for various other reasons, including that it is
3 unconstitutionally vague....IT IS THEREFORE ORDERED that
4 plaintiffs' motions for summary judgment upon the ground that
5 HVIRA violates due process be, and the same hereby are,
6 GRANTED. Defendant is hereby permanently enjoined from
7 suspending the licenses of the plaintiffs to do business in California
8 based on their failure to comply with the Holocaust Victim
9 Insurance Relief Act and its accompanying regulations. October 1,
10 2001, WILLIAM B. SHUBB, UNITED STATES DISTRICT
11 JUDGE

8 The State fails to distinguish between an injunction against the Insurance
9 Commissioner and the State Judiciary from enforcing an unconstitutional statute.

11 CONCLUSION

12 a) The State misses the boat

13 The State closes with footnote 10, suggesting that the imposition of sanctions
14 following remand could not even “arguably chill the antecedent filing of appeal.” Their
15 footnote belies their own Supreme Court holding:

16 Vague definitions of what constitutes a frivolous appeal raise the
17 danger that attorneys will be deterred from asserting valid claims
18 out of a *fear that they will incur court sanctions*. This in turn will
19 deprive their clients of their day in court. In re Marriage of Flaherty
(1982) 31 Cal.3d 637, 651. (emphasis added)

20 And is refuted at the Federal Level:

21 [A]n appellate court must be mindful of the possibility that
22 awarding damages and costs could have an *undue chilling effect on*
23 *the behavior of later litigants*. . . . sanctions should not be imposed
24 so freely as to make parties with legitimately appealable issues
25 hesitant to come before an appellate court. Finch v. Hughes
Aircraft Co., 926 F.2d, 1574, 1578, (Fed. Cir. 1991). (emphasis
added)

1 In the instant case the threat chills plaintiff from ever appealing from a family
2 court order again - regardless of how outrageous the order - denying him his
3 constitutional right to access the court. Under the State's new Rule of Law, a judge may
4 sanction any appeal on the grounds that the appeal frustrated a matter he had settled. The
5 threat may also be chilling visitors to www.familyinjustice.com who are having problems
6 with family court.

7
8 **b) Defendant Attorney General has a Constitutional duty to the People of California**
9 **to have this case decided on the merits**

10 If the State is correct and there is nothing unconstitutional about their new rule of
11 law in "Berry II", then they will prevail on the merits. However, as a new rule of law
12 contrary to every State and Federal policy on sanctions against appeals, the new rule of
13 law may be unconstitutional. If so, then the Attorney General has a duty to the People of
14 California "*to see that the laws of the state are uniformly and adequately enforced.*"
15 (California Constitution, Article V, Section 13). This includes enforcing the
16 Constitutional law of the State's *Petition Clause* at Article I, Section 3(a).

17 Plaintiff has sufficiently explained why this Court has jurisdiction to move
18 forward, and why justice demands it.

19 WHEREFORE plaintiff prays that this Court dismiss the State's Motion to Dismiss
20 and weigh this First Amendment issue on the merits.

21 January 30, 2005

22 Respectfully submitted,

23 _____
24 Kim Berry - PRO SE
25 6465 Aspen Gardens Way
Citrus Heights, CA 95621
916 213-0492

1 KIM ANDREW BERRY
6465 Aspen Gardens Way
2 Citrus Heights, CA 95621
Tel: (916) 213-0492
3 in Pro Per

4 CASE NAME: Berry v State of California
NO: CIV S-04-2580 LKK-KJM-PS
5

6 **DECLARATION OF SERVICE BY MAIL**

7 I am a citizen of the United States and a resident of Sacramento County, California. I am
8 over the age of eighteen (18) and not a party to the within above-entitled action. My
home address is 2705 17th Avenue, Sacramento California.

9 On this date, January 31, 2005, I served the parties named below with true copies of:
10

11 **MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

12 By placing the document in the United States mail, addressed to:

13

BILL LOCKYER, 14 Attorney General of the State of California 1300 I Street 15 Sacramento, CA, 94244-2550

16 I declare under penalty of perjury under the laws of the State of California that
17 the foregoing is true and correct.

18 Executed this 31st day of January 2005, at Sacramento, California.
19
20

21 _____
JOY AULT
22
23
24
25