

**Docket No. 05-16637**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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KIM BERRY,  
*Plaintiff/Appellant, pro se*

v.

THE STATE OF CALIFORNIA, et al,  
*Defendants/Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA,  
NO. CV S-04-2580 LKK KJM PS

**DISMISSAL FOR LACK OF JURISDICTION**

FINDINGS AND RECOMMENDATIONS BY HONORABLE KIMBERLY MUELLER  
ADOPTED IN FULL BY HONORABLE LAWRENCE K. KARLTON

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**PETITION FOR PANEL REHEARING**

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## SUMMARY OF ARGUMENT

Ninth District Panel,

Wrongfully denying jurisdiction to hear a Constitutional challenge of a State statute on the merits is a gross injustice.

Your *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004), where Wolfe brought a prospective challenge to future enforcement of a State statute against him, is strikingly similar to the instant case. This Court held that *Rooker-Feldman* did not bar his prospective challenge. Similarly, I also am only seeking to block future enforcement of a State statute. *Wolfe* was cited at: ***AOB 4, 6, 7, 10; AB passim; RB 1, 8, 12, 13*** – but the disposition is silent on how this instant case is distinguished from *Wolfe*:

[4] The district court read Wolfe’s complaint as a challenge to prior state court decisions and concluded that Wolfe’s suit was barred by Rooker-Feldman. However, since there was no vexatious litigant order entered against Wolfe at the time he filed in district court, there was no state court judgment from which he could have been seeking relief.

[5] Instead of seeking relief from prior state court judgments, Wolfe seeks declaratory and injunctive relief against the threatened future enforcement of the Vexatious Litigant Statute. He argues that the statute violates the First Amendment...

[6] We construe Wolfe’s references to the prior judicial actions enumerated above in this light. That is, we construe these references as showing that Wolfe has, in the past, acted in such a way as to subject himself to the operation of the Vexatious Litigant Statute. . . We do not construe these references as de facto appeals from the decisions in those prior actions. We therefore hold that the district court erred in dismissing Wolfe’s suit for lack of subject matter jurisdiction under Rooker-Feldman.

The prior State action was an appeal from a \$13,000 sanction for having brought good faith, nonfrivolous appeal, under *Family Code section 271*<sup>1</sup> standard, under which *ANY appeal could be deemed a "frustration of a settled matter" and thus sanctionable conduct.*

Prevailing in this federal action cannot in any way “provide relief” by undoing that \$13,000 sanction. The decision does not cite a single authority for its position that a complaint seeking wholly prospective, injunctive release can EVER be a "de facto appeal” – when all Ninth Circuit stare decisis hold otherwise.

Accordingly, *Rooker-Feldman* does not deny this Federal Court’s jurisdiction to hear a wholly prospective claim for injunctive relief.

On the merits I will make the first impression federal argument that a State statute that makes the mere act of filing an appeal sanctionable conduct is unconstitutionally chilling.

*Wolfe* was permitted to bring a wholly prospective challenge to a State statute. Accordingly, I should either be treated the same, or the disposition should distinguish *Wolfe* from this instant action.

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<sup>1</sup> California Family Code section 271(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction.

## BASIS FOR REHEARING

### A. THIS DISMISSAL MIS-APPLIED ROOKER-FELDMAN AND IS INCONSISTENT WITH THIS COURT'S PUBLISHED OPINIONS ON THAT DOCTRINE

#### 1) The Decision misquotes *Noel v. Hall*, replacing a comma with a period, and removing the pivotal passage: "No relief is sought from State judgment"

The decision misquotes *Noel v. Hall* as the basis for affirming dismissal, dropping the pivotal section, writing:

We reject Berry's contention that he brings an independent action seeking prospective relief because his complaint "asserts as a legal wrong an allegedly erroneous decision by a state court." [*Noel v. Hall* 341 F.3d 1148 (9th Cir. 2003) at 1164]

This Ninth Circuit Panel, EDWARD LEAVY, RONALD M. GOULD, and RICHARD R. CLIFTON, replaced a comma with a period and dropped off the pivotal passage of the citation. Here is the full citation, with the omitted section emphasized:

"If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, ***and seeks relief from a state court judgment based on that decision***, Rooker-Feldman bars subject matter jurisdiction in federal district court." [*Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) at 1164]

Berry's complaint for prospective, injunctive relief has no affect on any prior state court judgment. Accordingly, the federal district court has jurisdiction over independent claims, even "one that denies a legal conclusion that a state court has reached in a case to which he was a party." *Noel* *ibid* at 1163.

**2) As a wholly prospective action for injunctive relief, this complaint does not and cannot seek relief from a state court judgment**

Berry established that his complaint is wholly prospective [ARB 5, AOB 5, Fact C-2; AOB 8], and does not seek to “reject” or “overturn” the prior state judgment which ordered him to pay \$13,000 in sanctions for filing a good-faith, nonfrivolous appeal. [AOB 5 Facts C-3 and C-5; AOB 9]

The U.S. Supreme Court holds that prospective relief does not “overturn,” “annul,” or otherwise upset prior state judgments – and the Decision is silent on this conflict with this precedent:

Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. *Wooley v. Maynard*, 430 U.S. 705, 711 (1977)

Furthermore, this Court has already resolved in *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004) that *Rooker-Feldman* does not bar prospective federal relief from future enforcement of a State statute that punishes a citizen for engaging in a constitutionally protected activity.

