

**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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**REPLY BRIEF OF APPELLANT**

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## ISSUE OF FIRST IMPRESSION

The only authority raised in the briefs that explicitly speaks to prospective general challenges to a state statute is *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004). However, as the State points out, [AB 17] *Wolfe* is silent regarding whether plaintiff Wolfe had challenged the constitutionality of the state statute within the prior state action.

While Berry argues that wholly prospective relief is never a “de-facto appeal” – regardless of whether related issues had been raised in prior state proceedings – no published opinion appears to be directly on point on whether the content of prior state proceedings is relevant to whether *Rooker-Feldman* bars jurisdiction, when federal relief sought is wholly prospective.

To assure consistency, Berry suggests that this case be brought to the attention of Judge William A. Fletcher, who is a recognized authority on *Rooker-Feldman*<sup>1</sup> and author of both the *Wolfe* and *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) opinions.

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<sup>1</sup> Judge Alex Kozinski. [Kozinski Strikes Back](#) - The Recorder - September 23, 2005 - [www.callaw.com](http://www.callaw.com)

## PRELIMINARY STATEMENT

Serious errors pervade Appellees' Response Brief (AB). For example:

- Berry objects that, consistent with the State's attempt to argue a different case, their brief opens by editing Berry's "Issue for Review" from a specific<sup>2</sup> to a general question:

**Did the district court err in dismissing this action for lack of subject matter jurisdiction pursuant to Rooker-Feldman principles? [AB 3]**

Unless there is something erroneous about the question Berry presented, this Court should hear Berry's question.

- After editing the issue under appeal, the State evades the pivotal issue – that being the wholly prospective nature of the relief sought. (The term "prospective" does not appear once in the AB.)
- It does not cite a single authority in support of their legal theory that, if the litigant had already raised the constitutionality during the state proceedings, *Rooker-Feldman*. deprives the district court of jurisdiction to hear a prospective challenge to the state statute.
- It presents several pages of "facts" [AB 3-10] that have no relevance to the issue under appeal, for example:

"Berry also failed to advise either the district court or this court of the fact that the California Court of Appeal agreed with his claim that the 'second sanction order would tend to chill his right to appeal.'" [AB 7]

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<sup>2</sup> Whether the district court erred in denying jurisdiction under *Rooker-Feldman* when relief sought was solely injunctive and declaratory relief, prospectively challenging the constitutionality of a state statute, and was not affecting the prior \$13,000 state court sanction judgment. [AOB 1]

Notwithstanding that the state appellate court ultimately held that sanctions against nonfrivolous appeals are supported by the express language of the statute at issue [AB 8], such minute details are not remotely relevant to the instant question – whether the district court has subject matter jurisdiction within *Rooker-Feldman*.

- In arguing that the instant prospective challenge is “*inextricably intertwined*” with a state court decision, [AB 14-15] it ignores this own Court’s holding that “only when there is already a forbidden de facto appeal in federal court does the ‘inextricably intertwined’ test come into play.” *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). The State does not explain how a prospective relief can ever be construed as “forbidden de facto appeal,” and thus must fail in its claim of “inextricably intertwined.”
- It presents an invalid either/or proposition at [AB 15], arguing that, since section 271 is not unconstitutional in all its applications, “a federal court would be required to scrutinize the application of the statute to Berry in order to determine the constitutional issue.” This ignores that Berry seeks a general review as the statute as promulgated [ER 11:4 line 25; ER 16:5 line 6] to sanction nonfrivolous appeals, independent of the facts of any specific case.
- Finally, it misuses the Conclusion section to make off record misrepresentations of the prior state proceedings. [AB 18]

## STANDARD OF APPELLATE REVIEW

### **A. The State does not identify which allegations in Berry's complaint it asserts are untruthful, and thus fails to establish a factual attack on jurisdiction**

The State asserts that their “challenge to the court’s jurisdiction herein is factual, not facial.” [AB 12]

“[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004). [AB 12]

The fundamental premise of a factual attack is a dispute over a factual allegation in the complaint. Berry’s complaint [ER 1] contains properly numbered paragraphs 1 through 66. But neither the State’s district court pleadings [ER] nor their Appellee’s Brief [AB] allege that a single paragraph of Berry’s complaint contains an untruthful allegation.

