ORIGINAL

No. 23-6184

In the

Supreme Court of the United States

BRIAN BEST,

Petitioner,

v.

VIRGIL SMITH,

Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Brian Best

Petitioner

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QUESTIONS PRESENTED

1. Was Petitioner's right to Due Process violated in this case by the Court of Appeals making an original argument, premised on a case that nobody had cited in this case, in their summary dispositive order, and then arbitrarily rejecting Petitioner's Petition for Panel Rehearing without any consideration whatsoever?

2. The Court of Appeals was objectively in error regarding the scope of their jurisdiction and arbitrarily refused to review their decision. Should the Court of Appeals be required to exercise the jurisdiction they have, or should they be allowed to misconstrue the scope of their jurisdiction and refuse to review filings they objectively do have jurisdiction over?

3. Is *Swimmer v. IRS* contrary to *Clay v. United States*, and 28 USC Ch. 83? Is there any language in the Rules of Procedure supporting the 9th Circuit's interpretation of the FRAP Rule 4 in *Swimmer?*

PARTIES TO THE CASE

Petitioner is Brian Best, a victim of torture of near-murder, under a camera and in front of 6 witnesses, under color of law, where the County admits to destroying material evidence which was a violation of law.

Respondent is Virgil Smith, in his individual capacity.

Of note, after other parties were dismissed from the case, the District Court actively obstructed Petitioner from amending the complaint, and the claims were not adjudicated, the 9th Circuit attempted to re-add those parties to the case on appeal, and then refused to review the appeal. The claims against those parties were not adjudicated.

LIST OF PROCEEDINGS

In the U.S. Court of Appeals for the Ninth Circuit, No. 22-16809, *Best v. Smith,* the Court's disposition was entered May 31, 2023. Petitioner's petition for panel rehearing was rejected August 31, 2023.

In the U.S. District Court for the Northern District of California, No. 4:19-cv-02252-YGR, the orders appealed from were entered October 25, 2022, and August 29, 2022.

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V. OPINIONS BELOW

The Ninth Circuit cited *Swimmer v. I.R.S*, 811 F.2d 1343 (9th Cir. 1987) in their decision to reject my Appeal. The Court of Appeals stated, "See Swimmer v. IRS, 811 F.2d 1343 (9th Cir. 1987) (second motion for reconsideration does not toll time to appeal underlying judgment)". The *Swimmer* case reads:

> If we regard [Swimmer's motion] as a Rule 59 challenge to the court order denying the first post-judgment motion, it did not extend the period for appeal of the judgment itself. See Stark v. Lambert, 750 F.2d 45, 47 (8th Cir. 1984).

The provision used in *Swimmer* to reject my appeal was, as such, ostensibly based on *Stark v. Lambert*, 750 F.2d 45 (8th Cir. 1984), which reads:

> The 30 day period began to run again. Instead of filing a notice of appeal, appellant filed within 30 days a motion for reconsideration of the denial of the motion for new trial and an amended motion for reconsideration. The denial of the motions for reconsideration was entered March 6, 1984, and appellant then filed a notice of appeal on March 16, 1984. Appellant's notice of appeal would be timely filed only if the filing of the motions for reconsideration of the denial of the motion for new trial operated to toll the running of the 30 day period under Fed.R.App.P. 4(a) until the entry of the order denying the motions for reconsideration. This argument must fail. "[A] motion to reconsider a motion for new trial is not itself a motion for a new trial, and is therefore insufficient to toll the running of the time period in which to file a notice of appeal." American Security Bank v. John Y. Harrison Realty, Inc., 216 U.S.App.D.C. 159, 670 F.2d 317, 319 (1982) (emphasis in original); see Wansor v. George Hanstcho Co., 570 F.2d 1202, 1206 (5th Cir. 1978). Cf. Harrell v. Dixon Bay Transportation Co., 718 F.2d 123, 126-29 (5th Cir. 1983) (amended judgment).

