UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAVIN B. DAVIS,
Plaintiff-Appellant,

v.

TIMOTHY G. O'CONNOR,
Defendant-Appellee.

No. 19-55049

D.C. No.
3:18-cv-02824-LAB-LL
Southern District of California,
San Diego

(Filed January 23, 2019, Molly C. Dwyer, Clerk,
U.S. Court of Appeals)

ORDER

Before: THOMAS, Chief Judge, GOULD and PAEZ, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See 28 U.S.C. § 1291. Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED

No. 19-55049

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAVIN B. DAVIS,
Appellant and Petitioner,

vs.

TIMOTHY G. O'CONNOR,
Appellee and Respondent.

Appeal From the United States District Court for
the Southern District of California
Case No.: 3:18-cv-02824-LAB-LL
Hon. Larry A. Burns, District Judge

FRAP 40 REHEARING (MOTION (ECF 17) OF PLAINTIFF-APPELLANT'S INTERLOCUTORY APPEAL INCLUDING MOTIONS (ECF 7, 8, 9, 10, 16)

[ECF 19, January 24, 2019]

Table of Contents (Omitted)
Table of Points and Authorities (Omitted)

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the

governed; and in the next place, oblige it to control itself."

- James Madison, *Federalist Paper No. 47*

INTRODUCTION

1. Plaintiff-Appellant brings forth this FRAP 40 Motion for the Circuit Court 19-55049 Panel formed to re-hear (in actuality to hear) the Appeal, as follows:

(a) In the Circuit Court's Dispositive Order (ECF 17, January 23, 2019), it notes, "A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable See 28 U.S.C. § 1291. Consequently, this appeal is dismissed for lack of jurisdiction,"

(i) in an abuse of discretion, the Circuit Court has only reviewed the Record in making this disposition (ECF 17) of the Interlocutory Appeal;

(ii) the Circuit Court states that the Order challenged in the appeal is "not final or appealable See 28 U.S.C. § 1291," which is disputed. For example, the Plaintiff-Appellant has noted, "On January 17, 2019, the District Court (18-2824, Doc. 13, Attached) not reaching the merits, Denied Plaintiff-Appellant's Petition for Certification (18-2824, Doc. 11, previously attached (ECF 14-2))—a matter which Plaintiff-Appellant feels strongly each of:

(a) a priori, by right, pursuant to 28 U.S.C.§ 1292(a), this Appeal is able to be moved for Interlocutory Appeal as a State-to-Federal Removal action pursuant to 28 U.S.C. §§ 1446, 1443, and other authority (see e.g. ECF 7,

Directed to Hon. William A. Fletcher; and R. at 9-71.) is a special type of Injunction, de facto;

(b) secondarily, by discretion, pursuant to 28 U.S.C.§ 1292(b), Plaintiff-Appellant in his Petition (18-2824, Doc. 11) had met the three (3) requirements for Interlocutory Appeal (which the lower court does not engage upon; and, the Circuit Court has not engaged upon either); on an Issue (i.e. pre-trial, non judicial process *Brady* violations, clear Deprivation of Civil Rights and potentially 18 U.S.C. §§ 241-242 violations) that is of the very variety that should be the clear exception for discretionary interlocutory appeal in a precedential capacity (as with Plaintiff-Appellant's related 42 U.S.C. § 1983 pending Ninth Circuit cases: 18-56202 (4th and 8th Amendment violations), and 18-56107 (Denied "*Bounds*" Access to the Courts)" (see e.g. authorities and argument presented in ECF 10 and 16 for the Circuit Court).

Further, with the lower court, Plaintiff-Appellant has a pending FRCP 59 Motion regarding Certification of this Issue for Interlocutory Appeal (thus also reason for the Circuit Court to Stay its Mandate pursuant to Plaintiff-Appellant's January 23, 2019 Motion (ECF 18)

(iii) Plaintiff-Appellant also has: (a) an emergency motion under Circuit Rule 27-3, FRAP 2, FRCP 45, FRE 201 Subpoena of *Brady* and Ca PC § 1054 discovery disclosures, which is not moot, in any uncertain capacity (ECF 10, January 13, 2019; and a Stay of related proceeding pending review, ECF 9); and, (b) a Writ of Mandamus inside of 19-55049, for substantially similar relief (ECF 16, January 18, 2019);

(iv) Plaintiff-Appellant also notes that, "this a live controversy, involving not just clear and egregious Constitutional Brady and Ca PC § 1054 violations by state actors actioned under 42 U.S.C. § 1983 (ECF 3, Complaint, USDC SD Cal, 18-2824-LAB-LL R. at 72-95), (potentially bearing 18 U.S.C. §§ 241, 242 liabilities), but bearing a significant impact on the Plaintiff-Appellant's life and liberty, in an ongoing and future capacity.

2. The issues presented for Interlocutory Appeal in 19-55049, under each of 28 U.S.C. § 1291(a) and (b) are valid for the taking of the Appeal, and standing in the Circuit Court, despite such being very rare (especially for a self-litigant).

LEGAL STANDARD FOR FRAP 40 REHEARING

3. The Plaintiff-Appellant is able to move under either FRAP 40, for a rehearing by the panel already formed, or under FRAP 35, for a rehearing en banc, and without prejudice to a rehearing en banc, moves, at present, for a panel rehearing. (The Plaintiff-Appellant moves with specificity under FRAP 40, expressly reserving remedies under FRAP 35, including but not limited to those under *Socop-Gonzalez v. I.N.S.*, 272 F3d 1176, 1186, fn. 8 (9th Cir 2001). The Plaintiff views rehearing requests that move at the same time under FRAP 35 and FRAP 40, as is common, as premature, prejudicial to one's own opinion, not in balance or respect of the court and/or in bad faith—the Plaintiff-Appellant moves in good faith, and at present, only under FRAP 40 for rehearing; and, without prejudice).

4. Plaintiff-Appellant alleges that the panel that issued the Order (ECF 17) on January 23, 2019 from which this Motion seeks Re-hearing and Relief, was a "Screening Panel", in which, for reasonable time and efficiency, it relied entirely on the record and memoranda (if any, no docketed) prepared by staff (Goelz, Christopher A., and Watts, Meredith J., Federal Ninth Circuit Civil Appellate Practice, Rutter Group Practice Group, Disposition of Appeal, pg. 10-3, 10:18, (2016)). As a result, in bringing forth a FRAP 40 rehearing, Plaintiff-Appellant kindly requests that the Circuit Court be provided all moving papers and substantively comment on its rationale (e.g. Plaintiff-Appellant had already brought forth his position on 28 U.S.C. § 1291, which the Circuit Court does not engage upon) for denying the Plaintiff-Appellant's movements that he is seeking rehearing on.

5. Under FRAP 40(a)(1), this filing meets the Timing requirements as set forth for a rehearing.

6. Under FRAP 40(a)(2), a Petition must state with particularity each point of law or fact that the party believes the court has overlooked and must argue in support of such. On this point, the Order (ECF 17) cites no engagement with the authorities and argument put forth in the underlying Motions denied (ECF 22, 27, 29; and otherwise), including on Plaintiff-Appellant's argument of each of 28 U.S.C. §§ 1291(a) and (b). Therefore, the entirety of such arguments are brought forth for engagement by the Circuit Court in this FRAP 40 Petition.

7. Under FRAP 40-1(c), Plaintiff-Appellant is able to petition for rehearing of an order or opinion inside of a case.

8. The Plaintiff-Appellant has cited the facts that address the issues before the Court, and separately, the Circuit Court has not ruled any matter of fact or law, or the merits of such arguments in support thereof in its Denial (ECF 17) of Plaintiff-Appellant's Motions (e.g. ECF 7, 8, 9, 10, 16). (*Silva-Calderon v. Ashcroft*, 371 F3d 1135, 1136 (9th Cir. 2004)).

9. The purpose of this additional FRAP 40 Motion is to prevent manifest injustice as the Plaintiff-Appellant has not been heard, which is manifestly unjust. (*Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996))

REQUEST FOR RELIEF

10. Under FRAP 40, hear the Interlocutory Appeal (as indicated Plaintiff-Appellant has already cited his opening legal positions for this Appeal, interlocutory under 28 U.S.C. § 129[2], including but not limited to the Motions (ECF 7, 8, 9, 10 (including *Bowman* Four-Factor Analysis), and 16), which are each not Moot (further even the formal closing of an action (e.g. ECF 17); any action, does not Moot all relief by authority) standing on their own, and still timely put forth here for the Circuit Court to review (e.g. would the live controversy be substantially advanced by simply Ordering the Defendant-Appellee to produce the information on the felon criminal that they are timely legally required to under *Brady*? (rhetorical) – it does not matter how much formerly confidential information may be contained in such information

– the Plaintiff-Appellant has a legal right to, unfiltered, and timely as Briefed).

11. Provide the Plaintiff-Appellant's Motions (ECF 7, 8, 9, 10) to the panel (atypical for Screening Panel's), but required under rehearing.

12. Thereafter, substantively Opine including but not limited to Plaintif-Appellant's positions on 28 U.S.C. § 129[2].

13. Grant any other Relief that the Circuit Court deems fit.

CERTIFICATION

14. Under FRCP 11, by signing below, I certify to the best of my knowledge, information, and belief that this Filing and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the filing otherwise complies with the requirements of Rule 11.

DATED: January 24, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: 18cv02824-LAB (LL)

ORDER ON PLAINTIFF'S MOTION FOR MISCELLANEOUS RELIEF [Dkt. 22]

[January 31, 2019]

On January 23, 2019, the Court stayed this case and instructed the parties in no uncertain terms that, absent a compelling reason, no motions were to be filed until the stay is lifted. Ignoring that instruction, Plaintiff Gavin Davis has now filed a motion for miscellaneous relief, including (1) a request that the Court image and rule on his Rule 59 "motion regarding certification" and (2) a request that the Court order Defendant O'Connor to appear. Dkt. 22. He has also filed a proof of service that, for whatever reason, also contains a request that the Court order O'Connor to appear.[2] Dkt. 23.

---

[2] The Court does not take a position on whether service was adequate. O'Connor may, of course, move to quash service if he believes he was not properly served.

The Court has already denied Davis' request for certification and declines to revisit the issue, either directly or through a Rule 59 motion. Accordingly, that request is **DENIED**.

Davis' repeated requests that the Court order O'Connor to appear are unnecessary and improper, so they are also **DENIED**. The Court has already ordered O'Connor to appear once served. See Dkt. 19 ("O'Connor shall appear once he is served . . . ."). Since it appears that service has been completed, (Dkt. 23), O'Connor is already under an obligation to appear.1 The Court does not need further prodding from Davis as to its own orders. And as noted previously, an appearance is just an appearance—O'Connor has no obligation to respond to Davis' complaint until the state criminal case is completed.

Finally, the Court's instructions in its previous order bear repeating here: the parties are **ORDERED** not to file further documents in this case until the state court proceedings finish and the Court lifts the stay. The only exceptions are O'Connor's notice of appearance and a notice to inform the Court that the state court proceedings have terminated. These two documents are to be filed by O'Connor only. If Davis continues to flout the Court's instructions and file unnecessary motions, he will be subject to sanctions, including possible dismissal of his case. See FRCP 11; 28 U.S.C. §1927; *Wages v. I.R.S.*, 915 F.2d 1230, 1235-36 (9th Cir. 1990) (Section 1927 permits sanctions against a pro se plaintiff who "multipl[ies] the proceedings . . . unreasonably and vexatiously.").

IT IS SO ORDERED.

Dated: January 30, 2019

/s/ Larry A. Burns
HONORABLE LARRY ALAN BURNS
Chief United States District Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR ("TIMBO")
Defendant.

Case No.: 18-cv-02824-LAB-LL

NOTICE OF
PLAINTIFF'S FRCP 59 RESPONSE TO COURT'S ORDER (DOC. 13) OF PLAINTIFF'S PETITION FOR THE DISTRICT COURT TO CERTIFY ONE (1) ISSUE TO THE NINTH CIRCUIT FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292 (DOC. 11)

Date: EX PARTE
Dept: 14B, Hon. Larry A. Burns

(Received January 18, 2019, Clerk, U.S. District Court Southern District of California By ___ Deputy)

PLEASE TAKE NOTICE on January 18, 2019, via Ex Parte, or as soon as practical thereafter, before the Hon. Larry A. Burns at the U.S. District Court, Southern District of California, Plaintiff, herein, has moved pursuant to FRCP 59 for this District Court to reconsider its Order (Doc. 13, January 16, 2019) Denying the

Plaintiff-Petitioner's Request to Certify one (1) Issue for Interlocutory Appeal to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292 (Doc. 11, January 16, 2019) Separately (i.e. via separate filing), on this day, January 17, 2019, Plaintiff has timely, and graciously requested certain reasonable relief from this Court's Order to Show Cause (Doc. 5, 10) on two (2) highly technical matters (i.e. *Younger* Abstention Doctrine and State-to-Federal Removal actions).

This request and Motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, statements, facts, argument, and all accompanying pertinent information admitted with this filing, in its pursuit, or as otherwise relevant, now, or in the future.

DATED: January 18, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR ("TIMBO")
Defendant.

Case No.: 18-cv-02824-LAB-LL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S FRCP 59 RESPONSE TO COURT'S ORDER (DOC. 13) OF PLAINTIFF'S PETITION FOR THE DISTRICT COURT TO CERTIFY ONE (1) ISSUE TO THE NINTH CIRCUIT FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292 (DOC. 11)

Date: EX PARTE
Dept: 14B, Hon. Larry A. Burns

(Received January 18, 2019, Clerk, U.S. District Court Southern District of California By ___ Deputy)

Table of Contents (Omitted)
Table of Points and Authorities (Omitted)

A. INTRODUCTION

1. Plaintiff has timely (i.e within ten (10) days of such order) Petitioned the District Court (Doc. 11) pursuant to 28 U.S.C. § 1292, the federal statute, which permits interlocutory

appeal upon permission of both the District Court and the Court of Appeals (i.e. the Ninth Circuit), for its Certification of one (1) Issue from its Order (Doc. 5, 10) for Interlocutory Appeal to the Ninth Circuit; Issue #1: are Constitutionally protected preliminary *Brady* discovery disclosure violations an "integral" part of the judicial process subject to abstention under *Younger*

2. Plaintiff had noted that his Petition for Certification (Doc. 11) pursuant to 28 U.S.C. § 1292(b), and this Court's discretion under 1292(b) should not be "evaded" by an inappropriate entry of judgment as it alludes to in its Orders (see e.g. Doc. 5, pg. 2, ln 19-20) under FRCP 54(b)(or otherwise) by the district court prior to its opinion on this Petition (*Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) (holding that interrelationship between an adjudicated and un-adjudicated claim established that the district erred in entering judgment under FRCP 54(b) and noting that discretion of the appeals court to determine under 1292(b) cannot be so evaded), though 28 U.S.C. § 1292 movements are to be strictly construed (*Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965)). In its Order (Doc. 13, January 16, 2019), the District Court has done precisely this, however, choosing not to engage on the authorities and argument (literally ignoring) as presented by the Plaintiff in the Petition (Doc. 11).

3. Herein, on January 18, 2019, Plaintiff has timely moved for Relief from the Court's Order (Doc. 13) under FRCP 59, for the Court's reconsideration of its Order (Doc. 13) as put forth herein; and requests that the District

Court certify the one (1) Issue presented for Interlocutory Appeal to the Ninth Circuit.

4. Separately, on January 18, 2019, Plaintiff has also timely filed and moved for: (a) no prejudice with regard to its Orders (Doc. 5, 10) to show cause in the Court's limitation of the Plaintiff to a five (5) pages to respond on two (2) highly technical matters (i.e. *Younger* Abstention and a State-to-Federal Removal action); and, (b) a reasonable period of time to do so; rather than punitively dismiss the Complaint (Doc. 1) and close the case without prejudice (such would be prejudicially clearly) per its Orders (Doc. 5, 10, 13).

B. OPPOSITION TO THE ISSUES PRESENTED BY THE COURT IN ITS ORDER (DOC. 13) TO THE PETITION FOR INTERLOCUTORY APPEAL (DOC. 11)

5. The Court indicates in its Order (Doc. 13) denying Certification as Petitioned by the Plaintiff (Doc. 11) that, "[t]he deadline for [Plaintiff] to respond to that Order to Show Cause has come and gone," as if the Plaintiff is not moving timely or being diligent; when in fact the opposite is true. For example, the Court's Order (Doc. 13), is dated the same day (i.e. January 16, 2019) as its seven (7) day request to show cause (Doc. 5, pg. 2).

6. The Court indicates in its Order that, "instead of responding [to the Orders to Show Cause (Doc. 5, 10), Plaintiff] filed an interlocutory appeal to the Ninth Circuit," (Doc. 13, pg. 1, ln 17) and commits each of the fallacy of moving the goal post; and, a straw man fallacy. Plaintiff notes that: (a) an Order to Show Cause

and request a response to *Younger* Abstention Doctrine (e.g. Doc. 5, 10) is a matter of jurisdiction; which is and was shown, a priori, to be the very type of matter ripe for Interlocutory Appeal (e.g. Plaintiff's Petition for Certification, Doc. 11, pg.

7. Pursuant to 28 U.S.C. § 1292(b), a party is to be afforded ten (10) days from an Order (e.g. the latter of Doc. 5 or 10, as entered on January 9, and January 11, 2019, respectively) to Petition the district court for Certification and Interlocutory Appeal. Plaintiff was conscious of such fact and noted in his Petition that, "[t]he request to certify before the district court is either made at the time of the initial decision or made through a motion to certify and amend the order [e.g. within ten (10) days of such Order]," (Doc. 11, pg. 14, ¶ 19) as he clearly moved. Therefore, Plaintiff's Petition (Doc. 11) was timely made, prima facie.

