No. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

ROBERT A. COTTON, Appellant, v. COUNTY OF SAN BERNARDINO, a political subdivision, JOHN McMAHON, as Sheriff, SCOTT ABERNATHY. as Sheriff's Deputy, MICHAEL A. RAMOS, as District Attorney, TIMOTHY HASKELL, as Deputy District Attorney, PAUL LEVERS, as Deputy District Attorney, PHYLLIS MORRIS, as Public Defender fka sued as DOE 1, WILLIAM FIGUEROA, as Deputy Public Defender fka sued as DOE 2, DAVE SANDERS, as Deputy Public Defender fka sued as DOE 3, EDWARD WILSON, as Deputy Public Defender fka sued as DOE 4, and SHANE MATHIAS, as Deputy Public Defender fka sued as DOE 5, Appellees.	Case No.: 9th Cir. 16-56898 (U. S. D. C., C. D. Cal. No. 5:15-cv-2314-VAP(AGR) (C. D. Cal. 2016))

PETITION FOR WRIT OF CERTIORARI.

On Petition for Writ of Certiorari from the Judgment
Of the United States Court of Appeals
For the Ninth Circuit.

ROBERT A. COTTON
P. O. Box 98
San Bernardino, CA., 92402
TEL.: (909) 266-6201
Petitioner in Pro Se

QUESTIONS PRESENTED.

Petitioner's case was wrongly affirmed by the Ninth Circuit for reasons of issue preclusion, despite the fact that *Manuel v. City of Joliet,* 137 S. Ct. 911, 919-920, and fn. 8 (2017), allows the District Court to review a lack of probable cause after the criminal court found probable cause at Petitioner's Preliminary Hearing, despite the fact he was later found not guilty by an all-White Jury. The Petitioner's complaining witness was his estranged wife, a drug addict, who bit Petitioner on the lip first, a fact that was not disclosed until the third and last day of his criminal trial in violation of *Brady v. Maryland,* 373 U.S. 83, 3 S. Ct. 1194; 10 L. Ed. 2d 215 (1963). This Court also summarily reversed the case of *Sanders v. Jones,* 845 F.3d 721, 733-735, and fn. 7 (6th Cir. 2017), *Certiorari granted and summarily rev'd on Jan. 8, 2018,* where the Sixth Circuit also wrongly affirmed because the plaintiff in that case was indicted before a Grand Jury before her criminal case was dismissed.

Petitioner presents the following questions:

1. Was the Ninth Circuit in conflict with ***now,*** the Second, Third, *Fifth,* Sixth, *Seventh,* and Tenth Circuits, and the California Court of Appeal, First and Sixth Appellate Districts when the Ninth Circuit affirmed the Dismissal based on issue preclusion in violation of *Manuel v. City of Joliet,* 137 S. Ct. 911, 919-920, and fn. 8 (2017), when Petitioner was deprived of his evidence that was truthful, and under *Brady v. Maryland,* 373 U.S. 83, 3 S. Ct. 1194; 10 L. Ed. 2d 215 (1963)?
2. Was the Ninth Circuit in conflict with this Court's Decisions in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), and *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), when Petitioner properly pleaded his Second Amended Complaint?

///

///

3. Was the Ninth Circuit in conflict with this Court's Decision in *Buckley v. Fitzsimmons,* 509 U.S. 259, 275–76 (1993), when the Respondents withheld evidence under *Brady v. Maryland,* 373 U.S. 83, 3 S. Ct. 1194; 10 L. Ed. 2d 215 (1963), which is a law enforcement function?
4. Was the Ninth Circuit in conflict with this Court's Decision in *Tower v. Glover,* 467 U.S. 914, 922-923 (1984), where Petitioner's Public Defenders acted in conspiracy with the District Attorney to plead Petitioner as "guilty" when he protested his innocence during the 11-month period of his criminal case?
5. Did the District Court misstated facts in Petitioner's criminal case when Petitioner used self-defense after he was bitten by his estranged wife?
6. Was Petitioner's Second Amended Complaint still should be subjected to another amendment when amending the Complaint would not be futile?
7. Should the Hon. Virginia A. Phillips, the Chief District Judge in the case below, be disqualified from hearing this case after remand?

CORPORATE DISCLOSURE STATEMENT.

None of the Parties hold any stock in any corporation.

TABLE OF CONTENTS.

TABLE OF CASES.

TABLE OF AUTHORITIES.

CITATIONS.

The Judgment was granted against Petitioner in the case of *Cotton v. County of San Bernardino* (2017), dated November 9, 2017.

STATEMENT OF JURISDICTION.

The Judgment was granted against Petitioner in the case of *Cotton v. County of San Bernardino* (2017), dated November 9, 2017. This Court has jurisdiction pursuant to 28 U. S. C., §1254(1).

STATUTORY PROVISIONS.

United States Constitution, Fourth, Fifth, and Fourteenth Amendments , and 42 U. S. C., §§1983, 1985(2) and (3), and 1986 (Apx. 63a-65a).

STATEMENT OF FACTS.

On March 29, 2014, Petitioner's estranged wife falsely accused him of domestic violence. No violence was done by Petitioner, except in self-defense. She was high on pain killers at the time (She is now a full-blown illegal drug user.) (District Court Docket ("Dock.") No. 29, 7:13-15).

Petitioner's ex-wife bit Appellant on his lips first. She was already cheating on Petitioner. She started bragging about all of her junkie friends. When Petitioner was bit, as a reflex to the time Petitioner was bit by a German Shepard when he was eight, he pushed his ex-wife away from him. As for her "bruises", she purposely bruised herself. Petitioner then took her to the hospital (Dock. No. 29, 7:16-20).

When Petitioner took her to the hospital, Respondent Scott Abernathy, a detective from the Victorville Sheriff's Station, took Petitioner to a hospital room, and interviewed Petitioner. At no time was Petitioner read his *Miranda* rights. After questioning, Petitioner was then arrested by Abernathy solely on Petitioner's ex-wife's say-so (Dock. No. 29, 7:21-25).

When his ex-wife went to the Hospital, all of the bruises shown on the pictures were not there on March 29, 2014. None of the photos of Petitioner's ex-wife were date-stamped. Since they were not date-stamped, the bruises were either self-inflicted or were

inflicted by her drug dealers at least about two weeks after March 29, 2014 (Dock. No. 29, 8:1-5).

Petitioner was falsely arrested because:

a. He was Black.

b. He needed to be "feared".

c. It was around the time Baltimore Raven Ray Rice allegedly knocked out his wife and dragged her out of the elevator (Dock. No. 29, 8:6-10).

Petitioner was in Jail for 47 days, until May 21, 2014, when he posted a $50,000 bond (at the cost of $11,000) (Dock. No. 29, 8:11-12).

Petitioner was charged with Penal Code §273.5, a felony in the case of *People v. Robert A. Cotton,* Victorville Superior Court Case No. FVI 1401155 (Dock. No. 29, 8:13-14).

Between March 29, 2014, and February 25, 2015, Petitioner's Public "Pretenders" and Respondents William "Fat" Figueroa, Dave Sanders, Edward Wilson, and Shane Mathias did not do any of the following:

a. Sought disclosure of the *Brady* evidence.

b. Move to the Dismiss the Charges at the Preliminary Hearing.

c. Filed a Motion under Penal Code §995 to dismiss the Charges.

d. Read the file on Petitioner's case.

e. Kept on "shishing" the Petitioner.

f. Conspired with the District Attorney's Office, including Timothy Haskell and Paul Levers to plea Petitioner guilty, even though Petitioner did not commit a crime. They both conspired with the Superior Court Judges to help get a Guilty Plea, and unduly prolong and continue Petitioner's case (Dock. No. 29, 8:15-26).

///

///

At no time was Petitioner given a full and fair opportunity to litigate the issues of probable cause at his preliminary hearing, because Respondents Figueroa, Sanders, Wilson, and Mathias were more in conspiring to secure a plea deal than to defend Petitioner's innocence (Dock. No. 29, 9:1-4).

The prosecutors in Petitioner's case, Timothy Haskell and Paul Levers did not turn in the *Brady* evidence, evidence that was available at or before the preliminary hearing, showing that his ex-wife assaulted Petitioner first, until the first day of Jury Deliberations, February 25, 2015. Haskell and Levers also told Petitioner that "you won't get away with this." Get away with what? Haskell and Levers also alleged in their papers that Petitioner committed an "anticipated beating". What? Like Petitioner was committing Premeditated Jaywalking. When Haskell and Levers could not get their Guilty Plea, they argued to the Judge and Jury that they have to "fear" him only because Petitioner was:

a. Black.

b. Tall.

c. A little overweight (Dock. No. 29, 9:5-16).

Haskell and Levers wanted to simply inflame the Jury (Dock. No. 29, 9:17).

Petitioner's ex-wife also gave conflicting testimony, and faked her injuries before the Jury, including walking like a normal person in the Courthouse, and then slowly walking to witness stand to testify (Dock. No. 29, 9:18-20).

On February 25, 2015, the all-White Jury found Petitioner ***NOT GUILTY!*** (Dock. No. 29, 9:21).

In summary, the following rights were violated:

a. Petitioner's Equal Protection rights were violated because Deputy Abernathy, DDA's Haskell and Levers, and Public "Pretenders" Figueroa, Sanders, Wilson, and Mathias were prejudiced against Petitioner, a Black person.

b. Petitioner's Due Process and Equal Protection rights were violated when Deputy Abernathy refused to do a proper investigation of the facts; such investigation would had disclosed that his ex-wife assaulted Petitioner first.

c. Petitioner's Fifth, Sixth, and Fourteenth Amendments were violated when Haskell and Levers did not disclose all of the *Brady* evidence.

d. Petitioner's Fifth, Sixth, and Fourteenth Amendments were violated when Petitioner was falsely charged, and earlier incarcerated for 47 days on charges pressed by a drug addict, and was found ***NOT GUILTY*** by a Jury (Dock. No. 29, 9:22-10:8).