VI. JURISDICTION

In the U.S. Court of Appeals for the Ninth Circuit, No. 22-16809, *Best v. Smith,* the Court's disposition was entered May 31, 2023. Petitioner's petition for panel rehearing was rejected August 31, 2023. 90 days from August 31, 2023 is November 29, 2023. This petition was deposited in the mail according to the Rules on November 29, 2023, scheduled to arrive within 3 calendar days, at the address: "Clerk, Supreme Court of the United States, Washington D.C., 20543".

VII. PROVISIONS INVOLVED

The legal provisions involved are follows:

1. The 1993 Amendment, from the "Committee Notes", on FRAP Rule 4, which read:

"Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion[.]"

2. The Due Process clause of the 5th Amendment

3. The provision in *Clay v. United States* 537 US 522 Supreme Court 2003:

"[A] federal judgment becomes final for appellate review [...] when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment. See e. g., *Quackenbush v. Allstate Ins. Co.*, 517 U. S. 706, 712 (1996)",

Coopers & Lybrand v. Licesay, 427 US 468:

[T]he purpose of the finality requirement 'is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.' [Cohen v. Beneficial Industrial Loan Corp., 337 U.S.], at 546,

And *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

4. 28 US Code Chapter 83, § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, [...], except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5. *Swimmer v. I.R.S*, 811 F.2d 1343 (9th Cir. 1987):

[T]he second motion for reconsideration tolled the time within which to file a notice of appeal from that first post-judgment order. See Fed. R. App. P. 4(a)(1)(B); Swimmer v. Internal Revenue Serv., 811 F.2d 1343, 1344 (9th Cir. 1987) (holding that second motion for reconsideration tolled time to appeal from denial of first post-judgment motion).

And *Perez v. Berryhill*, No. 17-15278 (9th Cir. Dec. 21, 2017):

Even though the notice of appeal came more than sixty days after the court order denying this motion, the time for appeal was extended by the second post-judgment motion. [...] [T]he second motion extended the time for appeal so that Swimmer's challenge to the denial of his first motion is timely.

6. And Cohens v. Virginia:

We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

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VIII. BACKGROUND

1. Initial Litigation:

This case involves allegations of torture and near murder, under a camera and in front of witnesses. These allegations are supported by medical evidence, and Defendant and their Counsel repeatedly failed to dispute these allegations, admitted to these allegations, or failed to dispute them timely as required by law. Defendant admitted to applying a carotid hold. This occurred with a complete lack of rational basis, which is supported by the consensus of witness statements, stating that I was polite and cooperative prior to the incident (Exhibits 1 and 2), and did not resist during the incident (Exhibits 3 and 4). This also occurred right under a camera (Exhibit 5).

I was eventually diagnosed with a brain injury (Exhibit 6), corroborating both my statement of facts, and Defendant's statement of facts that he put his right arm over my right shoulder (Exhibit 7), and compressed my carotid arteries (Exhibit 8), which was also consistent with nurse and doctor notes indicating an injury to the left "SCM" muscle on the neck (Exhibits 36 and 37). He also used his left hand to apply additional force (Exhibit 9). He applied the carotid hold (a lateral vascular neck restraint) for 4-6 minutes, and because evidence was destroyed by the County it must result in a jury instruction that the evidence was unfavorable to the party responsible for its destruction. The only reason I didn't die was because the specific version of the carotid hold used allowed the subject to turn the head, which occurred when I was "driven" to the ground by Smith and laid face and stomach on the ground. I regained consciousness with my head turned to the left.

The County subsequently destroyed my complaint (Exhibit 10), obstructed me from filing a complaint (Exhibit 11), failed to make a record of the complaint (Exhibit 12), repeatedly lied about the camera's ability to record for 4 years (see Exhibit 11, for example), and ubiquitously disregarded the California Public Records Act requiring the disclosure of records over a hundred times from 2018 until August 2023, and still violate that law to this day, and illegally destroy documents material to pending litigation.

When I requested a claim form from the County, rather than provide me a claim form, the County requested I meet with Internal Affairs (Exhibit 13).