8. The Court indicates in its Order that, "[i]ndeed, an appeal from an interlocutory decision is a matter of right only with respect to three types of district court decisions, none of which are relevant here. See 28 U.S.C. § 1292(a) (permitting interlocutory appeals from decisions relating to injunctions, the appointment of receivers, and certain admiralty cases)." (Doc. 13, pg. 1, ln 20-23) Plaintiff has noted, in priority, that he has moved under U.S.C. § 1292(a) (Doc. 11, pg. 10, ¶ 8) as the District Court's Order to Show Cause (Doc. 5) was in Response to Plaintiff's State-to-Federal Removal Action (Doc. 6, rejected document, updating Doc. 4), a special type of Injunction, de facto.

9. The Court indicates in its Order that, "Plaintiff ... asks this Court to certify for appeal several issues relating to his Section 1983 suit," (Doc. 13, pg. 2, ln 6-7) which is incorrect. Nothing could be further from the truth, has Plaintiff has explicitly stated and Petitioned the District Court on one (1) Issue for Certification, namely: are Constitutionally protected preliminary *Brady* discovery disclosure violations an "integral" part of the judicial process subject to abstention under Younger? (e.g. Doc. 11, Introduction, pg. 9, ¶ 4)

10. The Court finds that, "there are at least two procedural problems with [Plaintiff's] motion that make it unnecessary to reach the merits of his request." (citation omitted)

(a) "First, a request for certification should occur before the party actually appeals the district court's decision. See 28 U.S.C. § 1292(b) (The circuit court has discretion to accept an appeal of a certified issue provided the application is made to the circuit court "within ten days after the entry of the [district court's] order."). Here, however, [Plaintiff] took it on himself to file an interlocutory appeal before he filed a request for certification—in fact, [Plaintiff] has already submitted an opening brief in his Ninth Circuit appeal." (Doc. 13, pg. 2, ln 8-14) On this point, Plaintiff, as noted in his Petition for Certification (Doc. 11), is a self-litigant, and is therefore to be afforded more liberty (not less) in moving before the courts by strong precedence in the cannon. Further, the exact language that the District Court presents from the statute does not prohibit his movement—the fact that Plaintiff has filed one or more documents with the Ninth Circuit,

need not concern the Circuit Court. A priori, Plaintiff has moved with his Petition for Certification (Doc. 11) within ten (10) days of the Court's Order to Show Cause (Doc. 5) and therefore has a right to reach the merits of the Petition (Doc. 11) and for substantive review there upon by the Circuit Court.

(b) "Second, there has not yet been a decision by this Court that would permit a certified interlocutory appeal even if the issues warranted appellate review (which they do not). Section 1292(b) provides that a district court may certify an issue related to an "order not otherwise appealable under this section." The interlocutory order at issue here is an order to show cause. While an order to show cause is, in the most literal sense of the word, an "order," it is not an "order" within the meaning of Section §1292(b). That statute contemplates that an interlocutory order would be a decision made by the district court. See, e.g., 28 U.S.C. § 1292 (entitled "Interlocutory decisions"); *Van Dusen v. Swift Transportation Co. Inc.*, 830 F.3d 893, 896 (9th Cir. 2016) ("District courts may certify a decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).") (emphasis added). An order to show cause is not a decision, it is a call for additional briefing. A request for certification relating to an order to show cause is therefore procedurally improper." (Doc. 13, pg. 2, ln 14-25) Plaintiff notes in response, that an Order is an Order—it is to be taken literally; and a party in response has several means of responding to such. Plaintiff's choice, to Petition for Certification for Interlocutory Appeal is valid, even if denied (whether with valid or invalid reasoning).

Further, the Court indicates that a decision has not been made yet that would permit certification for interlocutory appeal. Plaintiff disputes this as the Court has Ordered to Show Cause (Doc. 5, 10) for the Complaint (Doc. 1); and, and Order to Show Cause is a question of jurisdiction and standing. On this point, Plaintiff noted in the Petition for Certification that, "(threshold controlling legal issues such as subject matter jurisdiction, personal jurisdiction, capacity to be sued, and standing meet this requirement (See, e.g., *Moodie v. Fed. Reserve Bank of N.Y.*, 58 F.3d 879, 881 (2d Cir. 1995) (explaining that subject matter jurisdiction was a threshold issue); *Harris v. Evans*, 20 F.3d 1118, 1120 (11th Cir. 1994) (explaining that standing was another threshold issue)." (Doc. 11, pg. 15, ¶ 25).

11. The Court conclusory finds that, "fundamentally, certification is entirely unnecessary in this situation," (Doc. 13, pg. 2, ln 26); yet, has failed to reach the merits of the Plaintiff's Petition for Certification (Doc. 11) in prematurely and prejudicially procedurally defaulting the Plaintiff, which is held as each of a violation of due process and an abuse of discretion. The Court also adds, "[t]he proper course of action would have been for [Plaintiff] to respond to the Court's Order to Show Cause [Doc. 5, 10] as he was ordered to do." Plaintiff has, in fact, responded to the Court's Order (Doc. 5, 10) in his discretion by Petitioning for Interlocutory Appeal pursuant to 28 U.S.C. § 1292 (e.g. see Doc. 11, pg. 9, ¶ 2), which is one (1) permissible movement, prima facie; even if it is not what the Hon. Larry A. Burns wished for in priority.

12. The Court indicates that, "[h]ad Plaintiff provided the Court with legal authority supporting his position, the Court would permit him to continue litigating his case." (Doc. 13, pg. 2-3, ln 28-1) Yet, Plaintiff in his Petition for Certification has provided approximately four (4) pages of Points and Authorities that the District Court does not engage upon (Doc. 11, Points and Authorities, pg. ii-v) in not reaching the merits as it, itself, admits.

13. The Court indicates that, "[i]f [Plaintiff] failed to show cause [(i.e. as requested via order in Doc. 5, 10)], the case would be dismissed under the *Younger* abstention doctrine and [Plaintiff] would be entitled to appeal as a matter of right." (Doc. 13, pg. 3, ln 1-3) On this point, in part, Plaintiff has noted in 9th Circuit, 19-55049, Opening Brief, that, "the lower court is prejudicial in even suggesting that, "[w]hen *Younger* abstention applies, as the Court finds it likely does here, the Court may not retain jurisdiction but must instead dismiss the action without prejudice," (Doc. 5, pg. 2, ln 19-29, R. at 7.), finding this to a be a violation of Due Process, subject to reversal," (9th Cir., 19-55049, ECF 4, Issue #3, pg. 9, ¶ 3; as further briefed therein). Plaintiff has held this to be a legal trap, "[i]t is each of improper and prejudicial, prima facie, for the lower court to use suggestive language that, "[w]hen *Younger* abstention applies, as the Court finds it likely does here, the Court may not retain jurisdiction but must instead dismiss the action without prejudice. (See *Juidice v. Vail*, 430 U.S. 327, 348 (1977)." (Doc. 5, pg. 2, ln 19-20, R. at 7.) in regards to the Plaintiff-Appellant's Complaint (Doc. 1, R. at 72-95.). In making such suggestion,

while then requiring, via Order, the Plaintiff-Appellant to brief in response to two highly technical matters (i.e. *Younger* abstention); and, separately, his Notice of Removal action and movement; while also limiting his response to five (5) pages and suggesting that Plaintiff-Appellant is verbose, is a violation of Due Process (Doc. 5, pg. 2-3, ln 19-2, R. at 7.). Plaintiff-Appellant notes that *Younger* abstention is reserved as an opposition in opposition (e.g. a Motion to Dismiss) by the opposition (i.e. Defendant-Appellee Timothy) (pardon the alliteration) at the trial court level; and, it is improper for the District Court to prejudicially suggest such prematurely; and, then at the same time, set highly limiting grounds for the Plaintiff-Appellant (or any self-litigant) to easily trip over themselves (e.g. a literal legal "trap"; by a judiciary no less) in response thereto, as so ordered (Doc. 5)." (9th Cir., 19-55049, Opening Brief, ECF 4, pg. 28, ¶ 64)

14. Finally, the Court finds that, "certification here would not "materially advance the ultimate termination of the litigation" because the termination of the litigation, at least in this Court, is imminent. 28 U.S.C. § 1292(b). Accordingly, there is no basis for certifying an interlocutory issue for appeal." (Doc. 13, pg. 3, ln 3-6) In response thereto, Plaintiff notes this is clearly prejudicial (even worded so) and an abuse of discretion. Further, it is off point—Plaintiff, in his Petition for Certification (Doc. 11) has briefed the District Court with authority on how and why the Petition for Certification of the one (1) Issue (i.e. are Constitutionally protected preliminary Brady discovery disclosure violations an "integral"

part of the judicial process subject to abstention under *Younger*? (Doc. 11, pg. 9, ¶ 4)). For example, Plaintiff has noted that: (a) "28 U.S.C. § 1292(b) would encompass issues whose resolution would "likely" have an effect on the outcome. For instance, the First Circuit in *Rodriquez v. Banco Central*, 917 F.2d 664, 664 (1st Cir. 1990), deemed the accrual of a cause of action for statute of limitations purposes to constitute a "controlling question of law" even though other causes of action remained for trial. Thus, inherent to the controlling question of law criterion is timing in that an issue may be controlling at one point of the litigation but not another. (Discretionary Appeals, supra note 11, at 619)," (Doc. 13, pg. 18, ¶ 32) which the trial court has violated, prima facie, rather than engage there upon; (b) "In certain circumstances 'certification may be justified at a relatively low threshold of doubt" (*United States v. Sampson*, Cr. No. 01-10384-MLW, 2012 WL 1633296, at *12 (D. Mass. May 10, 2012). (quoting WRIGHT ET AL., supra note 3, § 3930, at 494–95); see Discretionary Appeals, supra note 11, at 624 ("degree of legal doubt escapes precise quantification"). There is no doubt that the Defendant is in clear violation of Brady and Ca PC § 1054" (Doc. 11, pg. 18, ¶ 33); and, (c) "It has been generally accepted that where the appellate determination would result in either litigation or similar actions "benefit[ing] from prompt resolution of th[e] question," certification is favored (*Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 182 (quoting *Camacho v. P.R. Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004)); see also Lawson v. FMR LLC., 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (stating that "the fundamental legal issue is

likely to shape both discovery initiatives and settlement strategies in a fashion which should expedite resolution of the case overall.")." (Doc. 11, pg. 18-19, ¶ 34) Each of these are reasons presented for the District Court's opinion under prong three (3) of three (3), "certification may materially advance the termination of a case," and, are each valid on their own to justify Certification as presented.

C. REQUEST FOR RELIEF

15. The plain statutory language of 28 U.S.C. § 1292(b) provides for no additional discretion to deny a certification request when all three of the statutory criteria have been met (See Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 780 (2006) ("[T]he text of [§ 1292(b)] simply does not give the district court unlimited discretion [to deny certification when the statutory factors are present]). Plaintiff has demonstrated that, the question of law found to be proper for certification concerned the scope of 28 U.S.C. § 1292(b) itself, namely whether a Section 2255 proceeding was a "civil action" for purposes of 28 U.S.C. § 1292(b) (e.g. as set forth in one recent case, *United States v. Sampson*, Cr. No. 01–10384–MLW, 2012 WL 1633296, at *10 (D. Mass. May 10, 2012).); and, unequivocally covers civil-criminal hybrids, such as this case. All three (3) criteria for Certification have been meet. Further, pursuant to 28 U.S.C. § 1292(a), in priority to § 1292(b), Plaintiff finds that a State-to-Federal Removal Action (e.g. as with Doc. 4, 7) is a type of Injunction, de facto; and,

therefore, by way of right, appealable interlocutory, as moved.

16. Pursuant to FRCP 59, the District Court should reach the merits of Petition for Certification (Doc. 11) of the one (1) Issue presented and Opine.

17. The District Court should grant any other relief that the Court deems appropriate.

D. CERTIFICATION AND CLOSING

18. Under FRCP 11, by signing below, I certify to the best of my knowledge, information, and belief that this Petition and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the petition otherwise complies with the requirements of Rule 11, as well as FRAP 32(c)(2), and FRAP 5(b),(c).

DATED: January 18, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: 18cv02824-LAB (LL)

ORDER DENYING PLAINTIFF'S MOTION FOR CERTIFICATION [Dkt. 11]

[January 17, 2019]

On January 9, 2018, this Court ordered Plaintiff Gavin Davis to show cause why his case should not be dismissed without prejudice under the Younger abstention doctrine. Dkt. 5. The deadline for Davis to respond to that Order to Show Cause has come and gone, but instead of responding, Davis filed an interlocutory appeal to the Ninth Circuit. Presently before the Court is Davis' Petition to Certify an Issue for Interlocutory Appeal. Dkt. 11.

In the federal court system, appeals from non-final judgments are the exception, not the rule. Indeed, an appeal from an interlocutory decision is a matter of right only with respect to three types of district court decisions, none of which are relevant here. See 28 U.S.C. § 1292(a) (permitting interlocutory appeals from decisions relating to injunctions, the appointment of

receivers, and certain admiralty cases). Section 1292(b), however, provides a catch-all exception that permits a district court, in its discretion, to certify an issue for interlocutory appeal if the district court's "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." *Id.* § 1292(b). The Ninth Circuit has cautioned that this discretion is to be applied "sparingly and only in exceptional cases." *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir.1959). Certification should only be used "in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981).

Plaintiff Gavin Davis asks this Court to certify for appeal several issues relating to his Section 1983 suit. But there are at least two procedural problems with Davis' motion that make it unnecessary to reach the merits of his request. First, a request for certification should occur before the party actually appeals the district court's decision. See 28 U.S.C. § 1292(b) (The circuit court has discretion to accept an appeal of a certified issue provided the application is made to the circuit court "within ten days after the entry of the [district court's] order."). Here, however, Davis took it on himself to file an interlocutory appeal before he filed a request for certification—in fact, Davis has already submitted an opening brief in his Ninth Circuit appeal. Second, there has not yet been a decision by this Court that would permit a certified

interlocutory appeal even if the issues warranted appellate review (which they do not). Section 1292(b) provides that a district court may certify an issue related to an "order not otherwise appealable under this section." The interlocutory order at issue here is an order to show cause. While an order to show cause is, in the most literal sense of the word, an "order," it is not an "order" within the meaning of Section §1292(b). That statute contemplates that an interlocutory order would be a decision made by the district court. See, e.g., 28 U.S.C. § 1292 (entitled "Interlocutory decisions"); *Van Dusen v. Swift Transportation Co. Inc.*, 830 F.3d 893, 896 (9th Cir. 2016) ("District courts may certify a decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).") (emphasis added). An order to show cause is not a *decision*, it is a call for additional briefing. A request for certification relating to an order to show cause is therefore procedurally improper.

More fundamentally, certification is entirely unnecessary in this situation. The proper course of action would have been for Davis to respond to the Court's Order to Show Cause as he was ordered to do. Had Davis provided the Court with legal authority supporting his position, the Court would permit him to continue litigating his case. If he failed to show cause, the case would be dismissed under the *Younger* abstention doctrine and Davis would be entitled to appeal as a matter of right. In other words, certification here would not "materially advance the ultimate termination of the litigation" because the termination of the litigation, at least in this Court, is imminent. 28

U.S.C. § 1292(b). Accordingly, there is no basis for certifying an interlocutory issue for appeal.

Davis' Motion to Certify an Issue for Interlocutory Appeal is **DENIED.** Dkt. 11. An Order on Davis' failure to show cause is forthcoming.

IT IS SO ORDERED.
Dated: January 17, 2019

/s/ Larry A. Burns
HONORABLE LARRY ALAN BURNS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR ("TIMBO")
Defendant.

Case No.: 18-cv-02824-LAB-LL

NOTICE OF
PETITION FOR THE DISTRICT COURT TO CERTIFY AN ISSUE TO THE NINTH CIRCUIT FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292 & OTHER RELIEF

Date: EX PARTE
Dept: 14B, Hon. Larry A. Burns

[January 16, 2019]

PLEASE TAKE NOTICE on January 16, 2019, via Ex Parte, or as soon as practical thereafter, before the Hon. Larry A. Burns at the U.S. District Court, Southern District of California, Plaintiff-Petitioner, herein, has petitioned this District Court to Certify an Issue for Interlocutory Appeal to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292 and authority found in the movement, responding, in part, to the Court's Orders (Doc. 5, 10) to show cause; but finding that 28 U.S.C. § 1292 action primes a dispositive order, and

therefore, also graciously and reasonably explicitly requests a Stay of its Orders (Doc. 5, 10) pending review and opinion of this Motion. This request and Motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, statements, facts, argument, and all accompanying pertinent information admitted with this filing, in its pursuit, or as otherwise relevant, now, or in the future.

DATED: January 16, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR ("TIMBO")
Defendant.