Furthermore, the case below was filed after Petitioner was found Not Guilty in the case of *People v. Robert A. Cotton,* Victorville Superior Court Case No. FVI 1401155. The Respondents in that case withheld *Brady* evidence from the first day Petitioner was arrested, March 29, 2014 ("Day One"), all the way to February 25, 2015, when the *Brady* evidence was introduced at the last day of Trial, and the first day of Jury Deliberations. It was clear to Petitioner's State Jury in his criminal Trial that Petitioner committed no crime against his ex-wife.

This is the case where a dismissal of the criminal case should have been made at the Preliminary Hearing. Instead of Respondent Levers dismissing the case, or the Public Defender Appellees asking for dismissal, Respondents wanted Petitioner to take a deal for a crime he did not commit. It was Petitioner's ex-wife that bit Petitioner first.

AN ACT OF SELF-DEFENSE IS A DEFENSE. Penal Code §866(a) would have allowed Petitioner to present this evidence of self-defense. Petitioner had the defense of Penal Code §693 to prevent an offense on his person when his ex-wife first bit him. The *Brady* evidence collected since Day One, the statement of Petitioner's ex-wife to Respondent Levers, ***prior to the Preliminary Hearing,*** telling him that she bit Petitioner first, shows that Petitioner was defending himself, and that his ex-wife bit him in the first place. The photos were not date-stamped, and the evidence statement given to Respondent Levers, and later given to the State Jury expressly discloses that Petitioner

acted in self-defense. Petitioner's ex-wife was also self-intoxicated on the day of the arrest and was put into a drug-rehab soon thereafter. Petitioner's ex-wife had the credibility of Adolf Hitler, Joseph Stalin, and the current Graber-in-Chief, ***ZERO.*** It was clear she was not a victim of the assault. She perpetrated the assault, and any testimony by Petitioner's ex-wife was false. Yet, Petitioner was falsely imprisoned for 47 days, and had to go to Hearings and Trial for 11 months till the Jury found Petitioner Not Guilty, all because Petitioner and his Public Defenders were deprived of the *Brady* evidence, which should have been produced at the Preliminary Hearing, during the entire period from Petitioner's arrest to acquittal, and that Petitioner's ex-wife otherwise gave false testimony. The Respondent Deputy D. A.'s put on their case only on the basis that Petitioner needed to be "feared" (!) only because he was Black, tall, and a little overweight. Since when was it a crime to be Black? The Fourteenth Amendment was ratified in part to overturn *Dred Scott v. Sandford,* 60 U.S. 393 (1857), where it was held that persons of African descent, slave or free, could not be American citizens. Petitioner did not hit his ex-wife first. Just because a Football player, Ray Rice, hit his wife near an elevator, does not mean that all Blacks, including Justice Clarence Thomas, are wife-beaters.

A. PRELIMINARY HEARING.

On April 15, 2014, the Preliminary Hearing against Petitioner was held. Respondent Scott Abernathy, the arresting officer was called. He was called to Victor Valley Hospital on March 30, 2014 Dock. No. 35, 3:11, 16). Respondent Abernathy first spoke to Petitioner's ex-wife (Dock. No. 35, 3:24). Petitioner's ex-wife falsely claimed that after an argument that she was laying on her bed (Dock. No. 35, 4:24). Respondent Abernathy claimed that he saw the lump on the back of her head, and a swollen right eye (Dock. No. 35, 4:28-5:1)[1]. She also falsely told Respondent Abernathy that she had a

---

[1] What was not testified to or challenged at the Preliminary Hearing, but what Respondent William Figueroa could had easily ascertained from Petitioner was that she

"brain bleed" (Dock. No. 35, 5:6-9)[2]. Respondent Abernathy then talked to Petitioner in a room at the hospital (Dock. No. 35, 6:1-4). Respondent Abernathy claimed that he did not tell Petitioner that he was not free to leave (Dock. No. 35, 6:14), and he did not tell Petitioner that he had talk to Respondent Abernathy (Dock. No. 35, 6:16). At no time did Respondent Abernathy ***give Petitioner his Miranda rights.*** Petitioner told Respondent Abernathy that he acted in ***SELF-DEFENSE*** after his ex-wife bit him (Dock. No. 35, 6:18-23). Because Petitioner acted in self-defense, as will be explained later, the conversation should had ended, and Petitioner should have been released.

On Cross-Examination, Respondent Figueroa asked Respondent Abernathy if Petitioner's ex-wife if she remembered biting Petitioner, and he said no (Dock. No. 35, 8:3). Respondent Figueroa confirmed that Petitioner told Respondent Abernathy that he acted in self-defense (Dock. No. 35, 8:12). Respondent Abernathy still claimed that the ex-wife had a swollen right eye, and a lump on the head (Dock. No. 35, 8:26-27).

When the Superior Court asked Respondent Figueroa if he had any affirmative defenses for Petitioner, he said no (Dock. No. 35, 10:7). Respondent Figueroa did not specifically move to dismiss (Dock. No. 35, 10:11-19). Respondent Levers falsely claimed that Petitioner smashed her head on the headboard and gave her a "brain bleed" (Dock. No. 35, 10:20-28)[3]. The Superior Court, despite Petitioner's affirmative defense of self-defense, falsely held him to answer (Dock. No. 35, 11:1-11).

B. RELEVANT PORTIONS OF THE TRIAL.

On February 24, 2015, Respondent Shane Matthias stated that:

"MR. MATHIAS: And that would be the late discovery instruction. I'll be brief in my argument.

---

self-inflicted those injuries between the time she bit Petitioner, and the time she easily walked to Petitioner's car to go to the Hospital.

[2] How can she had a "brain bleed" when she easily walked to Petitioner's car to go to the Hospital?

[3] But Appellee Levers kept the cat in the bag, knowing that Petitioner's ex-wife gave Levers before the Preliminary Hearing the admission that she first bit Petitioner.

"There was a statement that was, in my opinion, very important that was given to the District Attorney's Office that was allegedly given to Deputy District Attorney Paul Levers. We didn't receive that until the trial, and I think that would have been important to have that because, had we had that, we could have prepared differently for this trial.

"So I think that issue of not turning over that evidence is a discovery -- is a sanction that should be --we should be given.

"THE COURT: Or is an instruction that should be given.

"MR. MATHIAS: Correct.

"THE COURT: Mr. Haskell?

"MR. HASKELL: Well, you know, what we have is a statement from the victim in this case. However, as far as not being able to prepare, ***I think that statement about the biting was given from the very first day this case came to the Public Defender's Office.*** The defendant made that statement, and that evidence was provided to them. Now, I found out this morning that apparently the victim had lunged forward and made some sort of biting movement towards the defendant, and I informed Mr. Mathias -- Mathias; right?

"MR. MATHIAS: Thank you." (Dock. No. 35, 133:25-134:21). (Emphasis added.)

On February 25, 2015, the Superior Court further stated that:

"THE COURT: Okay, I'll put in a good word with Mr. Bremser when I see him. Let me do this, I'm going to see if I can just print this out. I'm going to print out a rough draft for each of us. But here's what I wrote for 306 -- and you could look at what's here in the book and you can tell which part I've added -- I've written;

"'Both the People and the defense must disclose their evidence to the other side before trial within the time limit set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence to counter opposing evidence or to receive a fair trial.

"'An attorney for the People failed to disclose, colon, a statement to Paul Levers, comma, a member of the District Attorney's office, comma, by Rosalyn Cotton that she had bitten the defendant's lip.'

"MR. HASKELL: And I would object to that language, your Honor, because all we have is an accusation from somebody who doesn't really remember much about anything. I don't remember. I don't know -- I would imagine Mr. Levers would disclose that had that actually been told to Mr. Levers. All we have here is an open-ended accusation.

"THE COURT: Okay, all right. I get you. By the way, is Mr. Levers here?

"MR. HASKELL: I don't know.

"THE COURT: Because we could call him. But I think if I understand what you're saying correctly, you don't oppose 306 but I am telling the jury that this is what happened. Instead, you would like me to tell the jury something different, that this –

"MR. HASKELL: A statement made by Rosalyn Cotton.

"THE COURT: So that we're clear, why don't you tell me how you would be in agreement with 306? What wording would you propose?

"MR. HASKELL: After the colon, just maybe a statement made by Rosalyn Cotton, I think, is sufficient.

"THE COURT: A statement made by Rosalyn Cotton that she had bitten the defendant's lip?

"MR. HASKELL: If the Court wishes to add on that additional language, it's up to the Court's discretion.

"THE COURT: If I'm going to tell them -- I have to tell them what it is that you didn't disclose if you didn't disclose something.

"MR. HASKELL: Okay, I suppose that's fine.

///

///

"MR. MATHIAS: I think the name of Mr. Levers is more specific but I think also the language you're suggesting also shows what statement we're talking about -- which is the important part of this -- is that they know.

"MR. HASKELL: And I just want to state for the record that as soon as I became aware of the statement, I disclosed it to Defense Counsel.

"MR. MATHIAS: And that is true -- had that conversation with Mr. Haskell and Ms. DiDonato earlier yesterday morning.

"THE COURT: So I have second paragraph now reads,

"'The attorney for the People failed to disclose a statement by Rosalyn Cotton that she had bitten the defendant's lip.'

"MR. MATHIAS: Yes." (Dock. No. 35, 143:23-145:28).

The Jury Instruction now read to the Jury:

"An attorney for the People failed to disclose a statement by Rosalyn Cotton that she had bitten the defendant's lip. In evaluating the weight -- sorry -- in evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure." (Dock. No. 35, 157:2-6).