Accordingly, Berry realleges his subject matter jurisdiction statement, [AOB 7] and this Court should presume the truthfulness of his allegations and draw all reasonable inferences in his favor [AB 12]

## ARGUMENT

### A. THE DISTRICT COURT ERRED IN DENYING JURISDICTION UNDER THE ROOKER-FELDMAN DOCTRINE

#### 1) Appellee's Brief avoids the fact that Berry seeks wholly prospective relief

The pivotal issue on appeal is that Berry seeks only prospective relief from future sanctions against future nonfrivolous appeals from future state trial court orders or judgments. [AOB 9]

Rather than respond on point,<sup>3</sup> the State unleashes an eight page “Statement of the Facts” [AB 3-10] that, contrary to their characterization as “salient,” [AB 3 fn 2] are inapposite to the future section 271 sanctions at issue – much less to the limited instant question of jurisdiction.

Accordingly, this Court should reject the State's “Statement of the Facts” as Red Herrings used to bolster their subsequent Straw Man arguments, and to improperly argue on the merits.

The State concludes by fundamentally misrepresenting Berry's federal action as an invitation for “the federal courts to review and reject state court final judgments...” [AB 18].

Berry has established that his complaint is wholly prospective [AOB 5, Fact C-2; AOB 8], and does not seek to “reject” or “overturn” a prior state judgment [AOB 5 Facts C-3 and C-5; AOB 9]

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<sup>3</sup> Unless I missed it, Appellee's Brief contains ZERO occurrences of the term “prospective.”

**2) This Federal Court has subject matter jurisdiction to hear wholly prospective challenges to state statutes**

The State writes, “[Berry] apparently believes the fact that he is seeking only to enjoin future application of Section 271 to him somehow makes the *Rooker-Feldman*. holding inapplicable.” [AB 13]

***(Change “him” to “all future state appellants” and that is exactly what I “believe,” and this “belief” has substantial precedential backing.)***

The “magistrate judge’s findings and recommendations for dismissal” cited applicable law [ER 14:2, cited at AB 18], but then misapplied it to Berry’s prospective general challenge to the state statute:

[A] State court’s application of its rules and procedures is unreviewable by a federal district court. The federal district court only had jurisdiction to hear general challenges to state rules or claims that are based on the investigation of a new case arising from new facts. *Samuel v. Michaud*, 980 F. Supp. 1381, 1412-1413 (D. Idaho 1996), *aff’d* 129 F.3d 127 (9th Cir. 1997) [ER 14:2] (emphasis added)

As a general prospective<sup>4</sup> challenge, Berry’s complaint is a “claim based on new appeals arising from new facts,” consistent with *Samuel, ibid.* *Rooker-Feldman* is not invoked, because Berry’s complaint does not “violate the basic precept that federal district courts are courts of limited jurisdiction.” [AB 14] Since a prospective challenge cannot upset prior state judgments, that “precept” is not violated.

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<sup>4</sup> The U.S. Supreme Court defines “prospective relief” as relief sought “i.e., to preclude further prosecution under a statute alleged to violate constitutional rights.” *Wooley v. Maynard*, 430 U.S. 705 at 705 (1977)

**3) The State misrepresents that Berry’s complaint attempts to “overturn the state appellate court decision.”**

The U.S. Supreme Court is clear that prospective relief does not “overturn,” “annul,” or otherwise upset prior state judgments:

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)<sup>5</sup>

At [AB 11] the State cites [ER 1:12 63:64] as authority for their claim that Berry’s complaint “*seeks equitable relief from the federal courts to overturn the state appellate court decision.*” But these paragraphs<sup>6</sup> are prayers for prospective relief that would not and could not “overturn” any prior state decision:

[ER 1:12 Complaint]

**PRAYER**

63. For a declaration that - either on its face or as applied - it is unconstitutional to sanction appeals under California Family Code Section 271;

64. For an order enjoining the California State Judiciary from sanctioning appeals under Family code Section 271;

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<sup>5</sup> Berry quoted this precise, on point, *Wooley* passage at oral argument [ER TR:5 line 7], but the Magistrate’s “Findings” ignored it [ER 14].

<sup>6</sup> Berry already addressed these paragraphs at [AOB 5, C-2, bullet 3].