Case No.: 18-cv-02824-LAB-LL

MEMORANDUM IN SUPPORT OF PETITION FOR THE DISTRICT COURT TO CERTIFY AN ISSUE TO THE NINTH CIRCUIT FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292 & OTHER RELIEF

Date: EX PARTE
Dept: 14B, Hon. Larry A. Burns

[January 16, 2019]

(Table of Contents, Omitted)
(Table of Points and Authorities, Omitted)

A. INTRODUCTION

1. On December 17, 2018, Plaintiff, Mr. Gavin B. Davis, brought a 42 U.S.C. § 1983 claim against Defendant Timothy G. O'Connor, Deputy City Attorney of the Office of the City Attorney (San Diego), in part for, a priori, the willful suppression of exculpatory evidence on the criminal background of Mr. John Gregory Unruh (aka "Carlito") in Superior Court of California,

San Diego County, case no.: M242946DV, one (1) Ca PC § 166(c)(1) contested charge filed on April 16, 2018. Subject to supplemental jurisdiction expressly reserved in the Complaint (Doc. 1, ¶ 5 for removal of M242946DV), and the Plaintiff filing a Removal Action(s) invoking such supplemental jurisdiction, the Court Ordered Plaintiff to show cause (Doc. 5). Thereafter, Plaintiff, a self-litigant, moved Interlocutory to the Ninth Circuit (Notice of Interlocutory Appeal, Doc. 7). Subsequently, the District Court Re-Ordered the Plaintiff to show cause (Doc. 10, January 11, 2019) for the Complaint. Upon review of the Court's Orders (Doc. 5, 10) specifically with respect to Interlocutory Appeal (as Noticed, Doc. 7), and its mandate; Plaintiff generally concurs with its authorities presented finding that the federal court system and appellate courts do not like piecemeal litigation, and therefore interlocutory appeals.

2. However, in response to the District Court's Orders to show cause (Doc. 5, 10), Plaintiff herein Petitions the District Court subject 28 U.S.C. § 1292, the federal statute, which permits interlocutory appeal upon permission of both the District Court and the Court of Appeals (i.e. the Ninth Circuit), for its Certification of the Issue herein for Interlocutory Appeal to the Ninth Circuit.

3. Plaintiff notes that this Petition pursuant to 28 U.S.C. § 1292(b), and this Court's discretion under 1292(b) should not be "evaded" by an inappropriate entry of judgment as it alludes to in its Orders (see e.g. Doc. 5, pg. 2, ln 19-20) under FRCP 54(b)(or otherwise) by the district court prior to its opinion on this Petition

(*Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) (holding that interrelationship between an adjudicated and unadjudicated claim established that the district erred in entering judgment under FRCP 54(b) and noting that discretion of the appeals court to determine under 1292(b) cannot be so evaded), though 28 U.S.C. § 1292 movements are to be strictly construed (*Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965))

4. Issue #1: are preliminary Brady Violations an "integral" part of the judicial process subject to abstention under Younger.

B. PARTIES

5. The parties are found in the Complaint (Doc. 1, pg. 6-7, ¶¶ 2-3) and are hereby incorporated as if expressed herein, should the District Court need to reference such information prior to rendering its opinion on thi Petition and Movement.

C. JURSIDICTION

6. This Court has Jurisdiction, and timely so, as found in the Complaint (Doc. 1, pg. 7, ¶¶ 4-5) and are hereby incorporated as if expressed herein, should the District Court need to reference such information prior to rendering its opinion on this Petition and Movement. Further, Jurisdiction, itself, is always grounds for Certification of an Interlocutory Appeal by authority.

D. CONDITIONS PRECEDENT

7. All Conditions Precedent have been met.

E. STANDARD OF REVIEW

8. 28 U.S.C. § 1292(b) presently remains almost identical to its wording when originally adopted. Unlike interlocutory appeals sought under Section 1292(a) pertaining to injunctions, 28 U.S.C. § 1292(b) is discretionary (*Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under 28 U.S.C. § 1292(b) is by permission while interlocutory appeal under Section 1292(a) is by right. For posterity, Plaintiff notes that his view is that the Interlocutory Appeal is actionable automatically under 28 U.S.C. § 1292(a); as a Removal Action (e.g. Doc. X), is by default a type of injunction; and, therefore, such action should be ruled upon by the trial court first, before requesting to show cause. Thus, in priority, Plaintiff so moves in this Petition under 28 U.S.C. § 1292(a), in priority, while subsequent thereto, providing support for moving, secondarily under 28 U.S.C. § 1292(b).

9. 28 U.S.C. § 1292(b) provides: When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order:

provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (note: the statutory criteria is worded in terms of "may," in that even if there is a measure of doubt whether appellate resolution will facilitate advance termination of the litigation, certification may still be appropriate. (See, e.g., *United States v. Sampson*, Cr. No. 01- 10384-MLW, 2012 WL 1633296, at *13 (D. Mass. May 10, 2012) (stating that "while inherently uncertain, the conclusion of this § 2255 proceeding before this court 'may' be facilitated by an interlocutory appeal."); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (holding that "neither 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation."); *Kagan v. Dress (In re Clark-Franklin-Kingston Press, Inc.)*, No. 90-11231, 1993 WL 160580, at *3 (stating that "interlocutory appeals should be granted where resolution of the issues on appeal might lead to settlement"). In this case, (a) a civil-criminal hybrid (therefore holding under *United States v. Sampson* (2012)); (b) not having to have a final dispositive effect; and, (c) as *Brady* and Ca PC § 1054 discovery disclosures are timely required by Constitutional right and statute; the taking and certification of the Interlocutory Appeal clearly would materially advance the controversy, even if for settlement purposes.

10. Plaintiff notes that the trial court has indicated that, "the district court finds that its Order to show cause (Doc. 7) is "not a final or even

an interlocutory decision and thus is not appealable. See *Bison Operating Co. v. Bretz*, 872 F.2d 426, 1989 WL 37246 (9th Cir. 1989) ("The District Court's Order to Show Cause is not an appealable order [and] the Appeal of the order is therefore dismissed.")" (Doc. 10, pg. 1, ln 18-21) pulling from an unpublished case and opinion. The District Court indicates that it retains its mandate and jurisdiction over the case (USDC SD Cal, 18-2824, *Davis v. O'Connor*) and claims (e.g. Doc. 1) (Doc. 10, see *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007) ("When a Notice of Appeal is defective in that it refers to a non-appealable interlocutory order, it does not transfer jurisdiction to the appellate court, and so the ordinary rule that the district court cannot act until the mandate has issued on the appeal does not apply.")

11. Yet, in its Orders (Doc. 5, 10), the District Court has presented questions of controlling law regarding each of the ability to timely move for a state-to-federal action (Doc. 5, pg. 1-2, ln 22-3); and, jurisdiction under *Younger* Abstention Doctrine, prima facie; which the Plaintiff disputes. Jurisdiction, itself, is an issue ripe for Interlocutory Appeal under 28 U.S.C. § 1292(b).

12. **Does a 42 U.S.C. § 1983 claim qualify for Interlocutory Appeal Certification under 28 U.S.C. § 1292(b)?** **Yes**, 42 U.S.C. § 1983 is a civil-criminal hybrid, which qualify for such movement. (the statute applies to grand jury proceedings (*In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978); see also *In re Grand Jury Subpoenas*, 573 F.3d 936, 940 (6th Cir. 1978) (subpoena upon witness to

testify in grand jury does not involve a witness in a criminal proceeding and § 1292(b) applies) as they are a "hybrid" matter (*Bonnell v. United States*, 483 F. Supp. 1091, 1092–93 (D. Minn. 1979) (holding that grand jury proceedings are "hybrid" civil and criminal proceedings and fall within "civil action" intention of § 1292(b)) with true criminal proceedings not otherwise formally arising "until a formal charge is openly made against the accused (*Post v. United States*, 161 U.S. 583, 587 (1896)).

13. Plaintiff notes that a 42 U.S.C. § 1983 action, such as USDC SD Cal, 18-2824, is a "hybrid" civil and criminal proceeding, and therefore falls within the intention of 28 U.S.C. § 1292(b), de facto (see e.g. *O'Neal v. McAnich*, 513 U.S. at 440-42 (1995) (Federal courts function in habeas corpus proceeding is to "review errors in the state criminal [proceedings]); *Brawn v. Allen*, 344 U.S. 44, 500, 510 (1953) (The federal court system remains as the authoritative forum for "litigating constitutional claims generally"); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (procedure in which "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game [for] federal [review]"); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (remedy designed to "interpose the federal courts between state and the people, as guardians federal rights-to protection the people from unconstitutional action.")

14. Plaintiff's position, is also supported by 28 U.S.C. § 1292(b) petitions under habeas interpretations. In a recent case, the issue arose as to whether an order under 28 U.S.C. § 2255 granting a defendant a new sentencing hearing

was "civil" for purposes of § 1292(b). (*United States v. Sampson*, No. 01-10384-MLW, 2012 WL 1633296, at *1 (D. Mass. May 10, 2012). The court noted that whether a Section 2255 proceeding is a civil action for purposes of 28 U.S.C. § 1292(b) was "a challenging question." (*Id.* at *10; see also *Rogers v. United States*, 180 F.3d 349, 352 n.3 (1st Cir. 1999) (explaining that "motions under § 2255 have often been construed as civil actions much like habeas corpus proceedings."); *Wall v. Kholi*, 131 S. Ct. 1278, 1289 n.7 (2011) (explaining that "there has been some confusion whether § 2255 proceedings are civil or criminal"). There are other examples of habeas corpus petitions being upheld for 28 U.S.C. § 1292(b) petitions (See *Rogers*, 180 F.3d at 352 n.3.).

15. Some courts to the extent that "the purpose of the appeal is not to review the correctness of an interim ruling, but rather to avoid harm to litigants. (*Lipsett v. Univ. of Puerto Rico*, 740 F. Supp. 921, 923 (D.P.R. 1990)). In this situation, Plaintiff has had his Constitutional rights, afforded by right before the material onset of the judicial process (i.e. *Brady* and Ca PC § 1054 discovery disclosures willfully and egregiously violated by the Defendant – in wich case the Interlocutory Appeal is also pursued to avoid harm.

16. Indeed some federal courts have stated that federal interlocutory appeal should not be used in "ordinary litigation" but only in protracted or long drawn out cases "such as anti-trust and conspiracy cases. (*Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64 (D.R.I. 1988) (citing *Fisons Limited v. United States*, 458 F.2d 1241, 1245 n.7 (7th Cir. 1972)); *Milbert v. Bison*

Laboratories, 260 F.2d 431, 433–35 (3d Cir. 1958) (citing House Report No. 1667, 85 Cong. 2d Sess., pp. 1, 2). On this point, Plaintiff notes each of: (a) this litigation is protracted and drawn out (though subject to due process) as the pendency of: (i) USDC SD Cal, 17-1997, in which in an Amended Complaint (Doc. 22) for the federal tort claim of Intentional Infliction of Emotional Distress (IIED), which the U.S. Department of Justice has addressed via joint stipulation (Doc. 24), the M242946DV false accuser, Mr. John Gregory Unruh, remains a de facto Fugitive from Summons (see e.g. Doc. 42); (ii) 9th Cir., 18-56202, Davis v. SDDA et. al., 42 U.S.C. § 1983, a priori, 4th and 8th Amendment violations (immediately actionable on parallel collateral attack, as posited with 18-2824 in the Complaint), fully briefed; (iii) 9th Cir., 18-56107, Davis v. SD Sheriff Dept., 42 U.S.C. § 1983, Denied "*Bounds*" Access to the Courts while unlawfully held pre-trial on Excessive and Punitive bail; (iv) 9th Cir., 18-56168, *Davis v. Adler et. al.*, generally, Cyberpiracy; and, (b) is alleged to be part of a conspiracy (see e.g. 9th Cir., 18-56168, ECF 29, Correspondence to the Court, with attached Joint Conspiracy claim developed, in part).

17. District Courts and Courts of Appeals have separate discretion in allowing interlocutory appeals under 28 U.S.C. § 1292(b) "confers upon district courts first line discretion to allow interlocutory appeals (*Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)). The discerning feature of the discretionary provision of 28 U.S.C. § 1292(b) is that it requires dual review. (*Heddendorf*, 263 F.2d at 888 (explaining that "It is to be seen that this amendment requires

judicial action both by the district court and by the court of appeals before a prospective appellant will be allowed to proceed with an appeal from an interlocutory decision not otherwise appealable under § 1292").

18. A party seeking review of an interlocutory order must first obtain a certification from the district court and then obtain leave from the appeals court to pursue the review of the certified interlocutory order. As Plaintiff is a self-litigant, he was unaware of this, and upon such research is now timely Petitioning the District Court for its Certification of his Interlocutory Appeal (9th Cir., 19-55049) as set forth herein.

19. The request to certify before the district court is either made at the time of the initial decision or made through a motion to certify and amend the order. As a result of the proceedings to-date, Plaintiff graciously requests that the District Court amend Orders (Doc. 5, 10) to show cause for the Complaint (Doc. 1); and, Certify this Motion and Petition to the Ninth Circuit for Interlocutory Appeal, as set forth herein.

20. While there is no prescribed time limit to seek certification from the district court, Plaintiff is moving expeditiously, prima facie. (note: the failure to take an authorized interlocutory appeal does not preclude including the issue in any subsequent appeal from the final judgment. (FRAP 5(a)(3))

21. "Indeed, a potential interesting use of 28 U.S.C. § 1292(b) is to expand a collateral order appeal such as seeking to add a precise issue with a ruling on qualified immunity entitled to interlocutory appeal as of

right." In this regard, Plaintiff notes that the Complaint (Doc. 1) for which the District Court requests that the Plaintiff show cause (Doc. 5, 10) is a matter in which the Defendant does not enjoy absolute immunity.

22. Pursuant to FRAP 5(b)(2), any response or cross appeal by the Defendant is due within 10 days after service of the petition.

23. 28 U.S.C. § 1292(b) specifically states that there is no automatic stay of the trial court proceedings. 28 U.S.C. § 1292(b) (an application for permissive appeal "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). A stay must be specifically requested, allowed, and entered by the trial court. However, in this situation, Plaintiff, herein moves for a Stay of the Court's Orders (Doc. 5, 10), pending review of this Movement, and, thereafter allowing for a reasonable time to reply to its Orders to Show Cause.

24. Three criteria must be met in order for the district court to certify an interlocutory order under 28 U.S.C. § 1292(b). The order or ruling at issue must present: (1) a "controlling question of law," (2) over which there is a "substantial ground for difference of opinion," and (3) an immediate appeal will "materially advance the ultimate termination of the litigation . . . ."

CONTROLLING QUESTION OF LAW

25. To be a "controlling" question of law, the legislative history suggests that the issue on appeal must be "serious to the conduct of the litigation either practically or legally (*Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.

1974) (citing Hearing on H.R. 6238, before Subcomm. No. 3 of the H. Comm. On the Judiciary, 85th Cong., 2d Sess. 2 (1958), reprinted in 3 U.S.C.C.A.N. 5256 (1958))). Plaintiff notes that *Brady* and Ca PC § 1054 violations are of Constitutional magnitude and concern, and broadly so (note: much as a Petition for a Writ of Certiorari to the Supreme Court, the notion of "importance" of a question(s) posed for Interlocutory Appeal, is viewed in terms of the litigation and the general substantive area, the Circuit, and/or the public or potential future litigants (See, e.g., *Donahue v. R.I. Dep't. of Mental health*, 632 F. Supp. 1456, 1480–81 (D.R.I. 1986) (explaining that "when one considers the critical importance of the statute, interlocutory review would surely redound to the benefit of not only the parties but also citizenry"); in this case and situation, *Brady* and Ca PC § 1054 regarding the Constitutional rights of a criminally accused; and placing their life and liberty in no uncertain jeopardy, whereby the practical conduct of a state actor in violation and deprivation of such civil rights is of high order, prima facie. Therefore, this is held as grounds for Certification of the Interlocutory Appeal. (threshold controlling legal issues such as subject matter jurisdiction, personal jurisdiction, capacity to be sued, and standing meet this requirement (See, e.g., *Moodie v. Fed. Reserve Bank of N.Y.*, 58 F.3d 879, 881 (2d Cir. 1995) (explaining that subject matter jurisdiction was a threshold issue); *Harris v. Evans*, 20 F.3d 1118, 1120 (11th Cir. 1994) (explaining that standing was another threshold issue). As a result, Plaintiff, a self-litigant, was correct in so far as to timely moving for

Interlocutory Appeal (e.g. Doc. 7; as opened 9th Cir., 19-55049), though incorrect in not seeking Certification from the District Court, as sought herein this Petition.

26. The District Court indicates that given Superior Court of California, San Diego County, case no.: M242946DV is an ongoing cause, under Younger, it cannot invoke jurisdiction. However, jurisdiction itself, is an important question subject to Certification for Interlocutory Appeal as "important" and meeting the "controlling" requirement thus favoring certification and permission to appeal (See *Marquis v. FDIC*, 965 F.2d 1148, 1151 (1st Cir. 1992) (noting the "importance of the jurisdictional question and its unsettled nature"); *Springfield School Committee v. Banksdale*, 348 F.2d 261, 262 (1st Cir. 1965) (noting importance of the jurisdictional question); *Lawson v. FMR LLC.*, 670 F.3d 61, 62 (1st Cir. 2010) (noting certified order "raised important questions of first impression"); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 821 (1st Cir. 1992) (holding that "in light of the pivotal importance and broad commercial consequences of the question, we accepted certification"); important' we allowed the intermediate appeal to proceed"); and *S.G. v. American Red Cross*, 938 F.2d 1494, 1495 (1st Cir. 1991) (noting the importance of jurisdiction issue). Therefore, this is held as grounds for Certification of the Interlocutory Appeal.

27. The "controlling question of law" element has two sub-parts: the presentment of a pure question of law and that the legal question be "controlling." Courts have noted that a legal issue suitable for interlocutory review under 28

U.S.C. § 1292(b) must pose a "'pure question of law' rather than 'merely . . . an issue that might be free from a factual contest (*United Airline Inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010) (quoting *Ahrenholtz v. Bd. of Tr. of Univ. of Illinois*, 219 F.3d 674, 676–77 (8th Cir. 2000)).)