This *Brady* evidence should have been given to Petitioner and Respondent Figueroa at or before the Preliminary Hearing. Self-Defense is an affirmative defense that Respondent Figueroa should have pursued, ***but Respondent Levers should have disclosed this admission from Respondent's ex-wife at the very first opportunity!***

Respondent Haskell also made an inflammatory statement that should not have been made to the State Jury, which stated that:

"Ladies and gentlemen, today I ask you to stand up against fear and I ask you to take a stand. I ask you to go back to the jury deliberation room, I ask you to discuss the case, and I ask you to return a verdict of guilty. Thank you." (Dock. No. 35, 172:2-5).[4]

---

[4] Petitioner admits that the "Fear" statement itself would still make Respondent Haskell absolutely immune for damages. However, for purposes of the State False Imprisonment,

The Superior Court later responded:

> "Mr. Haskell, you told the jury to stand up against fear. I don't know what that means but I suspect that what you're doing when you say that -- and I don't think you do it -- did it with any evil intent -- but isn't that asking the jury to make a decision based upon public opinion or something other than the evidence in this case?"

The problem with the criminal case is that the entire prosecution of Petitioner was a sham. All they had was a lying witness and "fear". Respondents wanted Petitioner imprisoned because he was Black, tall, and a little overweight, and that his Public Pretenders were eager to take a deal without consulting Petitioner about his defense of self-defense. Respondent Levers knew about the ex-wife admission, and didn't dismiss the case before the Preliminary Hearing.

"Miss me on the stupid stuff!"

STATEMENT OF THE CASE.

On November 10, 2015, Petitioner filed his Original Complaint (Dock. No. 1).

On December 15, 2015, Respondents filed their Motion to Dismiss (Dock. No. 8).

On January 6, 2016, Respondents Ramos, Haskell, and Levers filed an Answer to the Complaint (Dock. No. 17).

On January 13, 2016, Petitioner filed his Opposition to the Motion to Dismiss (Dock. No. 20).

On January 27, 2016, Respondents filed their Reply to the Opposition to the Motion to Dismiss (Dock. No. 21).

On February 18, 2016, Petitioner filed his Supplemental Opposition to the Motion to Dismiss (Dock. No. 24).

---

and 42 U. S. C., §1986 Claims for Relief, the District Attorney Respondents should had dismissed Petitioner's charges before the Preliminary Hearing, or not filed the charges at all since Petitioner had to use self-defense after his ex-wife bit him in the first place. In fact, she should had been charged with Penal Code §273.5 instead.

On February 26, 2016, the Magistrate Judge issued her Report and Recommendation (Apx. 5a-24a).

On April 1, 2016, the District Court granted Petitioner leave to amend (Apx. 25a-27a).

On May 2, 2016, Petitioner filed his First Amended Complaint alleging violation of civil rights (under 42 U.S.C., §§1983 and 1986), including malicious prosecution and abuse of process; conspiracy to violate civil rights (under 42 U.S.C., §1985(2) and (3)); invasion of privacy; false imprisonment; intentional infliction of emotional distress; violations of Civil Code §51.7; and violations of Civil Code §52.1 (Dock. No. 29).

On May 19, 2016, the Respondents filed their Motion to Dismiss (Dock. No. 30). Respondents argued that, *inter alia,* the District Attorney Respondents are immune despite the fact they withheld *Brady* evidence (Dock. No. 30, 6:25-8:13), and that Petitioner's Complaint is barred by issue preclusion (Dock. No. 30, 8:14-10:24, 14:15-27).

On June 20, 2016, Petitioner filed his Request for Judicial Notice of the Preliminary Hearing Transcript, and portions of the Trial Transcript (Dock. No. 35); and his Opposition to the Motion to Dismiss (Dock. No. 36). Petitioner argued in his Opposition that, *inter alia,* Petitioner only needed to plead notice pleading (Dock. No. 36, 14:14-17:21), the District Attorney Respondents were not immune for their *Brady* violations (Dock. No. 36, 17:22-19:22), and that Petitioner's First Amended Complaint was not barred by issue preclusion (Dock. No. 36, 20:1-23:11).

On June 28, 2016, the Public Defender Respondents filed their Motion to Dismiss based on the argument that they are not state actors (Dock. No. 37).

Also on June 28, 2016, the rest of the Respondents filed their Reply to the Opposition to the Motion to Dismiss (Dock. No. 39).

On July 27, 2016, Petitioner filed his Opposition to the Public Defender Respondents' Motions to Dismiss arguing that the Public Defenders conspired with the prosecution to get him to plead guilty to a crime he did not commit (Dock. No. 41).

On August 10, 2016, the Public Defender Respondents filed their Reply in Opposition to the Motion to Dismiss (Dock. No. 42).

On November 9, 2016, the Magistrate Judge issued her Report and Recommendation (Dock. No. 44), stating that, *inter alia,* despite the fact that Petitioner was bit first, there was still "probable cause" (Apx. 28a-56a).

On November 30, 2016, Petitioner filed his Objections to the Report and Recommendation (Dock. No. 46), stating that, *inter alia,* Petitioner only needed to plead notice pleading (Dock. No. 46, 16:14-19:25), the District Attorney Respondents were not immune for their *Brady* violations (Dock. No. 46, 20:1-22:2), and that Petitioner's First Amended Complaint was not barred by issue preclusion (Dock. No. 46, 22:3-25:14).

On December 8, 2016, the Chief District Judge adopted the findings of the Report and Recommendation (Apx. 57a-61a) making many statements that Petitioner was still guilty of assaulting his wife (Apx. 58a:25-60a:24)., despite Petitioner's Not Guilty verdict (Apx. 57a:22-23).

Also on December 8, 2016, the District Court entered Judgment against Petitioner (Apx. 62a).

On December 22, 2016, Petitioner filed a timely Notice of Appeal (Dock. No. 50).

On June 8, 2017, Petitioner filed his Opening Brief (Ninth Cir. No. 16). Petitioner argued that he didn't need to specifically plead his Complaint (Ninth Cir. No. 16, 26-29), that the District Attorney Respondents were not immune for *Brady* violations (Ninth Cir. No. 16, 30-31), that the District Court may review a lack of probable cause after a Preliminary Hearing (Ninth Cir. No. 16, 31-45), that Petitioner's Public Defenders were state actors when they conspired to obtain a plea contrary to Petitioner's claims of innocence (Ninth Cir. No. 16, 45-46), that the District Court misstated facts about Petitioner's criminal case (Ninth Cir. No. 16, 46-49), that another amended complaint would not be futile (Ninth Cir. No. 16, 49-51), and that the Chief District Judge should be disqualified on remand (Ninth Cir. No. 16, 51-52).

///

On July 19, 2017, Respondents filed their Brief (Ninth Cir. No. 17). Respondents argued that Petitioner being bound at the Preliminary Hearing foreclosed Plaintiff's Action below (Ninth Cir. No. 17, 12-17), that the District Attorney Respondents are immune (Ninth Cir. No. 17, 17-20), that the Public Defender Respondents are not state actors (Ninth Cir. No. 17, 20-22), that Petitioner failed to allege *Monell* liability (Ninth Cir. No. 17, 22-26), that the allegations about the Public Defender was insufficient (Ninth Cir. No. 17, 26-28), and that Petitioner's other civil rights claims are insufficient (Ninth Cir. No. 17, 28-34).

On August 4, 2017, Petitioner filed his Reply Brief (Ninth Cir. No. 22).

On November 9, 2017, the Ninth Circuit affirmed the Judgment of the District Court, even though this Court had earlier ruled that a lack of probable cause may be reviewed after a Preliminary Hearing (Apx. 1a-4a).

On November 24, 2017, Petitioner ***TIMELY*** filed his Petition for Rehearing En Banc (Ninth Cir. No. 29) (It was timely filed when it was in the Ninth Circuit mailbox on November 24, 2017, at 11:02 a. m. (Ninth Cir. No. 30, 2, 6)). That Ninth Circuit denied the Petition on April 5, 2018 (Apx. 63a).

REASONS FOR GRANTING THE WRIT.

I. THE NINTH CIRCUIT IS IN CONFLICT WITH THE SUPREME COURT PRECEDENT OF *MANUEL V. CITY OF JOLIET,* 137 S.CT. 911 (2017), AND THE SECOND, THIRD, SIXTH, AND TENTH CIRCUITS, AND THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT IN THAT THE COMPLAINT IS NOT BARRED BY ISSUE PRECLUSION, SINCE PETITIONER WAS DEPRIVED OF HIS *BRADY* AND TRUTHFUL EVIDENCE BEFORE THE PRELIMINARY HEARING.

Preliminary Hearings are a joke in California. As now-former New York Court of Appeals Judge Sol Wachter once said, "You can always indict a ham sandwich".

///

When a Petitioner submits his Briefs to the Appellate Courts, they should be read. The Ninth Circuit ***DIDN'T READ THE BRIEFS!*** When Petitioner cited *Manuel v. City of Joliet,* 137 S. Ct. 911, 919-920, and fn. 8, (2017), it should have overturned *Haupt v. Dillard* (9th Cir. 1994) 17 F.3d 285, 290, *Wige v. City of Los Angeles,* 713 F.3d 1183 (9th Cir. 2013)[5], and disapproved *McCutchen v. City of Montclair* (Cal. App. 4 Dist. 1999) 73 Cal.App.4th 1138[6] [7]. Instead, the Ninth Circuit furthered racism by allowing issue preclusion on a Preliminary Hearing finding, despite the fact that ***PETITIONER WAS FOUND NOT GUILTY BY AN ALL-WHITE JURY IN THE FIRST PLACE!*** Issue preclusion stops at the Not Guilty Verdict, ***NOT*** at an earlier Preliminary Hearing.

"A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stephen M. Shapiro et al., Supreme Court Practice § 4.5, at 250 (10th ed. 2013); see also Sup. Ct. R. 10(c) (review appropriate where "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court"). That is the situation here: The Ninth Circuit's rulings on whether lack of probable cause before or after a Preliminary Hearing was conducted conflict with the Supreme Court's governing precedents, including *Manuel.*

---

[5] Who is the City Attorney at the time *Wige* was decided? Carmen Trutanich, who the State Bar of California is considering on disbarring him for not turning over *Brady* evidence when he was a Deputy District Attorney for the County of Los Angeles.