#### **4) The State fails to materially distinguish the instant case from Wolfe**

The only distinguishing factor that the State raises between *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004) and the instant case is that, in the instant case, Berry had previously challenged the constitutionality of the state statute in a prior, non-pending, state proceeding:

[Berry] ignores the fact that, unlike the situation in *Wolfe*, the constitutional issue in his own case was raised in the state court litigation and it is that adverse decision from which he is necessarily seeking relief. [AB 17]

Under the State's *Rooker-Feldman*. theory, if Wolfe had ever challenged the constitutionality of the vexatious litigant statute in a state court, that challenge would have forever deprived this federal court of jurisdiction to hear a prospective challenge by Wolfe.

Presumably Plaintiff Wolfe had every reasonable opportunity to challenge the constitutionality within the prior state court proceedings. But this Court's silence on that opportunity – and absence of dicta on whether such a challenge had been raised – suggests that this Court deemed the matter of prior state court challenges irrelevant to that instant question of federal jurisdiction to hear Wolfe's prospective challenge.

In a desperate attempt to find further distinction, the State writes:

[B]ecause [Wolfe] was not considered a vexatious litigant at the time he filed the federal action, there was no danger that the assumption of jurisdiction by the federal district court could interfere with the jurisdiction of the state courts. [AB 17]

But congruently, Berry was not considered a “*nonfrivolous appellant*” when he filed the federal action. Accordingly, there is no interference.

**5) Resolution on the merits does not require this federal court to review the statute “as applied” to Berry in the prior instances**

The State misrepresents that “a federal court would be required to scrutinize the application of the statute to Berry in order to determine the constitutional issue.” [AB 15] This is simply false.

The State quotes the appellate court’s holding:

“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]

The dictum proceeds to explain that trial judges may sanction nonfrivolous appeals under the lower standard of section 271.

Thus, unless the *State* aims to “overturn” their appellate court’s interpretation, there is no factual dispute as to whether the express language of the statute authorizes state trial judges to sanction or threaten to sanction nonfrivolous appeals from their own rulings.

Accordingly, no specific set of facts is required to determine whether that lower standard for appellate sanctions violates the petition clause. The State has not cited a single authority – dicta or otherwise – that contradicts the appellate court’s general, facial, interpretation of the statute.

## **6) Prospective relief is not “inextricably intertwined” within the meaning of Rooker-Feldman**

Under the State’s “inextricably intertwined” theory [AB 14], once a statute is deemed constitutional by a state appeals court, federal jurisdiction would be barred because the district court would need to “hold that the state appellate court was wrong in order to find in favor of the plaintiff.”<sup>7</sup>

But this Court has already resolved in *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003), that *Rooker-Feldman* permits district courts to hold that state appellate decisions were incorrect in, as Berry explained [AOB 9]:

The 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.

Furthermore at *Noel* 1158 this Court specifically held that:

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

A prospective challenge is an “independent claim” from a prior state case, and thus not a “de facto appeal.” Accordingly a prior state appellate holding is not “inextricably intertwined” with a prospective district court action for the purposes of *Rooker-Feldman*.

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<sup>7</sup> The State commits a similar misstatement at [AB 16]: “*Again, the federal courts can provide relief to Berry on this issue only by reversing the state court decisions upholding Section 271 and its application against Berry. This is precisely what Rooker-Feldman forbids.*” But not only is Berry not seeking “reversal” of prior decisions -- since those cases are closed, “reversal” is not even an option. The outcome favorable to Berry would be merely “denial of a legal conclusion,” which this Court explicitly authorizes. *Noel* *ibid* at 1163. [AB 15]

**7) Berry's complaint is not a forbidden de-facto appeal because he is not alleging as a legal wrong an erroneous decision from the state court**

The State falsely alleges that "the constitutional issue in [Berry's] case was raised in the state court litigation and it is from that adverse decision from which he is necessarily seeking relief in federal court." [AB 17]

On the contrary, Berry agrees with the State decision's conclusion that the express language of the section 271 authorities trial courts to sanction nonfrivolous appeals. That is why he finds the statute so objectionable.

The two prongs of Berry's state appeal are in that opinion:

Husband contends the trial court erred in ordering him to pay Wife's attorney fees and costs on remand because: (1) there was no finding that the appeal was frivolous as required by *In re Marriage of Flaherty* (1982) 31 Cal.3d 637; and (2) the trial court failed to comply with the requirements of California Rules of Court, rule 27(e) in awarding sanctions on appeal. [SER 0015]

These are not constitutional questions and the opinion [SER 0013-0017] is devoid of constitutional analysis of the statute. The state appellate court merely ruled that the express language of the state statute authorized the \$13,000 sanction for bringing a nonfrivolous appeal, in spite of the authorities Berry raised in his two-prong question.