28. No disputed facts requiring reference to the record in such capacity. Further, there are no factual issues to turn on; and the questions posed are not in the abstract, providing sound basis for the appeal interlocutory. In this case, Plaintiff has presented evidence in the Complaint that the Defendant is in violation of his Constitutional rights; and, that such rights are not an integral part of the judicial process; and, therefore, there cannot be interference or enjoinment in such capacity (e.g. the movement and claim(s), could be to interpose the federal court between the state and the Plaintiff, as posited by the Plaintiff). There is no factual dispute; and, if there were to be, Defendant would have to either or both of respond to the Complaint, or this Movement and Petition, a priori.

A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

29. The District Court indicates that, "[Plaintiff] suggests the criminal prosecution is ongoing, which necessarily bars this Court from interfering by hearing a parallel suit against the prosecuting officer until those proceedings are complete. See *Younger v. Harris*, 401 U.S. 37 (1971); see also *Mourning v. Gore*, 2013 WL 4525264 (S.D. Cal. 2013) ("Under *Younger*, federal courts may not interfere with ongoing state criminal proceedings absent extraordinary

circumstances."). The Ninth Circuit is clear that *Younger* extension is not limited to requests for injunctive relief, but also extends to suits for damages under Section 1983. See *Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) ("When a state criminal prosecution has begun, the *Younger* rule directly bars a declaratory judgment action" as well as a sec. 1983 action for declaratory relief and damages "where such an action would have a substantially disruptive effect upon ongoing state criminal proceedings."). (Doc. 5, pg. 2, ln 3-13)

30. In reply, though not to be construed as his opposition to abstention under *Younger* doctrine, expressly reserved: (a) Plaintiff has noted that not all relief requested would be of a Declatory Judgment variety (e.g. to merely produce the *Brady* and Ca PC § 1054, willfully withheld by the Defendant in violation of the Plaintiff's Constitutional rights) (further, Plaintiff could move for an interim order to produce these disclosures; while staying judgment of the action in lieu of a dismissal without prejudice (which is often done under *Younger*), and is expressly reserved); (b) as these required disclosures are found to be not an integral part of the judicial process by authority, but to "prime" such, there is no disruption to an ongoing state criminal proceeding, prima facie—the district court, in such capacity, does not interfere or enjoin; it interposes itself, effectively to preserve the Plaintiff's Constitutional rights; and, (c) there is significant opposition in regard to 42 U.S.C. § 1983 (i.e. not all are outright barred by *Younger* in parallel to a state criminal proceeding) actions of the Due Process variety (5th and 14th Amendment) as compared to those of the 4th and

8th Amendment variety, actionable in parallel. On this point (c), Plaintiff notes that because *Brady* and Ca PC § 1054 violations come before the judicial process in a state criminal proceeding, they are as actionable in parallel as either 4th or 8th Amendment claims in cross-action. Plaintiff presents a question of first impression before the court with the potential for future precedence in such capacity.

CERTIFICATION MAY MATERIALLY ADVANCE THE TERMINATION OF A CASE

31. "[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal." (*Bank of New York v. Hoyt,* 108 F.R.D. 184, 188 (D.R.I. 1985)). In this case, however, the premature closing of a complaint and cross-action, is a Due Process violation. There is not much procedural difference between locating a criminal defendant to have him appear before a state as charged; as, there is to such defendant to be afforded his Constitutional right to *Brady* and Ca PC 1054 discovery disclosures, a non-integral part of the judicial process; with respect to advancement of such matters—doing so is clear violation of Due Process; which is able to be moved on parallel action and collateral attack such as 18-2824.

32. 28 U.S.C. § 1292(b) would encompass issues whose resolution would "likely" have an effect on the outcome. For instance, the *First Circuit in Rodriquez v. Banco Central*, 917 F.2d 664, 664 (1st Cir. 1990), deemed the accrual of a cause of action for statute of limitations purposes to constitute a "controlling question of law" even

though other causes of action remained for trial. Thus, inherent to the controlling question of law criterion is timing in that an issue may be controlling at one point of the litigation but not another. (*Discretionary Appeals*, supra note 11, at 619)

33. "In certain circumstances 'certification may be justified at a relatively low threshold of doubt" (*United States v. Sampson*, Cr. No. 01-10384-MLW, 2012 WL 1633296, at *12 (D. Mass. May 10, 2012). (quoting WRIGHT ET AL., supra note 3, § 3930, at 494–95); see *Discretionary Appeals*, supra note 11, at 624 ("degree of legal doubt escapes precise quantification"). There is no doubt that the Defendant is in clear violation of *Brady* and Ca PC § 1054.

34. However, Plaintiff is cognizant that "the issue must relate to the actual legal principle itself, not the application of that principle to a particular set of facts (*United Airline Inc. v. Gregory*, 716 F. Supp. 2d 79, 92 (D. Mass. 2010) ("Although this Court's ruling may be the first instance in which a court has applied he ADA preemption test to a tort claim by an airline against a customer, the defendants over-state the novelty of the holding").

35. Plaintiff notes that "[i]t is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute" (*Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983). Therefore, it is imperative that the Defendant make an appearance and oppose this Motion. In the

absence thereof, this Court must automatically certify the movement for Interlocutory Appeal by procedural default unless found to be frivolous (note: is this litigation is protracted; and its related litigation as cited herein is not frivolous, this litigation is, by definition, not frivolous either).

36. It has been generally accepted that where the appellate determination would result in either litigation or similar actions "benefit[ing] from prompt resolution of th[e] question," certification is favored (*Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 182 (quoting *Camacho v. P.R. Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004)); see also *Lawson v. FMR LLC.*, 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (stating that "the fundamental legal issue is likely to shape both discovery initiatives and settlement strategies in a fashion which should expedite resolution of the case overall."). As a result, this case presents a precedential opportunity regarding the willful suppression of required *Brady* disclosures by Constitutional right of a criminally accused. Thus, the Issue presented herein, will greatly narrow and future disputes of the same variety.

F. STATEMENT OF FACTS

37. Has the Plaintiff made *Brady* (and Ca PC § 1054) requests in the related proceeding (M242946DV, CA, San Diego County).

(a) Plaintiff demonstrates the facts and factual allegations in the Complaint (Doc. 1, R. at 72-95.) of Defendant's *Brady* violations.

(b) Plaintiff has noted exculpatory evidence on M242946DV, false accuser, federal felon, Mr. John Gregory Unruh (Henderson, NV) including

but not limited to, "Defendant Greg has previously provided false, partial, or misleading statements to authorities including committing Perjury (e.g. *United States of America v. J. Gregory Unruh*, USDC DA, case no .: 2:95-mj-05124-MS- (2005)). Plaintiff alleges that Fugitive from Summons Greg is a pathological liar." (Doc. 1, ¶ 9, R. at 79.) Yet, Defendant has not provided any information on Greg Unruh despite it each of, a priori, being a Constitutional requirement; and, secondarily, being Noticed (Expressly and Constructively).

(c) Plaintiff has put Defendant on Notice. For example,

(i) "In July 2018, Plaintiff provided a Demand Letter (July 19, 2018) to the Office of the City Attorney, with several reasonable and lawful demands including but not limited to fully, timely, complying with its *Brady* and Ca PC § 1054 obligations," (Doc. 1, ¶ 12, R. at 80.)

(ii) "On August 6, 2018, Defendant Timothy and his employer, were provided additional matters relevant to M24946DV, to the willful and unlawful withholding of required disclosures, and otherwise," (Doc. 1, ¶ 14, R. at 80.)

(iii) "On September 11, 2018, via formal Third Party Process Service, Plaintiff brought forth the following to Defendant Timothy and his employer for review: (a) "the Office of the City Attorney (San Diego) is in violation of Discovery rules under each Ca. Pen. Code § 1054; and, as set forth under *Brady v. Maryland*, 373 U.S 83 (1963); generally, regarding: (i) matters set forth in each of the Discovery Demand letters (e.g. that of July 19, 2018; and, July 25, 2018). As a result, M24946DV, is unable to advance forward until

these pre-trial matters (and others) are produced in accordance of: (i) California state, and, federal law; (ii) legal Demand; and, (iii) in court of the case overall."). As a result, this case presents a precedential opportunity regarding the willful suppression of required Brady disclosures by Constitutional right of a criminally accused. Thus, the Issue presented herein, will greatly narrow and future disputes of the same variety.

G. ARGUMENT

38. Plaintiff notes that the Complaint (Doc. 1; also 9th Cir., 19-55049, ECF 3,R. at 72-95.) indicates that *Brady* (and its California analog/parallel, Ca PC § 1054) "e.g. *Imbler v. Pachtman*, 424 U. S. 409, 428, 430 (1976) "lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process1" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams*, 465 F.2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972); *Haaf v. Grams*, 355 F. Supp. 542, 545 (Minn. 1973); *Peterson v. Stanczak*, 48 F. R. D. 426 (ND Ill. 1969). Contra, *Barnes v. Dorsey*, 480 F.2d 1057 (CA8 1973)." (18-2824, Complaint, Doc. 1, pg. 6, ¶ 1, also 9th Cir., 19-55049, ECF 3, R. at 77.)

39. Plaintiff, in the Complaint (Doc. 1), has evidenced the willful suppression of exculpatory evidence (i.e. *Brady* violations) by Defendant (e.g. see 18-2824, Complaint, Doc. 1, pg. 8, ¶ 9, pg. 9-10, ¶ 1.; pg. 10-11 ¶¶ 17(a-b), also 9th Cir., 19-55049, ECF 3, R. at 79-82.) State actors do not enjoy absolute immunity from federal suits (e.g. pursuant to 42 U.S.C. § 1983) based on such

claims. Further, Plaintiff has brought forth authorities (e.g per prior paragraph) indicating that unconstitutional suppression of exculpatory evidence (i.e. *Brady* violations) are: (a) not matters from which absolute immunity is held; and, (b) importantly, that *Brady* violations are not an "integral part of the judicial process". Therefore, by logical extension, such violations do not require final, favorable determination of the underlying state criminal proceedings (i.e. M242946DV in this situation and crossclaim) before cross-claim – and – there upon, the federal court is unable to abstain under *Younger*, prima facie. (Plaintiff posits that *Brady* violations are Due Process violations of a dimension holding one's ability to Petition (i.e. Petition Clause) the government under the 1st Amendment as an impossibility; and, this, generally, is why the ruling and case law citations from *Imbler* support that: (a) it is not an integral part of the judicial process; and, (b) prosecutors do not enjoy absolute immunity from such).

40. In further support of Plaintiff's argument for this Issue (#1), he notes that:

(a) "*In re Brown*, 17 Cal. 4th 873, 881, 72 Cal. Rptr. 2d 698, 952 P.2d 715 (1998)). [A]n incomplete response to a specific (Brady) request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. (*U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Any failure by a prosecutor to

respond to such a specific and relevant request is seldom, if ever, excusable (*U.S. v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding modified by, *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))." (Demand Letter [Plaintiff to Defendant], July 19, ¶¶ 14-17)" (Doc. 1, pg. 16-17, ¶ 23(f); also 9th Cir., 19-55049, ECF 3, R. at 87-88.)

(b) ""CONSTRUCTIVE POSSESSION OR KNOWLEDGE OF DISCOVERABLE MATERIAL. Your duty of disclosure includes any discoverable item or information, as listed in this informal request, that is possessed by and known to the Office of the District Attorney, any law enforcement agency that has investigated or prepared the case against the Defendant, or any person or agency hired to assist your office or the investigating agency in this case (Pen. Code, §1054.5(a)). You are charged with constructive knowledge of any discoverable item or information possessed by and known to the investigating law enforcement agency (*In re Jackson* (1992) 3 Cal. 4th 578, 11 Cal. Rptr. 2d 531). You are charged with the duty to access reasonably accessible databases, such as CII and FBI records, that are available to your office (*In re Littlefield*, 5 Cal. 4th 122, 135-136, 19 Cal. Rptr. 2d 248, 851 P.2d 42 (1993))." (Demand Letter [Plaintiff to Defendant], July 19, ¶¶ 7-8)" (Doc. 1, pg. 15, ¶ 23(a), also 9th Cir., 19-55049, ECF 3, R. at 86.)

41. The lower court errors in suggesting that, "[t]he allegations [Plaintiff] makes against [Defendant] may be mooted by the state court proceedings, either at the trial level or on appeal." (Doc. 5, pg. 2, ln 14-15, R. at 7.) This may be true,

though unlikely, if such matters, as generalized, by the lower court, were an intimate or integral part of the judicial phase of a criminal proceeding; however, a priori, as presented in the Complaint (Doc. 1), and brought forth in the Interlocutory Appeal, *Brady* (and Ca PC § 1054) Discovery Disclosures are not an integral part of the judicial process; they are Constitutional rights; and, separately timely so. (*Izazaga v. Superior Court*, 54 Cal. 3d 356, 378, 285 Cal. Rptr. 231, 815 P.2d 304 (1991), as modified on denial of reh'g, (Oct. 24, 1991), is the leading case interpreting the statutory discovery scheme. *Izazaga* also acknowledges that the defense is entitled to a broad range of discovery not specifically spelled out in the statutory scheme) (see also, Pen. Code, §1054.1 reads in part: "The prosecution shall disclose . . . materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." Our Supreme Court has placed a much greater burden on the prosecution than just producing evidence that is in its actual possession. The court in *In re Littlefield*, 5 Cal. 4th 122, 135, 19 Cal. Rptr. 2d 248, 851 P.2d 42 (1993) restated the prosecutor's burden: "California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution." In *Pitchess v. Superior Court*, 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974), the court construed the scope of prosecutorial "possession and control" as encompassing information "reasonably accessible" to the prosecution. "We find no basis for

[assuming] that, by designating discoverable information under . . . 1054.1 as that 'in the possession' of the prosecution or its . . . agencies, Proposition 115 was intended to abrogate this prior rule precluding the prosecution from withholding information that is 'reasonably accessible' to it" (*In re Littlefield*, 5 Cal. 4th 122, 135, 19 Cal. Rptr. 2d 248, 851 P.2d 42 (1993)). A broader duty also arises from the United States Constitution. The Supreme Court has held that "the . . . prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); see also *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (see also, Pen. Code, §1054(e), a statute cannot preclude discovery where it is required to vindicate rights guaranteed by the California Constitution (*People v. Superior Court*, 78 Cal. App. 4th 403, 92 Cal. Rptr. 2d 829 (6th Dist. 2000)).

42. A criminal defendant's well-established right to due process (*Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 121 Cal. Rptr. 3d 841 (6th Dist. 2011)). As discovery is required by Constitutional right and authorities, pre-trial; and held as not an intimate part of the judicial process; blatant, egregious, or willful suppression of such information; is immediately actionable on parallel collateral attack and cross-action (such as USDC SD Cal, 18-2824).

43. Our appellate courts have never held that discovery procedures were unavailable or inappropriate in advance of the preliminary examination. Instead the courts have simply

cautioned magistrates not to grant discovery motions "in the absence of a showing that such discovery is reasonably necessary to prepare for the preliminary examination" and observed that "[p]retrial discovery is aimed at facilitating the swift administration of justice, not thwarting it" (*Holman v. Superior Court*, 29 Cal. 3d 480, 174 Cal. Rptr. 506, 629 P.2d 14 (1981); *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 99 Cal. Rptr. 2d 149, 5 P.3d 203 (2000)). Plaintiff notes that willfully suppressing *Brady* information is, prima facie, thwarting the administration of justice. Further, Plaintiff has alleged that Defendant's willful suppression is extensive enough to not only be *Brady* violations; but, also potentially in violation of 18 U.S.C. § 242; and the case that Plaintiff is building towards Joint Conspiracy intended for separate litigation.

44. Pen. Code, §1054(e) and Pen. Code, §1054.7 do state that the prosecution must provide the required information to the defense "at least 30 days before trial." However, our appellate courts have held that Pen. Code, §1054.7 "does not preclude a defendant from making an earlier discovery motion under Pen. Code, §1054.5, nor does it preclude such a motion from being granted more than 30 days in advance of trial" (*Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 121 Cal. Rptr. 3d 841 (6th Dist. 2011) (preliminary hearing magistrate had the power to grant discovery in support of defendant's motion to suppress evidence at the prelim)). As a result, generally, California authority holds an inside date of fifteen (15) days from a complaint; and, an outside date of thirty (30) days from the first Trial Call; without prejudice as to violations

of such. Defendant is grossly in violation of such by approximately fourteen (14) fortnights.

45. The *Magallan* court also held that defense discovery under Pen. Code, §1054.1 was not limited to a "trial setting" which did not include the preliminary hearing (*Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 1458, 121 Cal. Rptr. 3d 841 (6th Dist. 2011)). Most importantly, the *Magallan* court reaffirmed the continuing viability of *Holman v. Superior Court*, 29 Cal. 3d 480, 485, 174 Cal. Rptr. 506, 629 P.2d 14 (1981) which was decided prior to enactment of the statutory scheme and held that a defendant is entitled to preprelimiary hearing discovery upon "a showing that such discovery is reasonably necessary to prepare for the preliminary examination.