[6] The *McCutchen* case is also in conflict with the case of *Schmidlin v. City of Palo Alto* (Cal. App. 6 Dist. 2007) 157 Cal.App.4th 728, 767-768, where the First District of the California Court of Appeal refused to follow *McCutchen,* and *Haupt.* Another case from the First District, *Cornell v. City and County of San Francisco* (Cal App. 1 Dist. 2017) http://www.courts.ca.gov/opinions/documents/A141016.PDF, also deals with the lack of probable cause, and will be discussed later in this Petition.

[7] This Petition is also related to the case of *Bobby Lee Montgomery v. Guy Louis Taylor, et al.,* Ninth Circuit No. 16-16878, https://cdn.ca9.uscourts.gov/datastore/memoranda/2017/11/09/16-16878.pdf (9th Cir. 2017), and Petitioner is requesting the Ninth Circuit to also consider that case.

It should be noted that the Supreme Court wes currently reviewing the level of probable to arrest is required. *Lozman v. City of Riviera Beach,* https://www.supremecourt.gov/opinions/17pdf/17-21_p8k0.pdf, at p. 11 (2018), and rejected Certiorari on whether a plaintiff may file suit after the prosecution scared one of her witnesses away at her criminal Trial. *Park v. Thompson,* 851 F.3d 910 (9th Cir. 2017), *Certiorari denied Jan. 8, 2018.*

Petitioner suffered injury at his Preliminary Hearing because he did not have his *Brady* evidence presented before then, and that his attorney, Deputy Public Defender William "Fat" Figueroa, kept on telling Petitioner to "Shh!" "I know what I'm doing". He only gave Petitioner a cursory defense at the Preliminary Hearing. Since in California, a Preliminary Hearing Finding is first reviewable by a Motion pursuant to Penal Code §995, and then a Petition for Mandamus in the State Court of Appeal. He ***NEVER*** had the opportunity to contest the Order binding him for Trial. He always told his Public Defenders, as well as the Respondent Deputy D. A.'s that he was innocent, and that his ex-wife bit him first. Both sides pressured Petitioner to plea Guilty to Felony Domestic Violence as a Strike. He was innocent then, and innocent now. The People's intent to railroad him to State Prison on the basis of a *Junkie,* whose story to Respondent Abernathy, and testimony at Trial was false, was because solely he was Black, period end. They had the *Brady* evidence since Day One, and Petitioner should have been released ***DAY ONE.***

The case of *Awabdy v. City of Adelanto,* 368 F.3d 1062, 1067-1068 (9th Cir. 2004), states that:

> "Awabdy contends that the district court erred because it did not afford him an opportunity to rebut, or overcome, the prima facie finding. We agree. Among the ways that a plaintiff can rebut a prima facie finding of probable cause is by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith. See, e.g., *Williams v. Hartford Ins. Co.,* 147 Cal.App.3d 893, 195 Cal.Rptr.

448, 452 (1983); *Rupp v. Summerfield,* 161 Cal.App.2d 657, 326 P.2d 912, 915-16 (1958); *Murphy v. Lynn,* 118 F.3d 938, 948 (2d Cir.1997). See also Restatement (Second) of Torts § 663; H.D. Warren, Annotation, Malicious prosecution: commitment, binding over, or holding for trial by examining magistrate or commissioner as evidence of probable cause, 68 A.L.R.2d 1168 (1993); 54 C.J.S. Malicious Prosecution § 33 (2003); 52 Am.Jur.2d Malicious Prosecution § 62; W. Keeton et al., Prosser and Keeton on the Law of Torts § 119, at 881 (5th ed.1984). Accordingly, the Superior Court's decision to hold Awabdy to answer after a preliminary hearing would not prevent him from maintaining his § 1983 malicious prosecution claim if he is able to prove the allegations in his complaint that the criminal proceedings were initiated on the basis of the defendants' intentional and knowingly false accusations and other malicious conduct.

"We reject the defendants' argument that they should be shielded from liability because it was the San Bernardino County District Attorney's office [the same Office] — and not they — who prosecuted Awabdy. Ordinarily, the decision to file a criminal complaint is presumed to result from an independent determination on the part of the prosecutor, and thus, precludes liability for those who participated in the investigation or filed a report that resulted in the initiation of proceedings. *Smiddy v. Varney,* 665 F.2d 261, 266-68 (9th Cir.1981). However, the presumption of prosecutorial independence does not bar a subsequent § 1983 claim against state or local officials who improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, ***concealed exculpatory evidence [JUST LIKE THE RESPONDENTS DID IN THIS CASE AGAINST PETITIONER IN THE STATE COURT. HOW COME THIS CASE WAS NOT FOLLOWED BY THE NINTH CIRCUIT?!! Respondent Matthias stated that the prosecution did not disclose the Brady evidence: "We didn't receive that until the trial". (Dist. Ct. Dock. No. 35, 133:25-134:21).],*** or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings. See *Galbraith,* 307 F.3d at 1126-27 (holding that plaintiff's allegations that a coroner's knowingly or recklessly false statements led to his arrest and prosecution were sufficient to state a § 1983 claim); *Harris v. Roderick,* 126 F.3d 1189, 1198 (9th Cir.1997) (holding that a probable cause determination 'that is "tainted by the malicious actions of the government officials [involved]" does not preclude a claim against the officials involved.') (quoting *Hand v.*

> *Gary,* 838 F.2d 1420, 1426 (5th Cir.1988)). See also 5 Witkin, Summary of Cal. Law, Torts § 418 (9th ed. 1998) ('One who procures a third person to institute a malicious prosecution is liable, just as if he instituted it himself.'). On the basis of the allegations in his complaint, Awabdy may be able to prove that the defendants' knowingly false accusations and other similarly conspiratorial conduct were instrumental in causing the filing and prosecution of the criminal proceedings." (Emphasis added.)

Petitioner should not have been prosecuted at all. They withheld the *Brady* evidence since Day One. The Respondents' Motion to Dismiss below is frivolous because it shields them from the same misconduct in *Awabdy.* Furthermore, the Respondents had the *Brady* evidence and willfully refused to disclose it. That is ***NOT*** issue preclusion, that's damages.

Furthermore, other Courts required the prosecution to turn over *Brady* evidence. *People v. Harrison* (Cal App. 2 Dist. 2017) http://www.courts.ca.gov/opinions/documents/B272132.PDF; *Serrano v. Superior Court* (Cal App. 2 Dist. 2017) http://www.courts.ca.gov/opinions/documents/B282975.PDF; *Browing v. Baker,* http://cdn.ca9.uscourts.gov/datastore/opinions/2017/11/03/15-99002.pdf (9th Cir. 2017).

There should be no issue preclusion in this case. The case of *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, explains that:

> "But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, 230 [123 Cal. Rptr. 1, 537 P.2d 1250]; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal. 2d 749, 757-758 [22 Cal. Rptr. 14, 371 P.2d 758].)"

The public interest would bar issue preclusion in findings made in criminal cases. This Court stated that a plaintiff has under the Fourth Amendment a cause of action for damages in malicious prosecution, ***A CASE NOT FOLLOWED BY THE NINTH***

CIRCUIT. The case of *Manuel v. City of Joliet,* 137 S. Ct. 911, 919-920, and fn. 8 (2017), explains that:

> "For that reason, and contrary to the Seventh Circuit's view, Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention. [Footnote omitted.] Consider again the facts alleged in this case. Police officers initially arrested Manuel without probable cause, based solely on his possession of pills that had field tested negative for an illegal substance. So (putting timeliness issues aside) Manuel could bring a claim for wrongful arrest under the Fourth Amendment. And the same is true (again, disregarding timeliness) as to a claim for wrongful detention—***because Manuel's subsequent weeks in custody were also unsupported by probable cause, and so also constitutionally unreasonable.*** No evidence of Manuel's criminality had come to light in between the roadside arrest and the County Court proceeding initiating legal process; to the contrary, yet another test of Manuel's pills had come back negative in that period. All that the judge had before him were police fabrications about the pills' content. The judge's order holding Manuel for trial therefore lacked any proper basis. And that means Manuel's ensuing pretrial detention, no less than his original arrest, violated his Fourth Amendment rights. Or put just a bit differently: ***Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.***[8]
>
> "FN. 8. The dissent goes some way toward claiming that a different kind of pretrial legal process—a grand jury indictment or preliminary examination—does expunge such a Fourth Amendment claim. See post, at 9, n. 4 (opinion of ALITO, J. ***[THE DISSENTING OPINION, NOT THE MAJORITY OPINION THE NINTH CIRCUIT WOULD NOT LIKE TO FOLLOW.]***) (raising but 'not decid[ing] that question'); post, at 10 (suggesting an answer nonetheless). The effect of that view would be to cut off Manuel's claim on the date of his grand jury indictment (March 30)—even though that indictment (like the County Court's probable-cause proceeding) was entirely based on false testimony and even though Manuel remained in detention for 36 days longer. See n. 2, supra. Or said otherwise—even though the legal process he received failed to establish the probable cause necessary for his continued confinement. We can see no principled reason to draw that line. Nothing in the nature of the legal proceeding establishing probable cause makes a difference for purposes of the Fourth Amendment: ***Whatever its precise form, if the proceeding is***

> ***tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights, for all the reasons we have stated. [WHICH THE NINTH CIRCUIT SHOULD HAVE FOLLOWED.]*** By contrast (and contrary to the dissent's suggestion, see post, at 9, n. 3), once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment. See *Jackson v. Virginia,* 443 U. S. 307, 318 (1979) (invalidating a conviction under the Due Process Clause when 'the record evidence could [not] reasonably support a finding of guilt beyond a reasonable doubt'); *Thompson v. Louisville,* 362 U. S. 199, 204 (1960) (striking a conviction under the same provision when 'the record [wa]s entirely lacking in evidence' of guilt—such that it could not even establish probable cause). *Gerstein* and *Albright,* as already suggested, both reflected and recognized that constitutional division of labor. See *supra,* at 6–8. In their words, the Framers 'drafted the Fourth Amendment' to address 'the matter of pretrial deprivations of liberty,' *Albright,* 510 U. S., at 274 (emphasis added), and the Amendment thus provides 'standards and procedures' for 'the detention of suspects pending trial,' *Gerstein,* 420 U. S., at 125, n. 27 (emphasis added)." (Emphasis added.)