Since Berry is not "alleging as a legal wrong an erroneous decision from the state court" pursuant to *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003), there is no "forbidden de-facto appeal" and is therefore not "inextricably intertwined" with prior state proceedings.

Accordingly, even if Berry were seeking retrospective relief, *Rooker-Feldman* would not bar jurisdiction.

**8) Bianchi v. Rylaarsdam is inapposite to the instant case because it does not pertain to prospective relief**

Unlike the case a bar, *Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003) [AB 11, 15] did not pertain to prospectively relief, but rather sought to invalidate a prior state court decision. That would denote a “de-facto appeal,” plainly inapposite to Berry’s instant prospective general challenge to a statute.

Furthermore, the State’s citation of *Bianchi* supports Berry’s position:

If, in order to resolve the claim, “the district court would have to go beyond mere review of the state rule as promulgated<sup>8</sup>, to an examination of the rule as applied by the state court to the particular factual circumstances of [the plaintiff’s] case,” then the court lacks jurisdiction. [citations] [AB 15]

As explained in prior sections, it would be absurd to bring a prospective challenge specific to the “particular factual circumstances” of one prior case. Consistent with *Wolf ibid*, Berry seeks a review of the statute as promulgated to sanction nonfrivolous appeals, in a manner that, if successful, would apply to and protect all future appellants in the state.

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<sup>8</sup> While pro se Berry had initially misplead “as applied” to mean “as promulgated” in his complaint, [ER 1:12 para 63] he corrected his error in his response to the motion to dismiss, writing: “This Court only need consider whether Section 271 - as promulgated by the new Rule of Law (Complaint ¶ 28).” [ER 11:4 line 25] Nonetheless the Magistrate Findings and Recommendations concluded that Berry “seeks a declaration that [section 271] is unconstitutional on its face and as applied to plaintiff.” [ER 14:1 line 21] (Unknown how “or” changed to “and”.) Berry again corrected the district court, explaining in his Objections to Findings and Recommendations [ER 16:5 line 6] that his response pleading had clarified that “‘as applied’ means ‘as promulgated by the new Rule of Law.’”

**9) The district court erred by ignoring all relevant Rooker-Feldman case law from this century**

“Since the *Noel* decision [in September 2003] the Ninth Circuit has reversed several district court decisions dismissing claims under the Rooker-Feldman doctrine in published decisions. See, e.g., *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004).” Quoting footnote 8 in *Manufactured Home Cmty. v. San Jose*, 03-16766 (9th Cir. 2005).

These are key cases that establish *Rooker-Feldman* within this Circuit.

But what is the point in publishing decisions if the district courts ignore them? The "*Magistrate Judge's Findings and Recommendations for Dismissal*" not only ignores all of the above opinions, it does not cite a single authority from this century – the most recent authority cited is eight years old. District court's authority dates in order of appearance [ER 14:2]:

**1983, 1923, 1996, 1997, 1995, 1987, 1987**

Berry OPENED his Opposition to the Motion to Dismiss by citing *Noel v. Hall* (2003), [ER 11, page 4, line 8] quoting the need to first find a "*forbidden de-facto appeal*." Then at oral argument Berry directed the court to that page 4 of his opposition: [ER TR:5 line 22]

MR. BERRY: ... If you are looking at the Rooker Feldman, I would hope you would look real carefully at my page 4 of my argument before you ruled in that manner.

THE COURT: I will.

Yet the district court's dismissal is silent on *Noel*.

## CONCLUSION

For the reasons stated above, Berry asks this Court to REVERSE the district court's dismissal for lack of jurisdiction and REMAND for consideration of the merits.

Respectfully submitted:

December 26, 2005

\_\_\_\_\_  
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.

December 26, 2005

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, December 27, 2005, I served the parties named below with true copies of:

#### REPLY BRIEF OF APPELLANT

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
--

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

Executed this 27<sup>th</sup> day of December 2005, at Sacramento, California.

SIGN \_\_\_\_\_

Marites Berry

\_\_\_\_\_