46. THE DEFENDANT HAS THE RIGHT TO DISCOVERY BEFORE THE PRELIMINARY HEARING IN ORDER TO EXERCISE SPECIFIC STATUTORY RIGHTS. The changes Proposition 115 made to the nature of preliminary examinations did not result in magistrates lacking the power to order discovery. Proposition 115 did not eliminate a criminal defendant's right to present specific statutory motions at the preliminary examination. Hence, the need for discovery in support of such motions is left unchanged by Proposition 115's other changes to the nature of preliminary examinations (*Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 121 Cal. Rptr. 3d 841 (6th Dist. 2011)). The appellate courts have reasoned it would defy common sense that the Legislature would provide rights under certain statutes but at the same time deny the defendant any means to pursue those

rights. Although *Magallan* and its progeny have not endorsed an expansive power to grant discovery prior to the preliminary hearing, the decisions have held that Pen. Code, §1054(e) itself specifically recognizes that certain discovery is exempted from the Prop 115 structure where it is necessitated by other express statutory provisions. In addition, discovery must be permitted before a preliminary hearing to exercise rights "mandated by the Constitution of the United States," such as Brady obligations to disclose material evidence favorable to the accused (*Galindo v. Superior Court*, 50 Cal. 4th 1, 13, 112 Cal. Rptr. 3d 673, 235 P.3d 1 (2010)).

47. A DEFENDANT HAS THE RIGHT TO DISCOVERY BEFORE THE PRELIMINARY HEARING IN ORDER, IN PART, TO SUPPORT A PENAL CODE §1538.5 MOTION. Under Pen. Code, §1538.5(f)(1) a defendant is statutorily authorized to bring a motion to suppress evidence at the preliminary examination, if the prosecution seeks to introduce, at the preliminary examination, evidence that the defense claims is the product of an unreasonable search and seizure. Therefore, a defendant's right to due process under the California Constitution takes precedence over the discovery statutes and entitles the defense to the discovery necessary to support a Pen. Code, §1538(f) motion at the preliminary hearing, even if the requested material is not enumerated in Pen. Code, §1054. In *Magallan v. Superior Court*, 192 Cal. App. 4th 1444, 1460, 121 Cal. Rptr. 3d 841 (6th Dist. 2011), the court held the preliminary hearing magistrate had the power to grant discovery in support of defendant's statutory right to move to suppress

evidence at the prelim. Proposition 115 did not eliminate a criminal defendant's right to bring a suppression motion at the preliminary examination. Hence, the need for discovery in support of such a motion was left unchanged by Proposition 115's other changes to the nature of preliminary examinations. A defendant's right to due process under the California Constitution takes precedence over Prop 115 and entitles the defense to the discovery necessary to support a Pen. Code, §1538.5(f) motion. The California Supreme Court has long recognized that a criminal defendant has a right to due process under the California Constitution at a suppression hearing. [T]he spirit and the purpose of the right to due process under the California Constitution is to assure to everyone a full and ample opportunity to be heard before he can be deprived of his liberty or his property [citation]. (*People v. Hansel*, 1 Cal. 4th 1211, 1219-1220, 4 Cal. Rptr. 2d 888, 824 P.2d 694 (1992)).

48. THE DUTY TO DISCLOSE FAVORABLE EVIDENCE EXISTS PRIOR TO THE PRELIMINARY HEARING – in turn, this provides the support, in part, that *Brady* (and Ca PC § 1054) Disclosures, Constitutional rights of a criminal defendant, are not an integral part of the judicial process. In *Stanton v. Superior Court*, 193 Cal. App. 3d 265, 267, 239 Cal. Rptr. 328 (4th Dist. 1987) , the court held that the prosecution's duty to disclose material evidence that is favorable to the defense under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) applies at the time of the preliminary hearing. In *Stanton*, the court struck an element of the charged offense because of "the

prosecution's failure to disclose evidence material to defense cross-examination of eyewitnesses at a preliminary hearing." The enactment of Proposition 115 (Cal. Const. art. I, §3(b), (c)) which authorized the use of hearsay evidence at preliminary hearings and the new criminal discovery statutes (Pen. Code, §§1054 et seq.) did not abrogate the prosecutor's *Brady* obligations at the preliminary hearing (*People v. Gutierrez*, 214 Cal. App. 4th 343, 350, 153 Cal. Rptr. 3d 832 (1st Dist. 2013), as modified on denial of reh'g, (Apr. 9, 2013) and review filed, (Apr. 19, 2013) and cert. denied, 134 S. Ct. 684, 187 L. Ed. 2d 577 (2013)). A defendant has a due process right to the disclosure of evidence, prior to a preliminary hearing, that is both favorable to the defense and material to the magistrate's determination of whether probable cause exists to hold the defendant to answer (*Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 1087, 154 Cal. Rptr. 3d 528 (2d Dist. 2013), review filed, (May 3, 2013)). Plaintiff posits that he has evidenced exculpatory evidence in multiple capacities; enough time has passed for Defendant to be clearly in violation of such as supported by the authorities put forth.

49. DUE PROCESS MANDATES DISCLOSURE OF EVIDENCE THAT UNDERMINES THE CREDIBILITY OF PROSECUTION WITNESSES. In the landmark case of Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that the suppression of material evidence favorable to the defendant violates the guarantees of due process. We now hold that the suppression by the prosecution of

evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. In *Giglio v. U.S.*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) the United States Supreme Court held that evidence that affects the credibility of a witness whose testimony might impact upon the defendant's guilt or innocence falls within the *Brady* rule of compelled disclosure. The *Giglio* holding was reaffirmed in *U.S. v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985): "Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule [citation]. Such evidence is 'evidence favorable to an accused' [citation]." The California Supreme Court adopted this reasoning in *People v. Pensinger*, 52 Cal. 3d 1210, 1272, 278 Cal. Rptr 640, 805 P.2d 899 (1991), as modified on denial of reh'g, (Apr. 24, 1991), holding that "[t]he duty to disclose evidence favorable to the accused extends to the disclosure of evidence relating to the credibility of witnesses."

50. The lower court conclusory (and out of place, off topic) states that, "the policy rationales that generally counsel in favor of abstention apply here," (Doc. 5, pg. 2, ln 13-14, also 9th Cir., 19-55049, ECF 3, R. at 7.) in reference to *Younger* discussion (Doc. 5, pg. 2., ln 5-14, also 9th Cir., 19-55049, ECF 3, R. at 7.) To wit, Plaintiff has found his "counsel" (Ronis & Ronis) deficient and ineffective in some but not all capacities (Plaintiff has a Sixth Amendment right to the "assistance" of counsel; and for such to be "effective"). For example, Plaintiff has Constitutional rights that

are not strategic or tactical decisions of his counsel (e.g. a Constitutional right to *Brady* disclosures, primes even a Preliminary Hearing) – and counsel, upon Demand, or Request, shall not impede, in ANY capacity, on such movement by a criminally accused. Plaintiff has certain inalienable rights to control his counsel and direct them as he deems fit; especially of matters that are Constitutionally protected; and, prime the judicial phase of a criminal prosecutorial and judicial process. The lower court indicates that, "more importantly, allowing a parallel federal proceeding against a state officer would impermissibly intrude on an important state interest in conducting prosecutions without interference," (Doc. 5, pg. 2, ln 16-18, also 9th Cir., 19-55049, ECF 3, R. at 7.) Plaintiff, again, finds that such is out of context and without legal basis. The prosecution (i.e. the Office of the City Attorney (San Diego)) is not usurped of its powers on behalf of the jurisdiction under the State of California if, such prosecution (on its own accord), or a Court (whether State or Federal) finds that a prosecutor (e.g. such as Defendant) is disqualified and the subject of parallel action. The fact remains, there are permissible parallel actions.

51. In summary, an abundance of authority supports the facts and factual allegations as presented: namely, that Defendant has willfully suppressed exculpatory evidence (e.g. criminal records on M242946DV false accuser, J. Gregory Unruh) in violation of Plaintiff's Constitutional Brady rights; which, themselves enjoy no immunity, and are actionable in parallel on cross-action (such as USDC SD Cal, 18-2824 from

which Interlocutory Appeal is sought and presented to the District Court for Certification).

H. REQUEST FOR RELIEF

52. The plain statutory language of 28 U.S.C. § 1292(b) provides for no additional discretion to deny acertification request when all three of the statutory criteria have been met (See Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims* WASH. L. REV. 733, 780 (2006) ("[T]he text of [§ 1292(b)] simply does not give the district court unlimited discretion [to deny certification when the statutory factors are present])

53. Plaintiff has demonstrated that, the question of law found to be proper for certification concerned the scope of 28 U.S.C. § 1292(b) itself, namely whether a Section 2255 proceeding was a "civil action" for purposes of 28 U.S.C. § 1292(b) (e.g. as set forth in one recent case, *United States v. Sampson*, Cr. No. 01–10384–MLW, 2012 WL 1633296, at *10 (D. Mass. May 10, 2012).); and, unequivocally covers civil-criminal hybrids, such as this case.

54. The District Court should Grant this Petition and Certify the Issue Presented for presentation to the Ninth Circuit Court of Appeals for Interlocutory Appeal.

55. The District Court via Order during the pendency of the Interlocutory Appeal should maintain its mandate and not dismiss the Complaint (Doc. 1) as set forth in its Orders to Show Cause (Doc. 5, 10).

56. In the alternative, the District Court, a priori, should grant the Plaintiff a reasonable

period of additional time to respond to its Orders to Show Cause, beyond January 16, 2019.

57. The District Court should grant any other relief that the Court deems appropriate.

I. CERTIFICATION AND CLOSING

58. Under FRCP 11, by signing below, I certify to the best of my knowledge, information, and belief that this Petition and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the petition otherwise complies with the requirements of Rule 11, as well as FRAP 32(c)(2), and FRAP 5(b),(c).

DATED: January 16, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR ("TIMBO")
Defendant.

Case No.: 18-cv-02824-LAB-LL

Notice of Appeal of ORDER (Doc. 5) Requesting that Plaintiff Show Cause for the Complaint (Doc. 1)

Dept: 14B, Hon. Larry A. Burns

[January 9, 2019]

Notice is hereby given that the Plaintiff in the above named case hereby timely appeals to the United States Court of Appeals for the Ninth Circuit from the lower court's Order (Doc. 5, January 9, 2019) requesting that the Plaintiff show cause for the Complaint (Doc. 1). Plaintiff notes for posterity, he is the only self-litigant in the history of the Ninth Circuit to have a Supplemental Brief accepted for filing (twice, 18-56202 and 18-56107). Plaintiff notes that the Complaint and pending action before the Court (not imaged in an abuse of discretion, is readily comprehensible, and the antithesis of frivolous litigation).

Plaintiff, generally, has evidenced from authority in the Complaint (Doc. 1), that *Brady* and Ca PC sec 1054 violations, are each of federal and state constitutional rights; and not an "intimate" part of the judicial process; and, therefore actionable without Younger Abstention discussion, and, in other capacities as brought forth.

The lower court has errored in its ORDER (Doc. 5) requesting to show cuase for the Complaint (Doc. 1) and subject to appeal.

Under Rule 3(c)(1)(A), the parties are as named in the header of the filing.

Under Rule 3(d), the district court clerk must serve notice of the filing of this Notice of Appeal of Order on all parties.

As the Court requests that the Plaintiff indicate how the Complaint is not "frivolous", relief from the Order (Doc. 5), under FRCP 59, would not be advisable to all parties, and prejudicial to the Plaintiff if required. Plaintiff is cognizant of such.

Certification and Closing

Under FRCP 11, by singing below, I certify to the best of my knowledge, information, and belief that this filing: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law or by a non-frivolous argument for extending, modifying or reversing existing law; (c) the factual contentions have evidentiary support of, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;

and (d) the filing otherwise complies with the requirements of FRCP 11.

DATED: January 9, 2019

s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: 18cv02824-LAB (LL)

ORDER TO SHOW CAUSE

[January 7, 2019]

Plaintiff's filings are no model of clarity, but here are the facts as best the Court can discern them: Plaintiff Gavin Davis is a defendant in an ongoing state prosecution in which Defendant Timothy O'Connor is the prosecutor. Davis has filed this Section 1983 suit alleging that O'Connor brought false charges against him and then willfully suppressed exculpatory evidence. *See generally* Dkt. 1.

Beyond this, the landscape is less clear. After Davis filed his initial complaint in this Court, he filed a "Notice of Removal" in which he apparently seeks to remove San Diego Superior Court Criminal Case No. M242946DV to federal court. Dkt. 3. There are numerous problems with this. First, a state criminal prosecution must be removed within 30 days of arraignment, and it appears the state court case here began in April 2018, more than six months before the current

case was filed. 28 U.S.C. § 1455(b)(1). Second, generally only state prosecutions involving a federal officer as a defendant may be removed to federal court, and there is no allegation that Davis is a federal officer. 28 U.S.C. § 1442.

Accordingly, given that it appears removal is inappropriate, what we are left with is premature Section 1983 lawsuit for what Davis alleges are constitutional violations by the state prosecutor. Davis suggests the criminal prosecution is ongoing, which necessarily bars this Court from interfering by hearing a parallel suit against the prosecuting officer until those proceedings are complete. See *Younger v. Harris*, 401 U.S. 37 (1971); see also *Mourning v. Gore*, 2013 WL 4525264 (S.D. Cal. 2013) ("Under *Younger*, federal courts may not interfere with ongoing state criminal proceedings absent extraordinary circumstances.").

The Ninth Circuit is clear that *Younger* extension is not limited to requests for injunctive relief, but also extends to suits for damages under Section 1983. See *Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) ("When a state criminal prosecution has begun, the Younger rule directly bars a declaratory judgment action" as well as a section 1983 action for declaratory relief and damages "where such an action would have a substantially disruptive effect upon ongoing state criminal proceedings."). The policy rationales that generally counsel in favor of abstention apply here. The allegations Davis makes against O'Connor may be mooted by the state court proceedings, either at the trial level or on appeal. And more importantly, allowing a parallel federal proceeding against a state officer would

impermissibly intrude on an important state interest in conducting prosecutions without interference.

When *Younger* abstention applies, as the Court finds it likely does here, the Court may not retain jurisdiction but must instead dismiss the action without prejudice. See *Juidice v. Vail*, 430 U.S. 327, 348 (1977). Accordingly, by **January 16, 2019**, Davis is **ORDERED TO SHOW CAUSE** why this case should not be dismissed without prejudice under the *Younger* abstention doctrine. If Davis maintains the criminal prosecution is removable, he must describe in detail the basis for removal. Davis' response to this Order to Show Cause must be no longer than five pages, excluding any appended materials.

Davis is encouraged to write in plain English and should refrain from using excessive legalese; this does not help his case, it confuses and muddles it.

IT IS SO ORDERED.

Dated: January 7, 2019

/s/ Larry A. Burns
HONORABLE LARRY ALAN BURNS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: 18-cv-02824-LAB-LL

Related Case No.: Superior Court of California, San Diego County, M242946DV

NOTICE OF (1) MOTION TO ACCEPT SUPPLEMENTAL FILING; (2) WITHDRAW OF DOC. 4; and, thereafter, (3) MOTION OF REMOVAL OF SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, CASE NO.: M242946DV

Date: EX PARTE
Time: N/A
Courtroom: 14A, Hon. Larry A. Burns

(Received January 7, 2019, Clerk, U.S. District Court Southern District of California By ___ Deputy)

PLEASE TAKE NOTICE that Plaintiff is moving for:

(1) Withdraw of the prior Notice and Motion for Removal of Superior Court of California (San Diego), case no.: M242946DV

(Doc. 4), as this Court found acceptance to be determined Nunc Pro Tunc upon, a priori, moving for, and granting of, acceptance of supplemental filings (Doc. 3);

(2) Advancement of the Noticed Motion Hearing presently set for February 25, 2019 in this case for such purpose, to Ex Parte, as moved herein;

(3) Motion to Accept a Supplemental Filing per Doc. 3 for Removal of Superior Court of California (San Diego), case no.: M242946DV to this Court, and, separately, this case (i.e. 18-2824); and,

(4) thereafter,

(a) upon Acceptance (#3) of the Supplement Filing, review of the Attached: (i) Notice of Motion, (ii) Statement of Removal; and, (iii) Excerpts of Record (M242946DV) or, in the alternative,

(b) Plaintiff shall timely file a stand-alone filing for Removal of M242946DV as a stand-alone case in this Court.

Of Note, Plaintiff's authority, generally, for such movement, of Superior Court of California, San Diego County, case no.: M242946DV to the in the U.S. District Court, Southern District of California is pursuant to 28 U.S.C. § 1446(a) and 28 U.S.C. § 1443 for Defendant Timothy, in his official capacity with the Office of the City Attorney (San Diego), Constitutional violations (e.g. subject of this cross-action, USDC SD Cal, 18-2824, 42 U.S.C. § 1983, December 17, 2018) and other good cause; which provides this Court's jurisdictional basis for the removal.

Superior Court of California (San Diego) case no.: M242946DV is one (1)(latent, and

unlawful in other capacities as well) Ca PC § 166(c)(1) charge. A Statement of Facts, generally regarding such is including in the Attached Statement.

Plaintiff has never been provided the Superior Court of California M242946DV complaint, discovery and such matters from Defendant Timothy (plaintiff therein, in his official capacity) that he seeks removed to this Court. Plaintiff only recently obtained such information, in part; and, on his own accord, on January 2, 2019 (as brought forth in the supporting M242946DV Record filed hereto). Authority showing the permissibility and timeliness as valid is also found in the attached Statement hereto.