Here, this Court eliminated findings of issue preclusion when there was no probable cause to bind Petitioner for his State Criminal Trial. Petitioner was both deprived of *Brady* evidence, and truthful evidence. If 12 White Jurors can find Petitioner "Not Guilty", it is because Respondents did not disclose exculpatory evidence, and that Respondents relied on an untruthful and incredible junkie. It was on that junkie's basis that Respondents Haskell and Levers said during plea negotiations "We won't let you get away with this." ***GET AWAY WITH WHAT?!! PETITIONER'S EX-WIFE BIT HIM FIRST. THERE SHOULD NEVER HAD BEEN A TRIAL TO BEGIN WITH.*** This Court also summarily reversed the case of *Sanders v. Jones,* 845 F.3d 721, 733-735, and fn. 7 (6th Cir. 2017), *Certiorari granted and summarily rev'd on Jan. 8, 2018* on the basis of *Monell*, where the Sixth Circuit also wrongly affirmed because the plaintiff in that case was indicted before a Grand Jury before her criminal case was dismissed.

Also, all the nonsense about "issue preclusion" cannot apply anymore. Petitioner was bound over at his Preliminary Hearing, because of non-disclosure of *Brady* evidence, and the false statements from Petitioner's ex-wife. Like Manuel's 48 days in Jail, Petitioner spent 47 days in Jail after first being bit on the lip by his ex-wife. She suffered no "brain bleed", and there are no date-stamped photographs stating when his ex-wife's bruises took place. She is a junkie who bit Petitioner's lips on the claim that Petitioner had sex with a lady who was the mother of the ex-wife's drug dealer. There was no probable cause here, even if God Himself ruled that there was "probable cause". If God Himself made such a ruling, the Pope's Jewish.

Another case from the Sixth Circuit also applies here. The case of *King v. Harwood,* 852 F.3d 568, 588 (6th Cir. 2017) *Certiorari denied Jan. 8, 2018*, explains that:

> "Moreover, the Supreme Court's recent decision in *Manuel v. Joliet,* No. 14-9496 (U.S. Mar. 21, 2017), considered ***and rejected*** the argument that either a judge's finding of probable cause or 'a grand jury indictment or preliminary examination' forecloses a Fourth Amendment claim arising from unlawful pretrial detention. *Id., slip op.* at 11 n.8 (holding that plaintiff could pursue a § 1983 claim for unlawful pretrial detention, and that the Fourth Amendment properly governed such a claim, where he spent forty-eight days in jail 'based entirely on made-up evidence' that a vitamin bottle in his possession actually contained illegal drugs, slip op. at 2, 4, even though a judge found there was probable cause for the charge on the day of arrest, and even though a grand jury returned an indictment twelve days later). The Court in *Manuel* went on: 'Whatever its precise form, if the proceeding [finding probable cause] is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights.' *Ibid."* (Emphasis added.)

The Northern District of Illinois recently allowed a suit to go forward based on malicious prosecution. The case of *Patrick v. Matthews,* 2017 U. S. Dist. LEXIS 68453, at 3 (N. D. Ill. 2017), explains that:

> "Section 1983 does not confer any substantive rights but rather is 'an instrument for vindicating federal rights conferred elsewhere.' *Spiegel v. Rabinovitz,* 121 F.3d 251, 254 (7th Cir. 1997). Here, the Complaint alleges

that Patrick was 'improperly seized, arrested, detained and charged without any probable cause in violation of his [c]onstitutional rights.' (Compl. ¶ 39, Dkt. No. 1.) As the Supreme Court recently held, ***this is sufficient to state a constitutional violation under the Fourth Amendment [NOT VERBOSE, GLORIOSKI PLEADINGS THE NINTH CIRCUIT WOULD RATHER HAVE],*** which prohibits, *inter* alia, both unreasonable arrests and unlawful pretrial detentions. *Manuel v. City of Joliet, Ill.,* 137 S. Ct. 911, 919 (2017) (holding that plaintiff stated Fourth Amendment claim to be redressed under § 1983 'when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention')." (Emphasis added.)

The Tenth Circuit also would allow a complaint alleging malicious prosecution if all of the elements are met. The case of *Margheim v. Buljko,* 855 F.3d 1077, 1084-1085 (10th Cir. 2017), explains that:

"The Fourth Amendment provides one source of rights enforceable in a § 1983 action. *See, e.g., Gutierrez v. Cobos,* 841 F.3d 895, 898 (10th Cir. 2016) (addressing § 1983 claims for excessive force, unlawful entry, and unlawful seizure based on the Fourth Amendment). As the Supreme Court recently reconfirmed, the Fourth Amendment provides a basis under § 1983 for challenging pre-trial detention. *Manuel v. City of Joliet,* 137 S. Ct. 911, 914-15 (2017).

"...

"The Court held that § 1983 can support a Fourth Amendment claim concerning pre-trial detention even after the institution of 'legal process' which in *Manuel* was a judge's probable cause determination at the first appearance of the defendant (who later became the § 1983 plaintiff). *Manuel,* 137 S. Ct. at 914-15, 919-20 (majority opinion). We have said 'the issuance of an arrest warrant' is 'a classic example of the institution of legal process.' *Wilkins,* 528 F.3d at 799."

Although the Tenth Circuit concluded in *Margheim,* at 21, that a granting of a Motion to Suppress is not a "favorable termination", Petitioner in his case obtained a favorable ***NOT GUILTY*** verdict from an all-White Jury.

The Second Circuit also ruled in the case of *Spak v. Phillips,* 857 F.3d 458, 461, fn. 1 (2nd Cir. 2017), explaining that:

> "Under Connecticut law, a plaintiff asserting malicious prosecution must prove that: '(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice.' *Brooks v. Sweeney,* 299 Conn. 196, 210-11 (2010). The United States Supreme Court has never squarely held that a plaintiff may bring a suit under Section 1983 for malicious prosecution based on an alleged violation of his Fourth Amendment rights. In *Manuel v. City of Joliet,* 137 S. Ct. 911 (2017), the Supreme Court confirmed that plaintiffs can sustain Section 1983 suits under the Fourth Amendment for deprivations of liberty suffered as a result of improper or maliciously instituted legal process. *Id.* at 918 ("[T]hose objecting to a pretrial deprivation of liberty may invoke the Fourth Amendment when . . . that deprivation occurs after legal process commences."). However, the Court's opinion in *Manuel* did not directly address the other "elements of, and rules associated with, an action seeking damages for" an unlawful pretrial detention. Id. at 920. The rule in the Second Circuit is that plaintiffs may bring what is in effect a state law suit for malicious prosecution in federal court under Section 1983, so long as they are able to demonstrate a deprivation of liberty amounting to a seizure under the Fourth Amendment. *Singer v. Fulton Cty. Sheriff,* 63 F.3d 110, 116 (2d Cir. 1995). Under our precedent, such a suit is proper where: (1) the defendant is a state actor, and (2) the plaintiff who was subject to malicious prosecution was also subject to arrest or seizure within the meaning of the Fourth Amendment. See *Manganiello v. City of New York,* 612 F.3d 149, 160-61 (2d Cir. 2010)."

Although the Second Circuit concluded in *Spak* that appellant failed to file within the statute of limitations, Petitioner in his case filed within two years from the time he obtained a favorable ***NOT GUILTY*** verdict from an all-White Jury.

In a district court Opinion, the Court found that a Fourth Amendment violation was sufficiently alleged. The case of *Dotts v. Romano,* 2017 U. S. Dist. LEXIS 71033, at 6, (Dist. N.J. 2017), explains that:

"'The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause.' *Manuel v. City of Joliet, Ill.,* 137 S. Ct. 911, 913 (2017). 'To state a claim for false arrest under the Fourth Amendment, a plaintiff must establish: (1) that there was an arrest; and (2) that the arrest was made without probable cause.' *James v. City of Wilkes-Barre,* 700 F.3d 675, 680 (3d Cir. 2012). '[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.' *O'Connor v. City of Phila.,* 233 F. App'x 161, 164 (3d Cir. 2007) (internal quotation marks and citation omitted).

"Construing the complaint liberally and giving Plaintiffs the benefit of all reasonable inferences, they have sufficiently alleged false arrest and false imprisonment claims against Detective Romano. Specifically, they allege that he charged them with robbery even after the victim and evidence indicated they were not involved. As a result, they were imprisoned without probable cause. The complaint shall proceed on these claims."

Even if proof of concealing *Brady* evidence or that the other evidence is false, the Action below should not have been dismissed without leave to amend. The case of *Everette-Oates v. North Carolina Department of State Treasuer,* 2017 U.S.Dist. LEXIS 77796, at pp. 19-20, 21 (E. D. N. C. 2017), explains that:

"Specifically, plaintiff must allege that a police officer 'deliberately or with a reckless disregard for the truth made material false statements . . . or omitted from [an] affidavit material facts with the intent to make, or with reckless disregard of whether they thereby made, the affidavit misleading.' *Miller v. Prince George's Cty., MD,* 475 F.3d 621, 627 (4th Cir. 2007) (internal quotations omitted); *see Manuel v. City of Joliet, Ill.,* 137 S. Ct. 911, 914, 919 (holding that plaintiff stated a § 1983 claim based on Fourth Amendment violation where 'a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime,' particularly 'police fabrications about [seized pills'] content' asserted to be illegal substances).

"...

"In this case, plaintiff has pleaded alleged facts that, when viewed in light most favorable to plaintiff, state a claim against defendant Chapman for having concealed or fabricated material evidence in presentation to the grand jury, in violation of plaintiff's Fourth Amendment rights. In

particular, it is plausible to infer from plaintiff's factual allegations that defendant Chapman represented to the grand jury that there were no receipts or documentation verifying business purpose for plaintiff's credit card expenditures charged in the indictment, when in fact, according to the allegations in the complaint, there were receipts and documentation verifying a business purpose for all of those credit card expenditures. It is further plausible to infer that defendant Chapman had knowledge of the receipts and documentation verifying a business purpose for all of those credit card expenditures but deliberately withheld that information from the grand jury."