The case at bar is strikingly analogous to *Wolfe*, in which this Court reversed the *Rooker-Feldman* dismissal.

Just as at bar, *Wolfe* had previously been penalized under the state statute that he now challenged prospectively. This Court found that "since there was no vexatious litigant order entered against *Wolfe* at the time he filed in district court, *there was no state court judgment from which he could have been seeking relief.*" (emphasis added) *Wolfe* *ibid.*

### 3) The Decision misapplies the “review of state court judgment” standard of Noel v. Hall

The decision states:

The district court correctly concluded that it lacked jurisdiction to consider Berry’s action because the relief Berry sought would require review of the state court judgment against him. See [*Noel v. Hall*] at 1158.

But *Noel v. Hall*, citing *GASH Associates v. Village of Rosemont*, 995 F.2d 726,728-29 (7th Cir. 1993), holds that *Rooker-Feldman* does not deny this Federal Court’s jurisdiction to hear “*some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party*[.]”

The “independent claim” is this prospective, Constitutional challenge, against Defendant State of California rather than as an appeal from a specific sanction where the defendant was, by necessity, the ex-wife.

Since *Rooker-Feldman* permits the federal court to deny the legal conclusions of state court decisions against the same party, clearly it must have authority to “review” state court decisions.

*A careful read of Noel and Wolfe reveals that the prospective nature of the relief sought supersedes the other contrary limitations on jurisdiction of Rooker-Feldman, such as whether certain arguments had been raised, or could have been raised, in State court. A prospective challenge is de novo from the prior, closed, State cases.*

Furthermore, the decision does not explain why “review” of the judgment would be necessary to grant the relief sought. It was the State that added the prior state decisions to the record, likely to create this Red-Herring. In fact there is no dispute the State statute, *Family Code section 271*, permits trial judges to sanction nonfrivolous appeals if the judge deems the appeal from their own order was a frustration of a settled matter, and thus “unnecessary litigation.” The State cites this undisputed scope of the State statute in their brief:

“By its express language, section 271 authorizes sanctions in response to reprehensible conduct that does not rise to the level of bad faith required under ... [*In re Marriage of Flaherty* (1982) 31 Cal.3d 637].” (Emphasis added) [AB 8, quoting SER 0016]

Finally, the State has made Judicial Admissions at page 5 line 5 in “Defendants’ Memorandum of Points and Authorities in Reply to Plaintiff’s Opposition to Motion to Dismiss.” [ER 12:5]

Citing a State appellate holding as one piece of evidence of how the State promulgates a statute does not rise to a “de-facto appeal” of that case under *Noel v. Hall*.<sup>2</sup>

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<sup>2</sup> See also *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139-40 (9th Cir. 2000) (en banc) holding that the history of enforcement of a statute is relevant to standing and ripeness inquiry.

**4) The Decision errs in affirming that this case is “inextricably intertwined” within the meaning of Rooker-Feldman**

The decision holds:

Berry’s action was thus a de facto appeal of the state court proceedings, and the district court was required to “refuse to decide any issue raised in the suit that is ‘inextricably intertwined’ with an issue resolved by the state court.”

The decision overlooks that this Court holds at *Noel* 1158 that:

*“only when there is already a forbidden de facto appeal in federal court does the ‘inextricably intertwined’ test come into play.”*

Consistent with *Wolfe v. Strankman* *ibid*, since there were no State sanctions or pending cases involving Berry at the time he filed in district court, there was not even a state judgment from which he could have been seeking relief – “de facto appealing from.”

And since the federal relief sought is prospective only, this case cannot be a “de facto appeal.” Accordingly, under *Noel* 1158, this federal case cannot be deemed ‘inextricably intertwined’ under any standard.

## CONCLUSION

For the reasons stated above, Berry asks this Panel to Rehear and issue a reversal consistent with the published authorities of this Court.

Berry also asks the panel to give due consideration to the first impression issue that it summarily rejected as “having no merit”:

**Whether Local Rule 72-302(c)(21), which denies only pro se litigants a hearing before the district judge who signs the dismissal order, violates the Equal Protection Clause embedded in the Fifth Amendment.**

Respectfully submitted:

November 24, 2006

\_\_\_\_\_  
Kim Berry – PRO SE

## CERTIFICATE OF COMPLIANCE

I certify that: The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

November 24, 2006

Date

\_\_\_\_\_  
Signature of Pro Se litigant

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PRO SE

## NINTH CIRCUIT COURT OF APPEALS

### DECLARATION OF SERVICE BY MAIL

I am a resident of Sacramento County, California. I am over the age of eighteen (18) and not a party to the above-entitled action. My home address is 6465 Aspen Gardens Way, Citrus Heights, California.

On this date, November 24, 2006, I served the parties named below with true copies of:

### PETITION FOR PANEL REHEARING

By placing the documents in the United States mail, addressed to:

Susan Roche Oie Office of the Attorney General P.O. Box 944255 Sacramento, CA, 94244-2550
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24<sup>th</sup> day of November 2006, at Sacramento, California.

SIGN \_\_\_\_\_

Marites Berry

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