Internal Affairs promised he would interview the witnesses (Exhibit 14), lied that he had interviewed the witnesses (Exhibit 15), lied about what the witnesses said (Exhibit 15), attempted to suborn perjury from the witnesses who were deputies by trying to covertly instruct them to review the statements from the deputies who assaulted me prior to providing their own statements (Exhibit 16), and failed to preserve crucial evidence which was destroyed in violation of state criminal statutes and in violation of the basic rules of civil procedure, including his correspondence with the witnesses (Exhibit 17), camera records (Exhibit 18), and various other records. He interviewed one witness, and then lied under oath, twice, that he had not interviewed "any" of the witnesses (Exhibits 19 and 20), in an effort to hide the fact that he attempted to suborn perjury from the witnesses.

Attorneys don't take these cases because they are not financially viable for private attorneys, because the County routinely commits misconduct, such as destroying evidence (Exhibits 21 and 22), with no consequences.

I filed a federal lawsuit. The County refused to discuss settlement, and, for 2 years, filed repetitive motions 6 times that were determined to be objectively frivolous.

Defense Counsel repeatedly refused to consider settlement. He was ordered to participate in a resolution process, but refused to participate, in violation of the Court's order. The County is unable to provide any evidence that any of my settlement offers were forwarded to anyone, indicating that the County is deliberately wasting millions of dollars in litigation, and avoiding settlement in violation of FRCP Rule 26.

The District Court improperly dismissed all my claims except the claim against Defendant Smith in his individual capacity. For the record, those claims have either accrued, re-accrued after they were dismissed, or were dismissed without prejudice, and I have repeatedly been actively and unlawfully obstructed from amending the complaint; in other words, I may lawfully bring forth those claims in a separate lawsuit.

Simultaneously or nearly so, the Court ordered Defendants to finally answer the complaint, and opened Discovery (after a year and a half).

In the answer to the complaint, Defendant and the County again overtly lied about the camera's ability to record / about its existence. They stated that no cameras capable of recording existed in the vicinity, in the answer to the complaint. This was a lie.

2. Discovery:

The County openly refused to provide the contact information for any of the witnesses, concealed the contact information for the bystander witnesses (Exhibit 23), and refused to schedule the deputy witnesses for deposition for approximately a year, and then interfered with the scheduling process in order to raise the cost of deposition to the maximum degree possible, from an estimated $600, to about $4,000 (because the Court reporter had a low initial fee, but high rate per hour). The Court promised that I would be able to summon the witnesses to trial (but later refused to cooperate with issuing subpoenas for the trial).

Upon repeated requests for the camera equipment list, Defense Counsel claimed that there were no records, that all records pertaining to the camera had been "lost or destroyed" (Exhibit 18).

After filing at least three motions pertaining to the County's acts of refusing to disclose evidence they were lawfully obligated to disclose outside of Discovery, the Court, in retaliation for me filing a motion for sanctions, ordered that I be stripped of my right to amend the complaint, and required that I whittle down all my Discovery requests to two pages, double spaced. Defense Counsel was allowed the same, despite filing no motions whatsoever regarding Discovery.

At that hearing, I was forcefully excluded from the hearing (Exhibit 24). Defense Counsel was caught lying to the magistrate (Exhibit 25). The magistrate did order Defense Counsel to provide photos of the cameras, and a sworn declaration from paid camera room staff. Again, they were caught in various lies (Exhibit 26), because that declaration was

signed in 2021, it claims that no significant upgrades were performed to the cameras, and that they still do not use the recording function, which is inconsistent with 2019 declarations from the same department in a different case, where it is an undisputed fact that the cameras record continuously (Exhibit 27). (See also Exhibits 21 and 22.)

Throughout Discovery, Defense Counsel harassed me. He accused me multiple times of "recording phone calls", and stated that it was a serious crime, referenced his obviously real connections with the Sheriff's Office and the DA's Office (not only did Defense Counsel repeatedly state that he would influence the DA's Office in various ways, but the DA's Office has explicitly stated they will speak to County Civil Legal Counsel, and the Sheriff's Office's investigations department obtained non-public records about me and provided it to Defense Counsel for the civil suit), and demanded the audio recordings. He did this because I was able to remember the exact phrases of conversations verbatim, once just hours after the phone conference. There was absolutely no reason to suspect me of recording the phone calls. He also asked where my sister works during deposition, and then when I couldn't provide him contact information for a counselor I had seen 20 years prior during deposition, and later asked him not to go to my sister's workplace, he started threatening to go to my sister's workplace with a subpoena unless I provided him the contact information for a counselor from 20 years prior (at the next deposition). He agreed to put the request in writing, but never did.