The case of *Perryman v. City of Seattle Police,* 2017 U.S.Dist. LEXIS 80788, at pp. 4-5 (W. D. Wash. 2017), further explains that:

> "Under Washington law, '[a] false arrest occurs when a person with actual or pretended legal authority to arrest unlawfully restrains or imprisons another person.' *Youker v. Douglas County,* 162 Wn. App. 448, 465 (2011). Under federal law, the Fourth Amendment protects individuals against unreasonable seizure. Seizures are neither unlawful nor unreasonable if the arresting officer has probable cause to believe that the individual has committed a crime. *Manuel v. City of Joliet, Ill.,* __ U.S. __, 137 S. Ct. 911, 917 (2017). Probable cause that will defeat a claim for false arrest or unreasonable seizure must be based on ***reasonably trustworthy information [NOT INFORMATION FROM A JUNKIE].*** *Bishop v. City of Spokane,* 142 Wn. App. 165, 170 (2007); *Allen v. City of Portland,* 73 F.3d 232, 237 (9th Cir. 1995). An officer may not rely solely on the claim of a witness that he or she was the victim of a crime 'but ***must independently investigate*** the basis of the witness' knowledge or interview other witnesses. ***[WHICH RESPONDENT ABERNATHY NEVER DID]*** *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 925 (9th Cir. 2001)." (Emphasis added.)

Here, Respondent Abernathy did the following:

1. He only interviewed Petitioner (without *Mirandizing*), and his now ex-wife.
2. He only accepted the ex-wife's statements as true, despite she was a junkie.
3. He did not date-stamp the photos of her alleged bruises. Those bruises could had been inflicted by herself or her drug dealer and his associates.
4. He made up facts about the ex-wife getting hit by the non-existent "bedpost".

5. He did not inquire about the ex-wife's statement that she bit Petitioner first over an affair with the drug dealer's mother over two decades ago.

Further in a pre-*Manuel* case, the Third Circuit ruled that plaintiffs may sue for malicious prosecution for illegal detentions up to the day of Trial. The case of *Halsey v. Pfeiffer,* 750 F.3d 273, 291 (3rd Cir. 2014), explains that:

> "The boundary between Fourth Amendment and Fourteenth Amendment claims is, at its core, temporal. The Fourth Amendment forbids a state from detaining an individual unless the state actor reasonably believes that the individual has committed a crime—that is, the Fourth Amendment forbids a detention without probable cause. See, generally, *Bailey v. United States,* ——U.S. ——, 133 S.Ct. 1031, 1037,185 L.Ed.2d 19 (2013). But this protection against unlawful seizures extends only until trial. *See Schneyder v. Smith,* 653 F.3d 313, 321 (3d Cir. 2011) (observing that post-conviction incarceration does not implicate the Fourth Amendment). The guarantee of due process of law, by contrast, is not so limited as it protects defendants during an entire criminal proceeding through and after trial. *Pierce v. Gilchrist,* 359 F.3d 1279, 1285–86 (10th Cir.2004) ('The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause.' (internal citation omitted))."

This Circuit cited *Halsey* in support of the case prosecuted without probable cause. The case of *Spencer v. Krause,* http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/18/14-35689.pdf, at pp. 19, 22-23 (9th Cir. 2017), further explains that:

> "In sum, the Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. *See Devereaux*, 263 F.3d at 1074–75 ('[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.'); *Halsey v. Pfeiffer*, 750 F.3d 273, 292–93 (3d Cir. 2014) ('[N]o sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence.'); *see also Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) ('No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee.'). The district court erred by granting judgment as a matter of law

to Defendants because, in this case involving direct evidence of fabrication, Plaintiff was not required to show that Krause actually or constructively knew that he was innocent.

"...

"Defendants assert that, when probable cause exists, an investigator's deliberate fabrication of evidence does not shock the conscience. *See Gantt*, 717 F.3d at 707 ('[D]ue process violations under the Fourteenth Amendment occur only when official conduct shocks the conscience . . . .' (citation and internal quotation marks omitted)). We join our sister circuits in rejecting that assertion as inconsistent with the Fourteenth Amendment's guarantee of due process: 'Even if we agreed [that probable cause existed], we believe that no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence.' *Halsey*, 750 F.3d at 292–93; *see id.* at 293 ('A rule of law foreclosing civil recovery against police officers who fabricate evidence, so long as they have other proof justifying the institution of the criminal proceedings against a defendant, would not follow the statute's [§ 1983] command or serve its purpose.'); *Ricciuti*, 124 F.3d at 130 ('To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice.'); *see also Black*, 835 F.3d at 371 ('[D]eliberate framing by officials offends the most strongly held values of our nation.' (internal quotation marks omitted)).

"We have held that, to establish a *Fourth Amendment* violation where officers allegedly have included false information in a *warrant affidavit*, 'the plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause.' *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). But the reasoning of our Fourth Amendment cases does not apply here. Probable cause definitively resolves a Fourth Amendment claim for including false information in a warrant affidavit, because the Fourth Amendment mandates that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' U.S. Const. amend. IV. If bona fide information in the warrant affidavit establishes probable cause, then the plaintiff necessarily cannot state a Fourth Amendment violation because the warrant was, in fact, issued upon probable cause, supported by oath or affirmation. The warrant would have issued regardless of the false information; the plaintiff cannot 'establish that, but for the dishonesty, the challenged action would not have occurred.'

> *Liston v. County of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997). In other words, in the Fourth Amendment warrant-issuance context, the probable cause inquiry collapses into the causation inquiry."

The *Manuel* case and similar cases foreclose findings of "issue preclusion" based on probable cause. Petitioner's Preliminary Hearing was a sham because Respondents failed to disclose the *Brady* evidence, and that other than admitting that Petitioner's ex-wife first bit Petitioner on his lip, she lied the entire time. Cases such as *Winfrey v. Rogers,* http://www.ca5.uscourts.gov/opinions/pub/16/16-20702-CV0.pdf, at p. 16, fn. 4 (5th Cir. 2018), and *Hunt v. Wise,* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D01-23/C:17-1771:J:Wood:aut:T:fnOp:N:2095793:S:0, at p. 18 (7th Cir. 2018), also come to this conclusion.

Furthermore, since Petitioner acted in self-defense, he committed no crime. There was no probable cause for Respondent Abernathy to arrest Petitioner, and the District Attorney Respondents had no authority to withhold the *Brady* evidence showing that Petitioner was innocent of the charges. The case of *Sialoi v. City of San Diego,* 823 F.3d 1223, 1232-1233 (9th Cir. 2016), explains that:

> "Taking the facts in the light most favorable to the plaintiffs, the officers did not have probable cause to arrest the three teenagers. The defendants attempt to justify the arrest on the basis of the fact that G.S. was initially holding what appeared to be a weapon. We may assume that the officers were justified in initiating an investigatory stop of the teenagers after they spotted what they believed to be a gun in G.S.'s hand. The police determined almost immediately after approaching G.S., however, that the gun was, in fact, a toy, and at that point any suspicion that the teenagers were engaged in a crime dissipated. [Footnote omitted.] Not only did none of the teenagers possess a gun, but none of them in any way matched the apartment manager's description of the suspects. They were three Samoan teenagers, not two black adults, and none of the boys was wearing either a brown shirt or a hooded long-sleeved T-shirt. Nevertheless, the officers handcuffed all three and placed them in the back of a police car after learning that the item in G.S.'s hand was a toy. At a minimum, then, the

officers violated the Fourth Amendment by continuing the seizure beyond the point at which they determined that G.S. had not in fact had a weapon in his hand. See *Lopez,* 482 F.3d at 1037."

See also the case of *People v. Espino* (Cal. App. 6 Dist. 2016) 247 Cal.App.4th 746, 760, *review dismissed,* which explains that:

> "Defendant argues he was no longer lawfully under arrest once police determined the object in his pocket was not crack cocaine, but a diamond. We agree with defendant that, once police realized the object was a diamond, they lacked probable cause to keep him under arrest for drug possession. The only other basis for the arrest—a vague and uncorroborated claim by an informant—did not constitute probable cause. (*People v. Ramey* (1976) 16 Cal.3d 263, 269 [probable cause not established by conclusory information]; *People v. French* (2011) 201 Cal.App.4th 1307, 1318 [conclusory statements by confidential informants insufficient to support a warrant]; cf. *Illinois v. Gates* (1983) 462 U.S. 213, 244 [probable cause supported by totality of the circumstances where details of informant's tip were corroborated by police investigation].)"

The latest case from the California Court of Appeal, *Cornell v. City and County of San Francisco* (Cal App. 1 Dist. 2017) http://www.courts.ca.gov/opinions/documents/A141016.PDF, at pp. 13-14, explains that:

> "...That analysis drives the probable cause analysis, for if there was no objectively reasonable basis to believe Cornell had violated Penal Code section 148, subdivision (a) or any other law, probable cause to arrest was lacking as well. (*Casares, supra,* 62 Cal.4th at p. 838 ['The detention being unlawful, the subsequent searches of defendant's person and the car he had been sitting in were also unlawful.'].)
>
> "We agree with the trial court that there was no reasonable suspicion to detain and hence no probable cause to arrest. This incident took place in broad daylight in one of the most heavily used public recreation areas in San Francisco. The jury found that when the chase commenced, Officers Brandt and Bodisco knew little more than that they had seen Cornell at a location where drug crimes often took place, but with nothing connecting him to any criminal activity. The man had nothing in his hands, made no furtive movements, and was speaking to no one. Nothing about the way he was dressed indicated he might be hiding something under his clothing, and

> Officers Brandt and Bodisco gave him no directions that he disobeyed. (See *Casares, supra,* 62 Cal.4th at p. 838 ['[officer] described no furtive movement or other behavior by defendant suggestive of criminal activity'].) They did not claim they recognized Cornell as someone with previous involvement in criminal activity. They had no tip that a drug transaction was about to take place in which he fit the description of someone likely to be involved. And they saw no activity on Hippie Hill, by anyone, indicating that drug activity was currently taking place or about to take place there."