Plaintiff has Served the Defendant via U.S. Mail on January 7, 2019, and filed the Notice of Removal. Defendant was previously Served of the nearly identical movement (i.e. Doc. 4) as to here (minor technical changes). Defendant, and his employer, have been Noticed (Constructive Notice), also, through: (a) email; and, (b) indirectly through Plaintiff Notifying, in multiple capacities, his M242946DV criminal defense attorneys (Ronis & Ronis, San Diego). Plaintiff notes, in part, the Removal action, a priori; if properly effectuated, is a Constitutional right and not a strategic or tactical decision; and, separately, that in this specific case (i.e. 18-2824), the grounds for removal are supported by each of the Defendant violating his Constitutional rights (Plaintiff has attempted appropriate redress in the Superior Court of California, and is unable to access the courts as moved (e.g. see Mardsen Motion in the M242946DV Excerpts of Record));

and, also brining a clearly false charge, subject to Fraud, Abuse of Process, and as otherwise alleged in the Complaint (Doc. 1), or subsequent amendments or supplements, as the case may be.

On January 7, 2019, Plain filed a Notice of Removal with the State court, rendering the filing "Effective" by this Date upon such movement. (28 U.S.C. § 1446(d))

This Notice is 28 U.S.C. § 1446(c) compliant.

This Notice and movement is based on, a priori, the Movement for acceptance of the supplemental attached filing as expressly reserved in the Complaint (Doc. 1, ¶ 5), and hereby incorporated. Thereafter, in the essence of time, Plaintiff has embedded the Notice of Removal herein, and attached the attached Statement of Appeal and support therein, the M242946DV Record as filed on this day, and all statements, facts, argument, and all accompanying pertinent information admitted with this filing, in its pursuit or as otherwise relevant, now or in the future.

DATED: January 7, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: 18-cv-02824-LAB-LL

Related Case No.: Superior Court of California, San Diego County, M242946DV

MOTION OF REMOVAL OF SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, CASE NO.: M242946DV

STATEMENT OF REMOVAL

Date: EX PARTE
Time: N/A
Courtroom: [14A, Hon. Larry A. Burns]

(Received January 7, 2019, Clerk, U.S. District Court Southern District of California By ___ Deputy)

STATEMENT OF REMOVAL

1. Defendant is in violation of Plaintiff's Constitutional Rights (regarding discovery disclosures under *Brady* and Ca PC § 1054) under and is the subject of federal cross-

action as a result (USDC SD Cal, 18-2824, 42 U.S.C. § 1983, December 17, 2018) and has moved pursuant to 28 U.S.C. § 1446(a) and 28 U.S.C. § 1443.

FACTS IN SUPPORT OF REMOVAL

2. Plaintiff, Mr. Gavin B. Davis, was held on Excessive and Punitive bail of One Million Dollars ($1,000,000) in Superior Court of California, San Diego County (SCD266332 / SCD267655 / SCD273043), and for approximately six (6) months (November 2018 to April 2018) was coerced (and otherwise) into a Plea Bargain (April 23, 2018). Prior to Sentencing on June 7, 2018, Plaintiff had formally Notified counsel and opposing counsel, of his intent to Withdraw his Plea pursuant to Ca PC § 1018, for good cause. On June 7, 2018 the Superior Court refused his formal Withdraw, Plaintiff indicated that his only option, then would be to file an Appeal. On June 8, 2018, Plaintiff, Pro Per, filed a Notice of Appeal, Statement of Issues on Appeal, and requested that the Superior Court issue a Certificate of Probable Cause pursuant to Ca PC § 1237.5 finding grounds for the appeal. On June 20, 2018, the Superior finding grounds for the appeal pursuant to CA PC § 1237.5, issued a Certificate of Probable Cause. Thereafter, on June 22, 2018, the 4th Dist., Div. 1 (California), opened case no.: D074186.

3. Defendant, Mr. Timothy G. O'Connor, individually, and in his official employ for the State of California (San Diego, City of), relying on police records (discovery not lodged in M242946DV) from September 2017, and clearly having knowledge that the Plaintiff was being

held in local custody, after learning that the Plaintiff's defense attorney was negotiating a Plea Bargain, filed a latent complaint (i.e. M242946D) on April 16, 2016. alleging one (1) count of Ca PC § 166(c)(1) against accuser, Mr. John Gregory Unruh (Henderson, Nevada, aka "Carlito"), Plaintiff's ex-father-in-law. Plaintiff notes that this is the same party and controversy as case no.: Superior Court of California, San Diego County case no: SCD267655, consolidated into SCD266332. In support of such, Plaintiff notes that the Ex Parte Minute Order of April 16, 2018 (see Record), which indicates that the charge is a "Add-On". Plaintiff notes, in part, that this is evidentiary as to a clear violation of Ca PC § 654 (i.e. "indivisible conduct" from SCD267655). Plaintiff further notes that the charge was based on September 2017 reports, and is a "latent" charge (obviously each of the accuser and the prosecution readily and reasonably knew of Plaintiff's in-custody status for many months; see e.g. "*County of Riverside v. McLaughlin*, 500 U. S. 44, 55 (1991), in noting that, "points to several statements from the [500 U.S. 44, 55] early 1800's to the effect that an arresting officer must bring a person arrested without a warrant before a judicial officer "`as soon as he reasonably can," and evidencing that Defendant Timothy, and/or his employer have failed to reasonably and legally do so", in an Abuse of Process. (citing from the USDC SD Cal, 18-2824, 42 U.S.C. § 1983 claim(s), Complaint of December 17, 2018, (Doc. 1, ¶ 25, ln 20-23)); also, on January 2, 2019, Plaintiff upon personally obtaining the Record first learned that the M242946DV complaint (R. at 45-46.) was prepared on January 18, 2018, and willfully and

unlawfully held from filing until April 16, 2018. Finally (herein), though in part, the M242946DV complaint regards Constitutionally protected (Petition Clause of the First Amendment) mail correspondence regarding litigation that the false accuser remains a Fugitive from Summons in (e.g. he is a de facto Fugitive from Summons in USDC SD Cal, 17-1997; federal tort of Intentional Infliction of Emotional Distress (IIED)) (false accuser Unruh has previously made false, partial, and/or misleading statements to authorities (which is illegal) to authorities intending to induce the arrest of the Plaintiff leading to false charges (one of which was entirely dropped pre-trial evidencing an Abuse of Process).

4. On November 1, 2018, Plaintiff filed a *Mardsen* Motion (see Record) reasonably requesting several matters of one of his attorneys, Mr. Jan E. Ronis (CSBN #51450, Ronis & Ronis (San Diego)). On November 27, 2018, Mr. Ronis filed a withdrawal Notice (in violation of several statutes and Ca Rules of Court (oral record on such day). On November 28, 2018, the Mardsen Motion was taken off calendar without discussion in an abuse of discretion. Plaintiff has reserved, and not foregone, in any uncertain capacity moving for a Mardsen Motion in M242946DV.

5. On December 17, 2018, the most significant matter, that being required Discovery (e.g. under the *Brady v. Maryland*, 373 U.S. 83 (1963); and its analog / parallel, Ca PC § 1054) on the criminal background of the false accuser, after numerous requests, informally, formally (e.g. via Notice, or via Court), Plaintiff filed a 42 U.S.C. § 1983 action and claim against Defendant Mr. Timothy G. O'Connor, Deputy City Attorney of

the City Attorney's Office (San Diego) ("Defendant Timothy") for: a priori, (a) willful suppression of exculpatory evidence (Claim #1, *Brady* Violation(s)) favorable to the Defendant (defendant therein) in Superior Court of California, San Diego County, case no.: M242946DV, [*State of California] v. Gavin B. Davis*, for Ca PC § 166(c)(1) in an unconstitutional capacity on false accuser, Plaintiff's ex-father-in-law, Mr. John Gregory Unruh ("Fugitive from Summons Greg" or "Defendant Greg"); and, secondarily, an additional claim for (b) bringing a false charge(s) (M242946DV) against the Plaintiff (defendant therein) in an Abuse of Process (Claim #2), as evidenced, in part, in this case. Plaintiff notes that Defendant Timothy does not enjoy absolute immunity (e.g. *Imbler v. Pachtman*, 424 U. S. 409, 428, 430 (1976) "lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams*, 465 F.2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972); *Haaf v. Grams*, 355 F. Supp. 542, 545 (Minn. 1973); *Peterson v. Stanczak*, 48 F. R. D. 426 (ND Ill. 1969). Contra, *Barnes v. Dorsey*, 480 F.2d 1057 (CA8 1973)."

6. In the USDC SD Cal, 18-2824 Complaint (Doc. 1), Plaintiff expressly reserved Supplemental Jurisdiction pursuant to expressly "28 U.S.C. § 1443, in which civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district

and division embracing the place wherein it is pending: (i) against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; or, (ii) for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (18-2824, Doc. 1, ¶ 5). Defendant is in clear violation of its Constitutional requirements has held under *Brady*, and its California equivalent, Ca PC § 1054 (therefore, as established in *Georgia v. Rachel*, [384 U.S. 780, 792 (1966), Plaintiff has satisfied the requirements for removal under 28 U.S.C. § 1443)

7. Plaintiff has cited to each of his attorneys, and to the opposition, relevant matters of moral turpitude on the false accuser Unruh necessitating very formal discovery: e.g. (a) Case No.: 94FH0371X, the *State of Nevada vs. John Gregory Unruh* (#1148704), Mr. J. Gregory Unruh was apprehended on April 22, 1994 within Clark County of intentionally possessing Cocaine, which is illegal. (b) Separately (i.e. different but potentially related incident), in the San Diego Police Department Investigator's Follow-up Report (March 21, 1995) for Case No.: 95302752E, involving the potential, recommending and ultimately charged, and found guilty of Auto Theft (January 1995), reporting detective, James F. Cash (ID#1148) by Mr. J. Gregory Unruh, such report evidences evasiveness and lying (e.g. "Each time Unruh gave him a different reason for failure to return the vehicle."); and, (c) Defendant

John Gregory Unruh also has a federal criminal case: *United States of America v. J. Gregory Unruh*, USDC DA, 2:95-mj-05124-MS-1, (1995). Plaintiff has not even been provided a RAP Sheet on Unruh, any materials on these issues of moral turpitude by Defendant Timothy, and Due Process thereafter.

8. Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the People failed to timely disclose the ALL evidence on Unruh including but not limited to that proffered and requested, or Demanded, for further inquiry. Trial call in M242946DV for January 22, 2019 (9am, San Diego Central Courthouse, Dept. 1104). The People's failure to timely disclose evidence was and remains without lawful justification. The Prosecution's willful failure to comply with its legal duty to disclose material evidence, and Discovery (e.g. under CA PC 1054, and otherwise) was in order to gain a tactical advantage, and therefore Plaintiff draws an adverse inference there from against the prosecution.

9. Plaintiff now moves under 28 U.S.C. § 1446(a), for Removal of Superior Court of California, San Diego County, case no.: M242946DV.

10. As Plaintiff's M242946DV defense counsel has not complied with Discovery requests (e.g. see *Mardsen* Motion in Record), this embedded Notice (i.e. subsequent to Ex Parte: (i) movement of acceptance of supplemental filing; and, (ii) withdraw of Doc. 4) and Motion for Removal is timely and legally compliant pursuant

to all federal rules and statutes, without exception. Plaintiff notes that private parties are able to be added to 42 U.S.C. § 1983 actions. Plaintiff also notes that he has instructed (see attached Demand Letter, without waiver of attorney-client privileges, in any capacity, without exception) Mr. Jan Ronis to file: (a) a GAG Order; (b) a Motion to Prohibit Electronic Media; (c) a Discovery Motion; and, (d) a Motion for Prosecution Theory. On December 31, 2018, Plaintiff has provided near final forms of these Motions for completion by Ronis & Ronis, as taken nearly verbatim from California Criminal Practice, Motions, Jury Instructions, and Sentencing, 4th ed. - by Edward A. Rucker & Mark E. Overland (Hastings Professors).

SELECT AUTHORITY IN SUPPORT OF REMOVAL

11. Should attorneys for defendants file claims in state court that arise under both federal and state law, defendants may remove all claims. The Supreme Court has suggested that "t]he presence of even one claim 'arising under' federal law is sufficient to satisfy the requirement that the case be within the original jurisdiction of the district court for removal." (*Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 386 (1998))

12. This Removal is each of Discretely and Constructively permissible and timely given the facts and circumstances including this cross-action (i.e. USDC SD Cal, 18-2824). Plaintiff is Constitutionally entitled to the right of "assistance of counsel", and separately, for such to be "effective". (see *Murphy Brothers. v. Michetti*

Pipe Stringing Incorporated, 526 U.S. 344, 354 (1999))

13. Plaintiff (defendant) has never been provided a copy of the M242946DV complaint (let alone Service), and its accompaniments, until retrieval and construction of the Record by the Defendant on January 2, 2019. (e.g. see deficiency of service under 28 U.S.C. § 1446(g)). Therefore, separately, Removal is permissible subject to 28 U.S.C. § 1446(b).

14. Both requirements for removal under 28 U.S.C. § 1443 have been met.

15. Under the *Strauder-Rives* doctrine Plaintiff's claims, facts, factual allegations and argument, in USDC SD Cal, 18-2824, are hereby incorporated, as if expressed herein, providing the grounds and support to make this petition and Notice and Motion for Removal as developed beyond mere allegations (though, even in the absence thereof, the citations from the M242946DV Excerpts of Record, fully support the additional claims and grounds for removal). Further, with prejudice, Plaintiff notes that under such doctrine, and 18-2824 by incorporation, the Ca PC § 166(c)(1) charge is required to be dismissed by this Court.

16. Further, Plaintiff has provided direct evidence of: (i) Constitutional violations against the Plaintiff by Defendant Timothy (e.g. willful suppression of information on the M242946DV false accuser in violation of Brady and Ca PC § 1054 requirements); (ii) latency and abuse of process in initiating and pursuing M242946DV by Defendant Timothy (e.g. read the Excerpts of Record Table of Contents for such direct and circumstantial evidence (i.e. not mere allegations)

of latency; (iii) Ca PC § 654 violations by Defendant Timothy; and (iv) otherwise.

CERTIFICATION AND CLOSING

17. Under FRCP 11, by signing below, I certify to the best of my knowledge, information, and belief that this Filing and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the filing otherwise complies with the requirements of Rule 11.

DATED: January 7, 2019

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per

(Certificates of Service, Omitted)
(M242946DV, Excerpts of Record, Omitted)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,
Plaintiff,

vs.

TIMOTHY G. O'CONNOR
Defendant.

Case No.: '18CV2824 LAB LL

COMPLAINT

JURY DEMAND

Courtroom: [14A, Hon. Larry A. Burns]

(Filed December 17, 2018, Clerk, U.S. District Court Southern District of California By /s MelissaE Deputy)

TABLE OF CONTENTS (omitted)
POINTS AND AUTHORITIES (omitted)

A. INTRODUCTION AND FRCP 8 & 12 COMPLIANT STATEMENT

1. Plaintiff, Mr. Gavin B. Davis, brings a 42 U.S.C. § 1983 action and claim against Defendant Mr. Timothy G. O'Connor, Deputy City Attorney of the City Attorney's Office (San Diego) ("Defendant Timothy") for: a priori, (a) willful suppression of exculpatory evidence (Claim #1,

Brady Violation(s)) favorable to the Plaintiff (defendant therein) in Superior Court of California, San Diego County, case no.: M242946DV, *[State of California] v. Gavin B. Davis*, for Ca PC § 166(c)(1) in an unconstitutional capacity on false accuser, Plaintiff's ex-father-in-law, Mr. John Gregory Unruh ("Fugitive from Summons Greg" or "Defendant Greg"); and, secondarily, an additional claim for (b) bringing a false charge(s) (M242946DV) against the Plaintiff (defendant therein) in an Abuse of Process (Claim #2), as evidenced, in part, in this Complaint. Plaintiff notes that Defendant Timothy does not enjoy absolute immunity (e.g. *Imbler v. Pachtman*, 424 U. S. 409, 428, 430 (1976) "lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams*, 465 F.2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972); *Haaf v. Grams*, 355 F. Supp. 542, 545 (Minn. 1973); *Peterson v. Stanczak*, 48 F. R. D. 426 (ND Ill. 1969). Contra, *Barnes v. Dorsey*, 480 F.2d 1057 (CA8 1973)."

B. PARTIES

2. Plaintiff, Mr. Gavin B. Davis (the "Plaintiff or "Mr. Davis"), is an individual that is a citizen of the State of California. He holds a Bachelor of Science degree from Cornell University; has completed approximately $4 billion of complex corporate finance and real estate transactions; is a published author; is an industry speaker, including before such law firms

as DLA Piper, and is represented Pro Per given liquidity issues of a marital dissolution, in which with the assistance of a family law attorney ghostwriter has filed against Defendant Mr. J. Gregory Unruh of Henderson, Nevada, for Perjury and Fraud under California Family Code §§ 2107 (d) (1) and (2).

3. Defendant, Mr. Timothy G. O'Connor ("Defendant Timothy", CSBN #216977), is an individual that is a citizen of the State of California, Deputy City Attorney, violating the Plaintiff's constitutional rights; as well, as bring a false charge(s) in an Abuse of Process; and, who may be Served at this play of employment, Office of the City Attorney (San Diego), Civic Center Plaza, 1200 Third Ave., #1620, San Diego, CA 92101 (Phone: 619-236-6220, Fax: 619-236-7215).