Upon continued noncooperation with Discovery and harassment, and my attempts to resolve the disputes being met with latent unlawful threats and further harassment, I filed another motion. I was again excluded almost entirely from the hearing for my own motion. My motion was hijacked by Defense Counsel, and I was ordered to provide the contact information that was protected by law, that Defense Counsel had never submitted a written request for, where Defense Counsel had not adequately attempted to resolve the issue outside of Court by making a written request, and Discovery was closed.

3. Federal Pro Bono Project:

During this time, the Court referred me to the Court's "partner project" (quoting a video on the Court's official website[1]), the Federal Pro Bono Project (FPBP), which is federally funded.

The District Judge also explicitly promised to provide me a pro bono attorney. Her exact words were "I will get you a pro bono attorney".

There was an explicit agreement on the part of the FPBP to provide me legal advice and instructions. They also communicated directly with the Court off the Docket. I had about 18 appointments with Abby Herzberg. She was precisely 15 minutes late to

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[1] See https://cand.uscourts.gov/attorneys/federal-pro-bono-project/, at 45 minutes.

every single appointment for the first approximately 14 appointments, spent an average of 95% of the appointments saying that she was reading something, without allocating enough time for anything else, while she refused to allow me to summarize anything, or ask any questions, and she screamed at me angrily because I brought up a state law that was being currently violated. That was the second time she had yelled at me. I had been absolutely polite, and had never commented on any of this at all. After that, I simply asked to make an appointment with the other attorney. At that appointment, the other employee was obviously angry right off the bat, and refused to discuss anything related to litigation, and wouldn't let me ask any questions or explain what I wanted to ask. Upon requesting another appointment, I was rejected. At that point, I had never complained or commented on their behavior at all. I am polite and respectful in my interactions with others. (Exhibit 28.)

At one appointment, I specifically went over expert witnesses, and Ms. Herzberg spent literally the entire appointment saying she was reading. I tried to tell her which section of FRCP 26 the topic of expert witnesses was in, but she kept interrupting me forcefully. The time was up and she concluded the call.

The District Court has a "General Order" (General Order 25) in which the order states that the FPBP and the Court will pay for deposition and expert witness fees for *in forma pauperis* pro se litigants with public funding set aside for this purpose, up to a certain amount without needing any authorization (Exhibit 29).

The video[1, Page 11] on the Court's official website also states that the Court will generally re-open Discovery when a Pro Bono attorney takes a case, and if it is in the interest of justice to do so. (The video states this at about 45 minutes into the video. See Exhibit 30 for the transcripts.)

After Discovery was closed, the FPBP called me and told me that the Court had ordered them to put me on the list for pro bono attorneys seeking clients, that a "team" of attorneys had previously reached out to them about a month prior to that conversation and they hadn't followed up, and that now that law firm was no longer interested. The FPBP then told me not to file any motions, explained that no attorney would want my case if I was "overfiling" and "it could be 1 month, or it could be 6 months [before my scheduled trial, that I got an attorney]". See Exhibit 28. My electronic filing privileges were then revoked by the District Judge (Docket Item .)

In the video on the Court's official government website, Abby Herzberg, who is the same attorney who pretended not to know about expert witnesses and spent the entire appointment 'reading' FRCP 26, expresses specific understanding of the topic and that the Court will reopen Discovery and pay for deposition and expert witness fees when pro bono attorneys take a case.[1, Page 11]

4. David Ratner:

The FPBP then called me and said that an attorney had inquired about my case and wanted to meet. I had a consult over Zoom with Attorney David Ratner. He seemed enthusiastic. I told him that before he takes my case, I wanted to "make sure we are on the same page as far as what we are aiming for", and asked David "what are we shooting for". I explained that it will be almost 5 years that I had sacrificed by the time of the trial, and

asked David "what are we shooting for". David gave a number in terms of what they would agree to aim for, and I gave the number that I had asked for in the complaint, and explained that this happened to be the exact same number asked for in the most similar case that Petitioner had been able to find (*Wroth v. County of Sonoma et al,* No. 3:2014cv05519 (N.D. Cal. 2015)). We made an explicit verbal agreement on what to "aim for", in terms of monetary compensation. After making the explicit, unambiguous verbal agreement on what to aim for, David and I agreed that he would represent me in the case. No other specification about the capacity in which David was representing Petitioner was made. David and his partner, Shelley Molineaux, then refused to speak with me for over a month, while I left polite inquiries by either leaving messages with their paralegals, voicemails on their personal numbers, or email, about once or maybe twice sometimes per week.