As *Cornell* applies here, Respondent Abernathy interviewed Petitioner's ex-wife, a junkie. He had obtained no other witnesses other than Petitioner, who was not *Mirandized.* He did not date stamp any of the photos of Petitioner's ex-wife. He did not gather any other admissible evidence. He did also know from the ex-wife that she bit Petitioner on his lip. That admission was not disclosed to Petitioner or any of his Respondent Public Defenders until the third day of Trial, 11 months after Petitioner's arrest. Because Respondent Abernathy had the exculpatory evidence, that should have negated any findings of probable cause. Since Petitioner was entitled to use self-defense (*Valerie G. v. Louis G.* (Cal. App. 4 Dist. 2017) http://www.courts.ca.gov/opinions/documents/D070495.PDF, at 8-9), he should never be arrested at all, and be released the night of his arrest.

Here, Petitioner was assaulted first by his ex-wife. There was nothing by any of the Respondents to have Petitioner arrested and tried for a crime he did not commit.

II. PETITIONER IS NOT REQUIRED TO SPECIFICALLY PLEAD ALLEGATIONS IN SUPPORT OF HIS FEDERAL CAUSES OF ACTION PER *LEATHERMAN,* AND NOT THROUGH UNAMENDED RULES OF CIVIL PROCEDURE.

Petitioner filed his lawsuit against Respondents, because of his false imprisonment that was instigated by his drug addicted ex-wife, the Sheriff's Department, and the District Attorney's Office, the later said that Petitioner needed to be "feared". Since when was it a crime to be Black? Ask the parents of Emmett Till. Petitioner was falsely

charged with Felony Domestic Violence. When both the Sheriff's Department, and the District Attorney's Office had the *Brady* evidence since the day of his arrest, Petitioner should had been released at that time, not spend 47 days in jail, and spend 11 months going to Court on the false charges.

The case of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), as explained by the late Hon. William H. Rehnquist, Chief Justice of the United States, in a unanimous opinion that:

> "***We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.*** Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' In *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), we said in effect that the Rule meant what it said:
>
> > "'***[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.*** To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' Id., at 47, 78 S.Ct., at 103 (footnote omitted).
>
> "Rule 9(b) does impose a particularity requirement in two specific instances. It provides that '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.' Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" (Emphasis added.)

What should be noted is that the Supreme Court did not change the Federal Rules of Civil Procedure, but has nevertheless issued the cases of *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S._662, 678, 129_S. Ct._1937, 173_L. Ed. 2d_868 (2009), where this Court merely

reinstituted heightened pleading standards again. Even though these cases may be improper, Petitioner still has pleaded all the facts necessary to support his Causes of Action.

Petitioner also should have been allowed to amend his Complaint, because he believes that neither Respondents County or McMahon had any policies written pursuant to Penal Code §13701 regarding arrests in domestic violence cases. If Respondents had such a policy or policies, Respondents should have disclosed those policies during the Early Meeting of Counsel with Petitioner.

The case of *Mendiondo v. Centinela Hospital Medical Center,* -- F.3d --, 2008 WL 852186, at 3, 4 (9th Cir. 2008), also states that:

> "The parties dispute whether a FCA retaliation claim must meet the notice pleading standard in Rule 8(a) or the heightened pleading standard in Rule 9(b). Rule 8(a) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 8(a) applies to all civil claims except those containing averments of 'fraud or mistake,' which must be pleaded with particularity under Rule 9(b). Fed.R.Civ.P. 8, 9. The Supreme Court has narrowly construed Rule 9(b) to apply only to the types of actions enumerated in the rule-those alleging fraud or mistake-and has not extended the heightened pleading standard to other legal theories. See *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (declining to apply Rule 9(b) to claims for violations of 42 U.S.C. §1983 or employment discrimination claims).
>
> "...
>
> "Where, as here, the heightened pleading standard of Rule 9(b) does not apply, the complaint 'need only satisfy the Rule 8(a) notice pleading standard ... to survive a Rule 12(b)(6) dismissal.' *Edwards v. Marin Park, Inc.,* 356 F.3d 1058, 1062 (9th Cir. 2004). The complaint need not contain detailed factual allegations, but it must provide more than 'a formulaic recitation of the elements of a cause of action.' *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). Under Rule 8(a), the plaintiff must 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* at 1964 (internal citation and quotation marks omitted). Dismissal under Rule 12(b)(6) is appropriate

only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir.1990)."

The case of *Johnson v. City of Shelby,* http://www.supremecourt.gov/opinions/14pdf/13-1318_3f14.pdf, at pp. 1-2 (2014), explains that:

> "We summarily reverse. Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. See Advisory Committee Report of October 1955, reprinted in 12A C. Wright, A. Miller, M. Kane, R. Marcus, and A. Steinman, Federal Practice and Procedure, p. 644 (2014 ed.) (Federal Rules of Civil Procedure 'are designed to discourage battles over mere form of statement'); 5 C. Wright & A. Miller, §1215, p. 172 (3d ed. 2002) (Rule 8(a)(2) 'indicates that a basic objective of the rules is to avoid civil cases turning on technicalities'). In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke §1983 expressly in order to state a claim. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163, 164 (1993) (a federal court may not apply a standard 'more stringent than the usual pleading requirements of Rule 8(a)' in 'civil rights cases alleging municipal liability'); *Swierkiewicz v. Sorema N. A.,* 534 U. S. 506, 512 (2002) (imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)').

Petitioner does not have to plead his evidence, the entire Bible, or the complete works of Shakespeare. Again, Petitioner was suing the Respondents for being falsely imprisoned on these groundless charges. No heightened pleading standard applies to claims brought under the Federal statutes Petitioner has pleaded in his Complaint.

> "To quote the Ninth Circuit in *Alter*, '[t]he [plaintiff] does not have to plead and prove his entire case to establish standing and to trigger the government's responsibility to affirm or deny.' Contrary to defendants' assertions, proof of plaintiffs' claims is not necessary at this stage."

Al-Haramain Islamic Fdn. v. Bush, 595 F. Supp.2d 1077, 1085 (N.D. Cal. 2009) (quoting *United States v. Alter*, 482 F.2d 1016, 26 (9th Cir. 1973)) (alterations in original).

There is nothing that requires Petitioner to tell every minute detail of his claims, unless this Court wants to know what Petitioner did at the West Valley Detention Center, or every argument he had with the Deputy D. A.'s or his own Public Defenders. The case of *Sause v. Bower,* https://www.supremecourt.gov/opinions/17pdf/17-742_c185.pdf, at p. 3 (2018), requires that a *pro se* Complaint be liberally construed. The People relied on a *junkie* for their basis to falsely prosecute Petitioner. The facts stated in the Complaint below supports the Federal Causes of Action.

III. PURSUANT TO SUPREME COURT PRECEDENT, THE DISTRICT ATTORNEY RESPONDENTS ARE NOT IMMUNE FOR NOT DISCLOSING THE *BRADY* EVIDENCE, SINCE THEY ARE EXERCISING LAW ENFORCEMENT DUTIES.

Respondents claim that the District Attorney Respondents are entitled to absolute immunity for all functions of a prosecutor. Pump brakes. The District Attorney Respondents, including Respondent Levers, did not disclose the ex-wife's statement until the last day of Trial, February 25, 2015. Since disclosure of *Brady* evidence is a police, not prosecutorial function, the District Attorney Respondents are not immune for the nondisclosure of the *Brady* evidence. Supreme Court Practice § 4.5, at 250 (10th ed. 2013), and Sup. Ct. R. 10(c) also apply here as well.

The case of *Lisker v. Monsue,* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/03/20/13-55374.pdf, at p. 13 (9th Cir. 2015), explains that:

> "The Supreme Court has repeatedly declined to extend absolute immunity to prosecutors acting outside of their traditional roles. See, e.g., *Kalina v. Fletcher,* 522 U.S. 118, 131 (1997) (prosecutor as 'complaining witness'); *Buckley v. Fitzsimmons,* 509 U.S. 259, 275–76 (1993) (prosecutor acting in investigative capacity). These cases confirm that

> absolute immunity is reserved for conduct 'intimately associated with the judicial phase of the criminal process,' *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976), and that outside of this context, qualified immunity is presumed 'sufficient to protect government officials in the exercise of their duties,' *Burns v. Reed,* 500 U.S. 478, 486–87 (1991)."

Here, producing *Brady* evidence is a law enforcement function, not a prosecutorial function. Since Respondent Levers knew about the admission from Petitioner's ex-wife that she bit him before the Preliminary Hearing, Appellant's criminal case should have been dismissed *by then,* and none of the prosecutors are absolutely immune for the nondisclosure of *Brady* evidence.

Here, the Respondents kept Petitioner in actual and constructive custody for a crime he did not commit, and the District Attorney knew it from Day One.

IV. PURSUANT TO SUPREME COURT PRECEDENT, PUBLIC DEFENDERS ARE STATE ACTORS WHEN THEY CONSPIRE WITH THE DISTRICT ATTORNEY RESPONDENTS IN ATTEMPTING TO FORCE PETITIONER TO PLEAD GUILTY TO A CRIME HE DID NOT COMMIT.

Petitioner sued Respondents William "Fat" Figueroa, Dave Sanders, Edward Wilson, and Shane Matthias because they never moved to dismiss the charges in Petitioner's case at the Preliminary Hearing or in a Motion to Dismiss under Penal Code §995. Their goal was to force Petitioner to plead guilty, so that they may have a job in the District Attorney's Office. Contrary to Respondents' cases, the Supreme Court has allowed suits against Public Defenders as State Actors. Supreme Court Practice § 4.5, at 250 (10th ed. 2013), and Sup. Ct. R. 10(c) also applies here as well. The case of *Tower v. Glover,* 467 U.S. 914, 922-923 (1984), states that:

> "Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if

so, what remedial action is appropriate. We conclude that state public defenders are not immune from liability under § 1983 for intentional misconduct, 'under color of' state law, by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights."