C. JURSIDICTION

4. This Court has proper jurisdiction over this lawsuit as: (a) a priori, under 42 U.S.C. § 1983, a priori, Civil action(s) for deprivation of rights, as alleged herein, that the willful suppression of exculpatory evidence by Defendant Timothy is a due process violation under the 5th and 14th Amendments (see e.g. Brady v. Maryland, 373 U.S. 83 (1963), establishing that the prosecution must turn over all evidence that might exonerate the defendant (exculpatory evidence) to the defense, or be in clear violation of due process); and, (b) secondarily, the federal tort claim of Abuse of Process, in brining a false charge (i.e. M242946DV) against the Plaintiff (defendant therein). Further, under 28 U.S.C. § 1331, the district courts shall have original jurisdiction of all civil actions arising under the

Constitution, laws, or treaties of the United States.

5. Plaintiff expressly reserves his rights under 28 U.S.C. § 1443, in which civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (i) against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; or, (ii) for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law, should Defendant Timothy, or his employer, as the case may be, bring additional charges in an act of Retaliation, additional Malice, or as otherwise relevant.

D. VENUE

6. Venue is proper in the United States District Court for the Southern District of California under 28 U.S.C. §§ 1391(b)(2), in which, a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.

E. CONDITIONS PRECEDENT

7. All conditions precedent have been formed or have occurred, as is sufficient and generally alleged under FRCP 9(c). While multiplication of cases within the federal system or across the federal and state systems is a

common characteristic of complex litigation, and may occur in the future, but does not now, as no matters herein have been litigated, or ruled upon, this complaint, on its own accord and face, is not multiplicative in any capacity, and is FRCP 11 compliant (Certification provided) as well. Should this Court find for any reason that this litigation may either interfere or enjoin ongoing state criminal proceedings, Plaintiff notes with prejudice, the Court's remedy is exclusively a Stay of the proceeding pending the outcome of the state criminal proceedings.

F. STATEMENT OF FACTS

8. Defendant Timothy has brought unlawfully brought a latent charge in the Superior Court of California, San Diego County, case no.: M242946DV, on behalf of Fugitive from Summons Greg (e.g. USDC SD Cal, 17-1997, federal tort claim of Intentional Infliction of Emotional Distress (IIED), pending) in evidencing an Abuse of Process (Claim #2). Plaintiff notes, in part, that M242946DV is: (a) of the same parties / controversy as a prior case (Superior Court of California, San Diego County, SCD267655 consolidated into SCD266332, now pending 4th Dist., Div. 1, case no.: D074186; and, also on federal cross-action pending in the Ninth Circuit (18-56202, Davis v. SDDA et. al., for, generally, and in part, a priori, 42 U.S.C. § 1983, Deprivation of civil rights, 4th and 8th amendment violations, immediately actionable on cross-action and collateral attack without final, favorable determination of underlying state criminal proceedings)); and, (b) is untimely (i.e. the charge pressed was known to the Office of the

City Attorney in September 2017; Plaintiff's whereabouts were easily known (i.e. in local San Diego custody, at the direct and indirect actions of the same party (i.e. Fugitive from Summons Greg) as M242946DV)).

9. Defendant Greg has previously provided false, partial, or misleading statements to authorities including committing Perjury (e.g. United States of America v. J. Gregory Unruh, USDC DA, case no.: 2:95-mj-05124-MS-1 (2005)). Plaintiff alleges that Fugitive from Summons Greg is a pathological liar.

10. In M242946DV, Defendant Timothy (as prosecution), has willfully withheld and suppressed exculpatory evidence favorable to the Plaintiff (defendant therein) on the false accuser, despite: (a) informal notice; (b) Constructive Notice; (c) express Notice(s); and, a priori, (d) as required under Ca PC § 1054, the California statutory equivalent to the requirements held as authority under Brady v. Maryland (1963), and therefore, due process violations under the 5th and 14th Amendments as actioned under 42 U.S.C. § 1983 herein (Claim #1, *Brady* violation(s).

11. As it relates to Claim #1 and the *Brady* violation(s), Plaintiff notes, the following facts and factual allegations as noted below, of clear, express Notices, informal Notices, and, Constructive Notices to each of Defendant Timothy, and his employer, the Office of the City Attorney (San Diego), in its official capacity in prosecution of M242946DV against the Plaintiff (defendant therein).

12. In July 2018, Plaintiff provided a Demand Letter (July 19, 2018) to the Office of the

City Attorney, with several reasonable and lawful demands including but not limited to fully, and timely, complying with its *Brady* and Ca PC § 1054 obligations.

13. In addition, at this time (July 19, 2018 Demand Letter), Plaintiff also made known to the Office of the City Attorney, in part: September 6, 2018); (b) the false, partial, and/or misleading statements; which led to a false charge (Ca PC § 422), being entirely dropped (pre-trial, SCD267655 consolidated into SCD266332 with no lesser charge in its place); and, (c) certain criminal records of the false accuser in M242946DV, Defendant Greg (herein). Plaintiff diligently followed up (email and facsimie) with an additional Demand Letter on July 25, 2018 to the Office of the City Attorney, prior to court in M242946DV.

14. On August 6, 2018, Defendant Timothy and his employer, were provided additional matters relevant to M24946DV, to the willful and unlawful withholding of required disclosures, and otherwise.

15. On September 11, 2018, in M242946DV, represented by Ms. Gretchen C. Von Helms (SBN #156518; Harvard University, B.A. (Government), J.D., Phi Beta Kappa), the following was noted on the Superior Court of California record (in part):

(a) MS. VON HELMS: AH MR. RONIS IS OUT OF JURISDICTION AT THE MOMENT AND WHAT WE TALKED ABOUT IS TO PUT THIS OVER FOR A READINESS CONFERENCE STATUS REGARDING DISCOVERY AND ALSO THE VICTIM WITNESS' SCHEDULE. WE WERE FOUND

OUT THERE WAS A, LOOKS LIKE A FEDERAL PERJURY CASE OUT OF NEVADA AND AN ARREST WARRANT FOR THE VICTIM WITNESS OUT OF LAS VEGAS. IN ADDITION, POTENTIALLY ANOTHER EITHER RESISTING ARREST OR FALSE STATEMENT CONTACT IN ARIZONA. I'M NOT SURE IF THAT IS THE SAME FEDERAL CASE AGAINST THE VICTIM WITNESS, BUT I'VE SPOKE TO THE PROSECUTOR ABOUT IT, HE WAS NOT TOLD ANYTHING ABOUT THIS BY THE VICTIM WITNESS, WHICH I THINK IS ALSO AN ISSUE, A BRADY ISSUE, AND SO WE NEED TO, I'M GOING TO REACH OUT TO THE DEFENDER'S, HE'S GOING TO REACH OUT TO THE PROSECUTOR'S ON THOSE CASES TO SEE WHAT CAN BE FOUND OUT. THEY'RE FROM THE 90S, '95, MID-90S, BUT SINCE IT IS PERJURY OBVIOUSLY IT'S STILL A VALID CONCERN, ESPECIALLY SINCE THE VICTIM WITNESS APPEARS NOT TO HAVE DISCLOSED THAT TO THE PROSECUTION COUNSEL. SO, WE WERE THINKING OF MONDAY FOR A STATUS BUT IN LIGHT OF THIS NEW DISCOVERY, MAYBE WE SHOULD PUT THIS OUT A LITTLE FURTHER SO THAT WE CAN, SO THAT THE PROSECUTION HERE CAN FULFILL ITS BRADY OBLIGATIONS, WHICH I THINK THEY ARE TRYING TO DO, AND WE CAN ALSO CHECK INTO IT.

(b) THE COURT: I MEAN, REALISTICALLY, I'M JUST THINKING ABOUT THE TURN AROUND TIME FROM THE FEDERAL DEFENDERS TO THE FEDERAL PROSECUTORS, A TWO-WEEK DATE MIGHT BE BETTER.

Thus, here again, Fugitive from Summons Greg has Perjured himself, in providing false, partial, and/or misleading statements in similar capacity that he did to the SDDA, to the Office of the City Attorney (M242946DV).

16. On September 11, 2018, via formal Third Party Process Service, Plaintiff brought forth the following to Defendant Timothy and his employer for review: (a) "the Office of the City Attorney (San Diego) is in violation of Discovery rules under each Ca. Pen. Code § 1054; and, as set forth under *Brady v. Maryland*, 373 U.S. 83 (1963); generally, regarding: (i) matters set forth in each of the Discovery Demand letters (e.g. that of July 19, 2018; and, July 25, 2018). As a result, M24946DV, is unable to advance forward until these pre-trial matters (and others) are produced in accordance of: (i) California state, and, federal law; (ii) legal Demand; and, (iii) in court oral request; (b) Plaintiff (defendant in M24946DV) directly accuses the Office of the City Attorney as being in a bona fide relationship with the False Accuser (John Gregory Unruh) and convicted felon".

17. On November 15, 2018, Plaintiff noted to Defendant Timothy and his employer, the Office of the City Attorney (San Diego), that:

(a) "Mr. O'Conner has withheld all Discovery information on M242946DV false accuser, Unruh, including but not limited to the most basic information; a RAP Sheet, typically provided in the very first batch of Discovery. M242946DV was opened in May 2018—and this information has now been withheld for five (5) months—highly ILLEGAL"

(b) "Office of the City Attorney (San Diego) and Defendant Timothy in violation of their required obligations and disclosures under Brady and CA PC § 1054 to the Plaintiff (defendant therein) "awaiting Discovery on the false accuser, [Fugitive from Summons] John Gregory Unruh (e.g. in M242946DV, the following is being withheld in violation of Brady, Ca PC § 1054,: e.g. (a) Case No.: 94FH0371X, the State of Nevada vs. John Gregory Unruh (#1148704), Mr. J. Gregory Unruh was apprehended on April 22, 1994 within Clark County of intentionally possessing Cocaine, which is illegal. It is not, yet known, if Mr. J. Gregory Unruh was intending to distribute the controlled substance, as believed, or if any government party (e.g. SDPD, SDDA, LVPD, Henderson PD, FBI) has information on Mr. J. Gregory Unruh's criminal actions (which could include but are not known drug distribution, bank robbery, manslaughter, relations with organized crime) regarding same, still subject to substantial pre-trial discovery, and highly relevant. (b) Separately (i.e. different but potentially related incident), in the San Diego Police Department Investigator's Follow-up Report (March 21, 1995) for Case No.: 95302752E, involving the potential, recommending and ultimately charged, and found guilty of Auto Theft (January 1995), reporting detective, James F. Cash (ID#1148) by Mr. J. Gregory Unruh, such report evidences evasiveness and lying (e.g. "Each time Unruh gave him a different reason for failure to return the vehicle."); and, (c) Defendant John Gregory Unruh also has a federal criminal case: *United States of America v. J. Gregory Unruh*, USDC DA, 2:95-mj-05124-MS-1, (1995).

Defendant Greg is alleged to be the "real life 'Carlito'". Plaintiff-Appellant holds, at a minimum, the M242946DV prosecution (Office of the City Attorney, San Diego) of having liability from these violations, actively being reviewed, and expressly reserved prejudice, internally and externally to this case). (on record in 9th Cir., 18-56202, ECF 19, November 10, 2018)." (also note that these crimes involve Moral Turpitude: Auto theft: *People v. Hunt*, 169 Cal. App. 3d 668, 215 Cal. Rptr. 429 (1st Dist. 1985); *People v. Green*, 34 Cal. App. 4th 165, 40 Cal. Rptr. 2d 239 (2d Dist. 1995). Attempted auto theft: People v. Rodriguez, 177 Cal. App. 3d 174, 222 Cal. Rptr. 809 (5th Dist. 1986). Grand theft auto (Veh. Code, §10851): *People v. Rodriguez*, 177 Cal. App. 3d 174, 178, 222 Cal. Rptr. 809 (5th Dist. 1986). Evading a peace officer (Veh. Code, §2800.2): *People v. Dewey*, 42 Cal. App. 4th 216, 49 Cal. Rptr. 2d 537 (6th Dist. 1996). Transportation of controlled substance: *People v. Navarez*, 169 Cal. App. 3d 936, 949, 215 Cal. Rptr. 519 (5th Dist. 1985). Failure to appear: (Pen. Code, §1320.5): *People v. Maestas*, 132 Cal. App. 4th 1552, 34 Cal. Rptr. 3d 503 (1st Dist. 2005). Perjury: *People v. Almarez*, 168 Cal. App. 3d 262, 214 Cal. Rptr. 105 (2d Dist. 1985)."

(c) "Mr. O'Conner is in clear violation of ABA Rule 8.4(c) and (d); as well, as Rule 1.3(c), with regard to his actions. These are not the only claims against Mr. O'Conner, with prejudice thereto; he is not immune from prosecution and should not falsely believe so."

(d) "A defendant is denied a substantial right if the defense counsel is limited in the cross-examination of the prosecution's witnesses

(*Jennings v. Superior Court of Contra Costa County*, 66 Cal. 2d 867, 877, 59 Cal. Rptr. 440, 428 P.2d 304 (1967)). When the subject of defense counsel's cross-examination is the allegations in the complaint, or is aimed at establishing an affirmative defense, or defeating the prosecution's case, restrictions will be deemed to have denied the defendant a substantial right (*People v. Konow*, 32 Cal. 4th 995, 1024-1025, 12 Cal. Rptr. 3d 301, 88 P.3d 36 (2004); see also *Jennings v. Superior Court of Contra Costa County*, 66 Cal. 2d 867, 877, 59 Cal. Rptr. 440, 428 P.2d 304 (1967) (error to restrict cross-examination of officer on entrapment defense); *Hines v. Superior Court*, 203 Cal. App. 3d 1231, 251 Cal. Rptr. 28 (1st Dist. 1988) (error to restrict cross-examination on surveillance))."

(e) "The criminal background information on John Gregory Unruh, in is entirety (or as close thereto, an ongoing DEMAND, and responsibility), is once again DEMANDED, as legally due, without prejudice to actions of your office and personnel to date which can and do have each of federal civil and federal criminal liability."

(f) "As the prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial to promote the ascertainment of the truth, save court time and avoid an surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence, or otherwise adequately prepare for trial."

(g) "Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the People failed to timely disclose the ALL evidence on Unruh including but not limited to that proffered and requested, or Demanded, for further inquiry. Trial call in M242946DV has been set, prematurely, and therefore, unlawfully for November 27, 2018 (9am, San Diego Central Courthouse, Dept. 1104). This is a DEMAND to, separately, provided the legally required Discovery Disclosures; and, take the Trial Call off calendar in favor of pre-trial matters (e.g. Status Conference)."

(h) "The People's failure to timely disclose evidence was and remains without lawful justification."

(i) "The Prosecution's willful failure to comply with its legal duty to disclose material evidence, and Discovery (e.g. under CA PC 1054, and otherwise) was in order to gain a tactical advantage, and therefore I draw an adverse inference therefrom against the prosecution. Further, I find that such adverse inference may be sufficient by itself to raise a reasonable doubt as to defendant's guilt."

(g) "If the Office of the City Attorney (San Diego), directly, or through my M242946DV attorneys (Ronis & Ronis, San Diego, CA) do not provide the legally required M242946DV Discovery; they will be added as Defendants in one or more litigations, which could include: (i) 9th Cir., 18-56202 (pursuant to FRAP 2, FRE 201, FRCP 10(e), and the Circuit Court's inherent authority; (ii) USDC SD Cal, 17-1997, Davis v.

Unruh, an Intentional Infliction of Emotional Distress (IIED) claim, in which such party is a Fugitive from Summons (your office could have become an involuntary plaintiff; and/or, (c) new litigation. Therefore, such cross-claim will include each of you (Mr. Hemmerling); and, Mr. O'Conner. If the "RAP" Sheet, unredacted, unabridged, on Mr. John Gregory Unruh (false accuser in M242946DV) is not provided by close of business on Monday, November 19, 2018—then on Tuesday, November 20, 2018, such parties will be made Defendants in federal litigation. (TIME IS OF THE ESSENCE)."

18. "On December 17, 2018, Plaintiff confirmed with one (1) of his attorneys in M242946DV, Mr. Jan E. Ronis (CSBN #51450) that each of Defendant Timothy; and, his employer, the Office of the City Attorney (San Diego) had provided no information on the criminal background of Fugitive from Summons Greg (M242946DV false accuser). Defendant Timothy is in clear violation of each of Brady and CA PC § 1054. Plaintiff expressly reserves the right to allege why Defendant Timothy, his employer, or other parties may be in violation of such timely required disclosures in this litigation or future litigation.

19. Plaintiff notes that Fugitive from Summons Greg provided false, partial, or misleading statements (unlawful) to the San Diego Police Department ("SDPD" including employees thereof) and to the San Diego County District Attorneys' Office ("SDDA", including employees thereof) intending to induce the arrest of the Plaintiff. Immediately preceding a financial hearing (D555614) in June 2016, in

which Plaintiff sought to remove Fugitive from Summons Greg as a fraudulent trustee to Plaintiff's ex-spouse, Fugitive from Summons Greg influenced the SDDA and SDPD to arrest the Plaintiff prior to such hearing, which resulted in a Ca PC § 422, a serious violent felony, charge (Superior Court of California, case no.: SCD267655, later consolidated into SCD266332). In September 2017, this charge was entirely dropped, pre-trial, by the SDDA, with no lesser charge in its place. Plaintiff holds this action, and results, as evidentiary as to his tort claim herein against Fugitive from Summons Greg for Intentional Inflection of Emotional Distress (IIED); a priori, and, secondarily, Negligent Infliction of Emotional Distress (NIED), in case, Defendant Greg is successful in, or persuasive in (a "expert at persuasion," and master at blackmail, bribery and extortion (e.g. 8 U.S.C. § 201(3)), perpetuating lies regarding his explicit intentions towards the Plaintiff as alleged (subject of separate litigation, .