After a hearing, David then demanded "all" the documents I had, but ignored my request for specification, and I worked very hard with his paralegals for over a month providing them batches of files of the 50GB and thousands of documents I had (since his paralegals stated they didn't actually want all of them), and wrote new documents to describe experiences. He then emailed me and said he was going to withdraw as my attorney because I hadn't provided him "any" documents. I forwarded him the email with his paralegal, and he didn't reply. He then forwarded me an email from Defense Counsel, in which Defense Counsel made a false accusation against me, and David again said that he was going to withdraw as my attorney. He then forwarded me a settlement offer of $5,000, which was 0.0x% of what we had explicitly agreed to aim for. He openly told me that he was planning on precluding me from discussing any
damages at the trial except "garden variety" pain and suffering for no more than 30 days.

He made false accusations about me to me regarding issues he didn't have knowledge of. He ignored the fact that I had made Discovery requests, that the Discovery requests were not complied with, and that I had filed motions regarding these issues and

that those motions were improperly ignored. He also ignored the fact that General Order 25, and the video[1, Page 11] on the Court's website stating that Discovery will be reopened and that deposition and expert witness fees will be paid for with the public funding that is set aside for that purpose.

I called the FPBP and explicitly told Abby Herzberg that I expected to be put back on the list should David withdraw, and she refused to respond.

David then filed a motion to withdraw as my attorney, in which he obliquely made a false accusation against me to harm my standing with the Court. I got my filing privileges reinstated with the Clerk's Office and with PACER, and filed objections to the motion, and requested a hearing. My objections and request for a hearing were ignored, the Court thanked Mr. Ratner, and granted his request to withdraw, in blatant violation of the Rules of Professional Conduct, the Court's General Order 25, and the agreements that Mr. Ratner made with both me, and a separate contract he had made with the Court and FPBP without my knowledge, which the judge referred to later. Both David and Judge Gonzalez Rogers stated on the Docket that this had not caused any delay.

The FPBP refused to put me back on the list for attorneys seeking clients (despite the FPBP being informed about the situation, and it being 3 months before my trial, and them saying that an attorney could take my case 1 month before my trial before). Again, the Court had explicitly promised me a pro bono attorney, and there was a charade of following through with this agreement until 3 months before my trial, when the agreement was violated.

5. Pretrial:

I filed a motion for reconsideration regarding dismissing the claim against the County, because dismissing it was blatantly improper, considering the facts, and because it would allow the County to simply endorse the violation of my rights as within their policy as a legal defense against the claim against Smith in his individual capacity. This motion was completely ignored.

In pretrial disclosures, Defense Counsel provided an unredacted version of a document. This version of the document had never been released to me despite being subpoenaed and requested, and Defense Counsel explicitly stating that he did not have it. It contained the contact information for one of the bystander witnesses. The District Judge had me call him at a hearing and both Defense Counsel and I were allowed to question him for about 2 minutes each. He stated very clearly and beyond dispute that I was not resisting in the slightest. I called him later and he stated that I was not in handcuffs when the other deputies arrived, and did not yell at any deputies prior to force being applied to me. This witness agreed to appear over Zoom, but the District Judge screamed at me when I informed her of this and berated me for about 10-15 minutes straight (Exhibit 31). She then refused to cooperate with summoning him.

The District Judge also refused to cooperate with summoning anyone else, including the officer from a different agency who was a witness to my demeanor prior to the incident, who stated I was "polite, calm, courteous, and cooperative" (Exhibit 2), or my various medical providers. She ordered Defense Counsel to summon the officer from a different agency.