Here, Petitioner's case was a ***BURDEN ON THE TAXPAYER*** because the Public Defender Respondent didn't bother to defend Petitioner so that they can get a job with the District Attorney's Office. They caused Petitioner to be bound over at the Preliminary Hearing, a point ***BURDEN ON THE TAXPAYER*** Crane claims is "collateral estoppel", especially when ***BURDEN ON THE TAXPAYER RESPONDENT DEPUTY DISTRICT ATTORNEY PAUL LEVERS*** knew all about the *Brady* evidence before the Preliminary Hearing. ***PUMP BRAKES!***

V. THE DISTRICT COURT MISSTATED FACTS ABOUT PETITIONER'S CRIMINAL CASE BY DISREGARDING FACTS ABOUT PETITIONER'S USE OF SELF-DEFENSE.

When the District Court entered Judgment, it stated facts that still make Petitioner look guilty in that:

"Defendant Abernathy, the deputy sheriff who was the sole witness at the preliminary hearing, testified that he interviewed Plaintiff at the hospital. Abernathy testified that Plaintiff said his wife, during an argument, 'stood up from the bed and tried to bite him near the lip. So in self-defense he shook her several times, and she consequently hit her head several times on the headboard of the bed.' (Pl. Req. Jud. Not., Exh. A at 11.) Plaintiff's wife could not recall how she got her injuries. She told Plaintiff she wanted a divorce. 'She was sitting on her bed, and next thing she remembered is waking up on her bed.' (*Id.* at 9.) Q: 'She doesn't recall whether she attempted to bite Mr. Cotton before she blacked out or doesn't remember what happened?' A: 'I asked her. She claimed she did not.' (*Id.* at 12-13.) She told Abernathy that Plaintiff struck her head on the headboard, but 'she only knew this because Mr. Cotton told her.' (*Id.* at 13.) Plaintiff told her he became frustrated at her and hit her head against the headboard several times. (*Id.* at 14.) Abernathy observed that she had a swollen right eye and a lump to the back of her head. (*Id.* at 9-10.) Plaintiff does not allege that Abernathy fabricated or omitted evidence. The court

held Plaintiff to answer on Count 1 of the First Amended Felony Complaint. (*Id.* at 16.)

"Taking as true the allegation that Plaintiff's wife admitted to a prosecutor that she attacked first by biting Plaintiff, the question remained whether Plaintiff defended himself by use of force that would appear necessary to a reasonable person in a similar situation and with similar knowledge. Thus, the prosecutor acknowledged at the preliminary hearing Plaintiff's statement that '[s]he tried to bite him,' but argued that Plaintiff 'hit her head repeatedly against the headboard and knocked the victim unconscious.' (*Id.* at 15.) "Probable cause does not require proof beyond a reasonable doubt.' *United States v. Noster*, 590 F.3d 624, 629 (9th Cir. 2009). Probable cause exists when, 'under the totality of the circumstances known to the officer, a prudent person would have concluded that there was a fair probability that the suspect had committed or was committing a crime.' *Id.* at 629-30. The facts presented by Abernathy show a fair probability that Plaintiff's response to the bite was unreasonable. *See also* Cal. Penal Code §13701(b) ('The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor.')." (Apx. 59a:22-60a:24)

That's not the law in California. Penal Code §693 states that:

"Resistance sufficient to prevent the offense may be made by the party about to be injured:

"1. To prevent an offense against his person, or his family, or some member thereof.

"2. To prevent an illegal attempt by force to take or injure property in his lawful possession."

The case of *People v. Myers* (Cal. App. 5 Dist. 1998) 61 Cal. App. 4th 328, 335, 71 Cal. Rptr. 2d 518, explains that:

"It follows that an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery. [Footnote omitted.] To hold otherwise would lead to the ludicrous result of a person not being able to lawfully resist or defend against a

continuing assault or battery, such as the act defendant alleged here. [Footnote omitted.]"

The case of *Valerie G. v. Louis G.* (Cal. App. 4 Dist. 2017) http://www.courts.ca.gov/opinions/documents/D070495.PDF, at 8-9, further explains that:

"... The clear purpose of this requirement is to avoid restraining a party who is not culpable, and section 6305 reflects the Legislature's understanding that reasonable self-defense is a defense to a claim of abuse.

"Section 6305 is consistent with a long-standing principle of California law that a party who inflicts injury while acting reasonably in self-defense is not culpable. In *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714 (*Calvillo-Silva*), disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, footnote 19, our Supreme Court explained:

> "'[A] person is privileged to use "[a]ny necessary force" to protect or defend oneself or one's property from "wrongful injury." [(Quoting Civil Code, § 50.)] The right to use force against another has long been limited by the condition that the force be no more than "'that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.'" [(Quoting *Vaughn v. Jones* (1948) 31 Cal.2d 586, 600.)] *When the amount of force used is justifiable under the circumstances, it is not willful* and the actor may escape liability for intentionally injurious conduct that is otherwise actionable. [Citation.] But if force is applied in excess of that which is justified, the actor remains subject to liability for the damages resulting from the excessive use of force. [Citations.] This is consonant with the general principle that *an actor is subject to liability for an intentionally injurious act only if his or her conduct "is generally culpable and not justifiable under the circumstances."* [(Quoting Rest.2d Torts, § 870.)] When an alleged act of self-defense or defense of property is at issue, the question of what force was reasonable and justified is peculiarly one for determination by the trier of fact.' (*Id.* at pp. 730-731, italics added.)

> "Under California law, a person may use reasonable force to resist a battery even if such force causes bodily injury to the initial aggressor. (See, e.g., *People v. Myers* (1998) 61 Cal.App.4th 328, 334-335 [use of reasonable force to resist a battery even when actor has no reason to believe he is about to suffer bodily injury].)"

Here, after Petitioner was bit, he had to defend himself. Petitioner's wife conduct would had barred her from getting a restraining order. If the Legislature declared that self-defense was a defense, Petitioner shouldn't be charged at all. Petitioner should have been allowed to amend his Complaint, because he believes that neither Respondents County or McMahon had any policies written pursuant to Penal Code §13701 regarding arrests in domestic violence cases. Accordingly the Complaint should be amended after remand pursuant to *Lozman v. City of Riviera Beach,* https://www.supremecourt.gov/opinions/17pdf/17-21_p8k0.pdf, at p. 11 (2018). He was arrested in the heat of the moment due to his race, and to Baltimore Raven Ray Rice being caught dragging his fiancée out of the hotel elevator.

VI. PETITIONER WAS ENTITLED TO LEAVE TO AMEND HIS COMPLAINT, AND ISSUES REGARDING ISSUE PRECLUSION SHOULD HAVE BEEN HEARD ON A MOTION FOR SUMMARY JUDGMENT.

The case of *State of Missouri ex rel. Koster v. Becerra,* https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/17/14-17111.pdf, at pp. 16-17 (9th Cir. 2017), *certiorari denied May 30, 2017,* explains that:

> "... 'Denial of leave to amend is reviewed for an abuse of discretion.' *Dougherty v. City of Covina,* 654 F.3d 892, 897 (9th Cir. 2011). 'Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.' *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.,* 368 F.3d 1053, 1061 (9th Cir. 2004). But a 'district court does not err in denying leave to amend where the amendment would be futile.' Id. (internal quotation marks omitted). An amendment is futile when 'no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.' *Miller v. Rykoff-Sexton, Inc.,* 845 F.2d 209, 214 (9th Cir. 1988)."

The District Court's dismissal of the complaint without leave to amend was an abuse of discretion because the District Court provided no rational justification for its decision not to allow leave to amend.

> "A simple denial of leave to amend without any explanation by the district court is subject to reversal. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Sharkey v. O'Neal,* 778 F.3d 767, 774 (9th Cir. 2015) (citations omitted).

The Ninth Circuit also stated that:

> "The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

See also *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (quoting *Noll* approvingly). Thus, "[a] pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (quoting *Noll,* 809 F.2d at 1448) (internal quotation marks omitted). Furthermore, "[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam).

The case of *Wilhelm v. Rotman,* 680 F.3d 1113, 1121 (9th Cir. 2012), also explains that:

> "Plaintiff filed his complaint pro se. 'We construe pro se complaints liberally and may only dismiss a pro se complaint for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Silva v. Di Vittorio,* 658_F.3d_1090, 1101 (9th Cir. 2011) (internal quotation marks omitted). *Iqbal* did not alter the rule that, 'where the petitioner is *pro*

se, particularly in civil rights cases, [courts should] construe the pleadings liberally and . . . afford the petitioner the benefit of any doubt.' *Hebbe v. Pliler,* 627_F.3d_338, 342 (9th Cir.2010) (internal quotation marks omitted)."

Here, Respondents knew about the *Brady* evidence before the Preliminary Hearing, and in that case, issue preclusion should not apply. If this Court believes that the Complaint below can be further amended, Petitioner would like to request in what detail the Complaint can be further amended. If it appears that more facts need to be decided, dismissal should not be concluded, unless the case below is heard on Summary Judgment.

VII. ON REMAND, THIS CASE SHOULD BE HEARD BEFORE A JUDGE, OTHER THAN CHIEF DISTRICT JUDGE PHILLIPS, DUE TO HER BIAS IN THIS CASE.

Chief Judge Phillips is clearly biased against civil rights cases and civil rights plaintiffs. Even though Chief Judge Phillips did not have the benefit of *Manuel,* she had the benefit of *Awabdy* when Respondents County, Levers, and Haskell withheld disclosure of the *Brady* evidence until the third day of Petitioner's criminal Trial. It is clear that Chief Judge Phillips bended over backwards to help Respondents. It is time to remand this case back to District Court to be heard by a Judge other than Chief Judge Phillips.

CONCLUSION.

Petitioner requests that the Judgment be reversed with Costs to Petitioner.

Dated this 28th day of June, 2018

By: _____
ROBERT A. COTTON
Petitioner in Pro Se