20. At this time (June 2016), Fugitive from Summons Greg attempted to bring a criminal protective order against the Plaintiff, which Plaintiff deems as a Fraudulent Protective Order; itself, with a pending, unheard Motion to Dismiss such (fraudulent) Protective Order (Superior Court of California, SCD266332; Dist. 4, Div. 1, D074186)

21. On July 7, 2016, in Superior Court of California (San Diego County), case no.: SCD267655, [State of California] v. Gavin B. Davis, two charges were presented: (a) Ca PC § 646.9(a) ("Miscellaneous Offenses"), which carries a maximum One Thousand Dollar fine ($1,000));

and, (b) Ca PC § 422 ("criminal threats"), a serious felony charge, "any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (evidence at case Minute Order, July 7, 2016)

22. On October 10, 2017, in an amended complaint of SCD267655 into SCD266332 (now pending 4th Dist., Div. 1, case no.: D074186, R. at 38-43. (also ECF 19, pg. 12, ¶ 29(b)(i); pg. 14-15, ¶¶ 30(a)(i)(ii)(iii)(iv), (b)(i)); Plaintiff (defendant-appellant therein, has and is seeking a withdraw of his plea (April 23, 2018), which was entered unlawfully for one or more reasons including but not limited to inducement and/or coercion to regain his pretrial liberty, after being held, pre-trial on unreasonable, Excessive, and Punitive bail), 9th Cir. 18-56202 defendant Mr. Leonard Nyugen Trinh (CSBN #236873) of defendant San Diego County District Attorney ("SDDA"), the Ca PC § 422 charge, was entirely dropped pre-trial, evidencing, in part, Abuse of Process,

Vindictiveness, Malice, and, otherwise. (see Attachment C,), leaving the only SCD267655 (now consolidated against express objection into SCD266332) charge as the PC § 646.9(a)).

G. STANDARD OF REVIEW AND ARGUMENT

Claim #1 – Willful Suppression of Exculpatory Evidence in violation of Ca PC § 1054 and *Brady*

23. The Office of the City Attorney brought case no.: M242946DV. In such case in July 2018, Plaintiff provided a Demand Letter (July 19, 2018) to the Office of the City Attorney, with several reasonable and lawful demands including but not limited to fully, and timely, complying with its *Brady* and Ca PC § 1054 obligations. For example, such demands included but are not limited to:

(a) "CONSTRUCTIVE POSSESSION OR KNOWLEDGE OF DISCOVERABLE MATERIAL. Your duty of disclosure includes any discoverable item or information, as listed in this informal request, that is possessed by and known to the Office of the District Attorney, any law enforcement agency that has investigated or prepared the case against the Defendant, or any person or agency hired to assist your office or the investigating agency in this case (Pen. Code, §1054.5(a)). You are charged with constructive knowledge of any discoverable item or information possessed by and known to the investigating law enforcement agency (*In re Jackson* (1992) 3 Cal. 4th 578, 11 Cal. Rptr. 2d 531). You are charged with the duty to access reasonably accessible databases, such as CII and FBI records, that are available to your office (*In re*

Littlefield, 5 Cal. 4th 122, 135-136, 19 Cal. Rptr. 2d 248, 851 P.2d 42 (1993))." (Demand Letter, July 19, ¶¶ 7-8)

(b) "CONTINUING DUTY TO DISCLOSE. This request should be construed as a continuing demand, so that any statements, reports or evidence that are obtained by your office, investigators or agents after compliance with the initial request should be disclosed without any further request for these materials (Pen. Code, § 1054.7; *Izazaga v. Superior Court*, 54 Cal. 3d 356, 375, 285 Cal. Rptr. 231, 815 P.2d 304 (1991), as modified on denial of reh'g, (Oct. 24, 1991))." (Demand Letter, July 19, ¶ 9)

(c) "REFUSAL TO DISCLOSE UNTIL RECIPROCAL DISCOVERY IS PROVIDED BY DEFENDANT. You are not entitled to refuse to comply with this informal request for discovery on the ground that you believe that the Defendant has not complied with informal discovery (*People v. Jackson*, 15 Cal. App. 4th 1197, 19 Cal. Rptr. 2d 80 (4th Dist. 1993), as modified, (May 11, 1993))." (Demand Letter, July 19, ¶ 10)

(d) "INTENT TO CLAIM A PRIVILEGE OR EDITING OF DISCLOSURES. If you intend to claim any privilege in connection with any information or material listed in this request, we request that you inform the defense of any deletions or editing of any material that is disclosed. We request that you provide the defense with a privilege log of any material that has been edited or deleted on the basis of a claimed privilege. If you do not reply to this informal request within 15 calendar days of the date of this request, as required by Pen. Code, §1054.1, we may be compelled to seek a formal

order to compel disclosure and to issue any other order necessary to enforce compliance with the provisions of Pen. Code, § 1054.1." (Demand Letter, July 19, ¶¶ 11-12)

(e) "INFORMATION AVAILABLE TO THE PROSECUTION. The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access (*People v. Robinson*, 31 Cal. App. 4th 494, 499, 37 Cal. Rptr. 2d 183 (2d Dist. 1995)). In *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535, 113 Cal. Rptr. 897, 522 P.2d 305 (1974), the court construed the scope of possession and control as encompassing information "reasonably accessible" to the prosecution. In *People v. Coyer*, 142 Cal. App. 3d 839, 843, 191 Cal. Rptr. 376 (1st Dist. 1983), the court described information subject to disclosure by the prosecution as that "readily available" to the prosecution and not accessible to the defense. (See also *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995).) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.") (Demand Letter, July 19, ¶ 13)

(f) "THE PROSECUTION CANNOT DELEGATE ITS RESPONSIBILITY TO RESPOND TO A REQUEST FOR BRADY INFORMATION. The prosecutor's obligation under *Brady*, as both the California and United States Supreme Courts have made clear, cannot be delegated. It must be the deputy district attorney, not a police officer, who reviews records

and determines what constitutes *Brady* material. [T]he Supreme Court has unambiguously assigned the duty to disclose solely and exclusively to the prosecution: those assisting the government's case are no more than its agents. By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. (*In re Brown*, 17 Cal. 4th 873, 881, 72 Cal. Rptr. 2d 698, 952 P.2d 715 (1998)). [A]n incomplete response to a specific (*Brady*) request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. (*U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Any failure by a prosecutor to respond to such a specific and relevant request is seldom, if ever, excusable (*U.S. v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding modified by, U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)))." (Demand Letter, July 19, ¶¶ 14-17)

(g) "PROMISES, OFFERS, OR INDUCEMENTS. The prosecutor has a duty to disclose any explicit promise, offer, or inducement extended to prosecution witnesses. In *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the Supreme Court found a Brady violation for a failure to disclose written contracts with informant witnesses. In *In re Sassounian*, 9 Cal. 4th 535, 37 Cal. Rptr. 2d 446, 887 P.2d 527 (1995) the California Supreme Court concluded

the prosecution withheld favorable evidence when it failed to disclose evidence of benefits provided, and promises made, to a jailhouse informant. The prosecution has a duty to disclose any "implied promise," such as when the words are not expressed but the substance implies the witness will receive a benefit. In *Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court found a Brady violation for the failure to disclose that a prosecution witness had been told to rely on the government's good judgment whether he would be prosecuted if he agreed to testify. The prosecutor cannot evade the duty to disclose promises by extending such offers in secret to the witness' attorney (*People v. Phillips*, 41 Cal. 3d 29, 47, 222 Cal. Rptr. 127, 711 P.2d 423 (1985) (full disclosure of any agreement between the prosecution and a witness or the witness's attorney is required, regardless of whether the witness has been fully informed of the agreement))." (Demand Letter, July 19, ¶¶ 18-20)

(g) "UNTRUTHFUL REPUTATION. Evidence that a prosecution witness has a pattern of lying to law enforcement or a reputation for manipulation and deceit is evidence that could be used to impeach the witness and is therefore evidence that is favorable to the defendant pursuant to *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997)." (Demand Letter, July 19, ¶ 21)

(h) "BIAS TOWARD DEFENDANT. Evid. Code, §780(f) provides that the trier of fact may consider "[t]he existence or nonexistence of a bias, interest, or other motive" in determining the credibility of a witness." (Demand Letter, July 19, ¶ 22)

(i) "EVIDENCE SUPPORTING STATEMENTS OF DEFENSE WITNESSES. Under §1054.1(e), the continuing duty of the prosecution to turn over material extends to exculpatory evidence, such as information that might establish the truth of a defense witness' testimony." (Demand Letter, July 19, ¶ 23)

24. Defendant Timothy and his employer have had ample time; far beyond that which is required; and ample Notices to obtain, disclose and comply with their legal obligations under Ca PC § 1054 and Brady regarding the utter lack of credibility and criminal record of M242946DV false accuser, Fugitive from Summons Greg. Plaintiff has properly pled these as Brady violations, actionable against state actors under 42 U.S.C. § 1983.

Claim #2: Abuse of Process

25. Plaintiff was known to the SDPD and to the Office of City Attorney to be in custody for months (approximately November 2017 to April 23, 2018, held on unreasonable, Excessive and Punitive bail, itself pending opinion before the Ninth Circuit (18-56202) after the SDPD's official reports (September 2017). On this grounds alone, Plaintiff notes that the purposeful, and unlawful, latency of bringing M242946DV, was an Abuse of Process, prima facie, and was intended, in part, to attempt to bring about a probation violation—which can have grave consequences, including but not limited to potentially its outright revocation, becoming the subject of the full sentencing of which probation may stem, and/or confinement to jail—where probation itself, stemming from SCD266332

(inclusive of consolidated SCD267655), is of related parties and matters; was never afforded trial, despite diligently seeking such (e.g. given unlawful pre-trial restraints on liberty that are the subject of 9th Cir., 18-56202); is the subject of appeal (4th Dist., Div. 1., case no.: D074186, represented by Mr. John O. Lanahan (CSBN #133091). Plaintiff cites to *County of Riverside v. McLaughlin*, 500 U. S. 44, 55 (1991), in noting that, "points to several statements from the [500 U.S. 44, 55] early 1800's to the effect that an arresting officer must bring a person arrested without a warrant before a judicial officer "`as soon as he reasonably can," and evidencing that Defendant Timothy, and/or his employer have failed to reasonably and legally do so.

26. Plaintiff has Demanded to the Office of the City Attorney on more than one occasion via Notice and Demand Letter(s) to the Office of the City Attorney to engage (see also Attachments to USDC SD Cal, 17-1997, Doc. 28-2, additional Demand Letters and formal Notices). Plaintiff notes, with prejudice, that, "Ca. Civ. Code, § 19 defines "constructive notice" as follows: Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such an inquiry, he might have learned such fact. As a result, each of Defendant Timothy, and, separately, his employer, the Office of the City Attorney (San Diego), have been put on Constructive Notice, prima facie.

27. In addition, Defendant Timothy is in violation of ABA Rules, as generally follows: "Under ABA Rule 4.1(b), "[i]n the course of

representing a client a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6," yet, Plaintiff contends that the Office of the City Attorney (San Diego), is done precisely this by attempting to withhold the cross-action (i.e. USDC SD Cal, 17-1997) documents as provided to them in good faith for Defendant Greg, while the Office of the City Attorney, certainly, does not have to (nor would) represent Defendant Greg in cross-action (i.e. USDC SD Cal, 17-1997), it certainly, beyond any reasonable doubt, to reasonable persons, would have to provide information intended for their client (i.e. Defendant Greg, false accuser in M242946DV), without impendence; (ii) under ABA Rule 4.4 (a), Respect for Rights of Third Persons, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person," and whereby, in this circumstance, the Office of the City Attorney (San Diego, an Interested Party), has done precisely this, they are attempting to delay permissible cross-action (i.e. USDC SD Cal, 17-1997) rather than engage in good faith; (iii) under ABA Rule 8.4 it is "professional misconduct for a lawyer to... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; .. (d) engage in conduct that is prejudicial to the administration of justice;" yet, Plaintiff's Intentional Infliction of Emotional Distress (IIED) federal tort claim (FAC, Doc. 22), is permissible cross-action, involving the same parties and

controversy. Therefore, in purposefully inhibiting such cross-action, the Office of the City Attorney is in direct violation of ABA Rule 8.4 (c) and (d); finally, herein without prejudice otherwise, (iii) under ABA Rule 1.3, "[a] lawyer shall act with reasonable diligence and promptness in representing a client," yet, in violating the aforementioned Rules; and willfully choosing to ignore cross-action (i.e. USDC SD Cal, 17-1997), third party process service (e.g. see ¶ 1 and support thereof) and otherwise, the Office of the City Attorney (San Diego), is also in violation of this ABA Rule(s), and its obligations." (USDC SD Cal, 17-1997, Doc. 31, pg. 5-6, ¶ 7)

28. In an Abuse of Process, no requirement of malice is required. Plaintiff alleges that Defendant Timothy has one or more ulterior motives in bringing the M242946DV prosecution, clearly latent (unlawful), and could include but not be limited to merely a successful prosecution and case under his belt.

29. Plaintiff has demonstrated via latency a priori, as to an Abuse of Process; however, constructively, also supported from an evidentiary standpoint as to the willfully suppressed criminal background evidence on M242946DV false accuser, Fugitive from Summons Greg. Further, these are the same matters and parties as prior litigation, as providing further evidentiary weight as to an Abuse of Process.

H. OTHER

30. As the Supreme Court explained more than 50 years ago in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), res judicata does not

bar a suit, even if it involves the same course of wrongful conduct as alleged earlier, so long as the suit alleges new facts or a worsening of the earlier conditions.

31. Under *Angie M. v. Superior Court*, 37 Cal. App. 4th, 1217, 1227 (1995)), "liberty" in permitting amendment and a fair opportunity to correct any defect, where one has not been given, the Court should grant leave.

32. Even if the Plaintiffs claims seem unlikely or improbable, the facts must be accepted as true for reliance purposes or purposes of ruling on an action or Motion. (*Del E. Webb Corp. v. Structural Materials*, 123 Cal.App.3d 593, 604, (1981)) Furthermore, the Plaintiffs ability to prove the allegations is also irrelevant. (*Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 213-4, (1983)) Additional facts may be implied or inferred from those facts expressly set forth in such filing, action or Motion, and construed in the larger context of a case, where in this case, such facts allegations and arguments are significantly complex.

33. This Complaint, in any and all capacities, provides fair notice of the claims and the factual allegations are sufficient to show that the right to relief is plausible.

I. JURY DEMAND

34. Plaintiff asserts his rights under the 7th Amendment to the U.S. Constitution and demands, in accordance with FRCP 38, a trial by jury on the following issue: each of the 42 U.S.C. § 1983 claims against each of the defendants

35. This Jury Demand and Notice, is timely, as it is made at any time after the commencement of the suit, but not later than service of the last live pleading. Further, all parties have been properly served and no party shall attempt, in bad faith, technical default on the issue of jury demand, herein.

36. Jury Demand is herein FRCP 38(b)(2) compliant.

37. Plaintiff has preserved his right of trial by jury as provided in the 7th Amendment to the U.S. Constitution or by federal statute. (see *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 708-09 (1999); *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974))

38. There is a federal right to a jury trial in this case under FRCP 39(a)(2), and supporting case law. (*Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990), also, *United States v. Balistrieri*, 981 F.2d 916, 927-28 (7'h Cir. 1992))

39. No parties, hereto, have waived the right to jury trial, in whole, or in part. (*Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1166 (9'h Cir. 1996))

40. This case involves issues that are best tried by a jury. (*Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983))

41. A jury trial will not disrupt the schedule of the court, or any party to the proceeding, where such right (7th Amendment) outweighs any potential disruption. (*TG Plastics Trading Co. v. Toray Plastics (Am.), Inc.*, 775 F.3d 31, 36 (1" Cir. 2014); *Daniel Int'l Corp. v. Fishbach*

& Moore, Inc., 916 F.2d 1061, 1064 (5'h Cir. 1990); see *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983))

J. DAMAGES

42. As a direct and proximate result of the defendants conduct, the Plaintiff suffered the following injuries and damages.

(a) Medical expenses in the past and future;

(b) Physical pain and mental anguish in the past and future;

(c) Lost earnings;

(d) Lost profits;

(e) Loss of earning capacity; and

(f) Exemplary damages, if applicable.

K. ATTORNEYS FEES & COSTS

43. Plaintiff reserves the right to request appointment of counsel under 28 U.S.C. §§ 1915 (e)(1) and separately 42 U.S.C. §§ 2000 (e), 5(f)(1), at any future time.

44. Irrespective of self-litigant status, or future attorney(s) representing the Plaintiff, under *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 604 (2001), the Plaintiff is entitled to reasonable attorney fees and costs, and expressly reserved.

45. In the taking of this Complaint, the Plaintiff seeks an award of attorney's fees and costs under the *Lodestar* method without prejudice to any Damages sought and awarded whether individually or in totality and shared by the Plaintiff with future counsel, or co-counsel if

at all though reserved, under evolving noveau industry standards in litigation finance.

L. REQUEST FOR RELIEF

46. Grant the Plaintiff Damages from Defendant Timothy's unlawful actions given each of the natural and probable consequences of such actions.

47. Any other relief that the Court deems appropriate.

M. CERTIFICATION AND CLOSING

48. Under FRCP 11, by signing below, I certify to the best of my knowledge, information, and belief that this Complaint and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the complaint otherwise complies with the requirements of Rule 11.

DATED: December 17, 2018

/s/ Gavin B. Davis
Gavin B. Davis, Pro Per