A later California Public Records Act request to the other agency shows that Defense Counsel did not make any attempt to summon that officer. It also shows Defense Counsel clearly stating that he already has the unredacted version of the document that he requested from them, which contained the contact information of the bystander witness. (Exhibits 34 and 35.)

Defense Counsel also filed a Motion in Limine to prohibit me from discussing the fact that Defendant, his associates, and Defense Counsel himself, had repeatedly lied about the camera's ability to record. My objections were ignored. At a hearing, I specifically brought up applicable hearsay exceptions, and the District Judge disregarded these, and granted the motion, in blatant violation of the rules of evidence (Rules 801, 803, 804, 807, etc.).

Defense Counsel told both me and the trial judge explicitly that he had not made any edits to the jury instructions. Then during the hearing I was reading the jury instructions and noticed that he had slipped in language about the crime of resisting arrest, and then during the trial he argued that I had committed that crime (without me being allowed to summon the witnesses who said that I was not resisting and was polite and cooperative, or inform the jury of what they had said, in violation of the applicable hearsay exception in the Federal Rules of Evidence, Rules 801, 803, 804, 807, etc.). When I pointed this out, the judge yelled at me for pointing it out, and misconstrued the situation without acknowledging the fact that Defense Counsel had explicitly just said that he hadn't edited the jury instructions before the Court 5 minutes prior.

6. Trial:

At the trial, Defense Counsel lied to the jury. He said that I was "on the run" at the time of the incident. This was a blatant lie. He waved around a piece of paper and told the jury that I "got into a fight" with my sister, and then placed the paper in front of me and asked if I remembered some date 17 years ago, which was a blatant lie. The paper contained no such assertion, he had never released that during Discovery, and he had obtained that from the Sheriff's Office investigations department requesting it from another office, and the document had the words "CONTROLLED" and "DO NOT DUPLICATE" printed on it.

Defense Counsel told the jury that I had changed my story "like the shifting sands". Literally the one and only inconsistency that has been pointed out between my extremely minutely detailed statements of facts that I made completely blind to the evidence, and the various evidence, was that the bystander witness stated that he thought I was not picked up and carried into the holding cell by both my hands and feet but stated that he thought my feet were either on or close to the ground as I was being carried or escorted into the holding cell -- however, Defendant Smith himself corroborated my assertion in this regard, by stating that he remembered that I was picked up, placed on the bench, and told that if I

moved I would be tasered by another deputy, and then unhandcuffed in precise corroboration with my statements. 99.9x% of the details of my statements of facts were corroborated by the evidence and records, where the Defendant Smith and the County have been caught in HUNDREDS of lies (violations of FRCP Rule 11), but the District Judge actively prohibited me from informing the jury about these in general, in blatant violation of the Federal Rules of Evidence.

In response to the most basic level of advocacy, the judge treated me as though I was being uncooperative before the jury. She did this after she was informed that Defense Counsel was strategically "weaponizing" my advocacy to corroborate their legal defense - their claim that I was "uncooperative" after they had criminally destroyed and concealed all the evidence, or gotten it unlawfully prohibited from being submitted before the jury. The judge then participated in this during the trial, before the jury. I was stripped of my ability to advocate for myself, as the best decision to avoid being painted as uncooperative before the jury, for basic advocacy.

Their expert witness was not admitted as an expert. He was proposed as an expert literally 1 week before the trial. He provided no written report. I was explicitly deprived of the opportunity to take his deposition, misconstruing the fact that Defense Counsel had openly refused to schedule Andrew Cash for deposition for a year, and then interfering with scheduling, and the trial judge promising to summon him to the trial, but then going back on her word, as my choice. I had no time to prepare to question him.

The judge, in a blatantly improper manner, interfered with my legitimate questioning of the witnesses when it became apparent that I was making a crucial point, on two occasions. I asked Defendants' "expert witness" if he had trained his employees in any other safety measures regarding the carotid hold, and he answered "no" literally 3 times. Upon me asking about training his trainees on a time limit to apply the carotid for, the judge interfered and didn't let him answer. He shook his head. On another occasion, Defendant Smith himself testified that I had lied repeatedly. Upon questioning him, I

asked him to provide examples. He listed several examples, and then the judge interfered with me questioning him about the details. I was not allowed to expose his contentions as hollow lies.

I wasn't allowed to refer to case law while questioning Defendant's expert witness.

Defense Counsel was allowed to wait until my witnesses were gone to lie about them. He said that I got into a fight with my sister (which was false, 17 years prior, and speciously based on blatantly inadmissible documents, but in reality completely fabricated). He waited until my expert witness was gone before he told the jury that my expert witness came from an office that policies that Defense Counsel claimed were vague, which Defense Counsel claimed were like the County's. My expert witness pointed out that the carotid hold was not lawful unless someone exhibited "assaultive" behavior, pointed out where in Defendant's office's OWN policies they stated this, and also stated that the County's policies were substantially deficient and confusing (basically that the County was liable under Monell v. Board of Education, although the only claim being adjudicated was the claim against Defendant Smith in his individual capacity, a shortcoming that had been repeatedly actively and improperly covered up by the Court, despite continued effort on my part to have it corrected). My expert witness from not from the office referred to by Defense Counsel - he was a master level instructor at a California POST police academy.

The jury wrote me a letter, basically stating that they appreciated my efforts, but obviously implied that not enough evidence had been presented for them to make a determination, and obviously implied that without any evidence, they could not rule against Defendant Smith. Again, I would note that crucial evidence was destroyed and otherwise spoliated by the County (such as the camera equipment list, the potential video records, and various witness testimony) and unlawfully prohibited from being submitted by the judge (such as Defendant's and his associates' and his Counsel's own prior

statements about the camera, and various witnesses who were disclosed properly both in initial disclosures and in post-Discovery disclosures).

During the trial, I said to the judge, "This is a mistrial". The judge responded "Lets see what happens". After the trial, I said "This goes way beyond just sanctions". The judge responded "This is a lot to process". I responded "It is a lot to process".

Obviously, destruction and concealment and other spoliation of evidence shouldn't result in a prohibition from informing the jury about it, which encourages criminal misconduct. Rather it should result in the opposite - a jury instruction that the evidence spoliated was unfavorable to the party who destroyed it (*West v. Goodyear Tire & Rubber Co.*, 167 F. 3d 776 - Court of Appeals, 2nd Circuit, 1999:

> "It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favourite maxim of the law, *omnia presumuntur contra spoliatorem*.' Sir T. Willes Chitty, et al., Smith's Leading Cases 404 (13th ed. 1929); see Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)".[2]

[2] See also: Fed.R.Civ.P. 37 parts (b)(2)(A), and (e)(2); and *Anheuser-Busch, Incorporated v. Natural Beverage Distributors*, 69 F.3d 337 (9th Cir.1995); *Castro v County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016); *Consumer Financial Protection Bureau v. Morgan Drexen, Inc.*, 101 F.Supp.3d 856 (C.D. Cal. 2015); *Doe v. County of San Mateo*, 2017 WL 6731649 (N.D. 2017); *Farmer v Brennan*, 511 U.S. 825 (1994); *Glover v. BIC Corporation.*, 6 F.3d 1318 (9th Cir.1993); *Halaco Engineering Company v. Costle*, 843 F.2d 376 (9th Cir.1988); *Jerry Beeman & Pharmacy v. Caremark, Inc.*, 322 F.Supp.3d 1027 (C.D. Cal. 2018); *Leon v. IDX Systems Corporation.*, 464 F.3d 951 (9th Cir.2006); *Lolli v County of Orange*, 351 F.3d 410 (9th Cir. 2003); *Micron Technology., Incorporated v. Rambus, Incorporated.*, 645 F.3d 1311 (Fed. Cir. 2011); *Mizzoni v. Nevada*, 2017 WL 4284597 (D. Nevada 2017); I*n re Napster, Incorporated Copyright Litigation.*, 462 F.Supp.2d 1060 (N.D.Cal.2006); *North American Watch Corporation v. Princess Ermine Jewels*, 786 F.2d 1447 (9th Cir.1986); *Omnigen Research v. Yongqiang Wang*, 321 F.R.D. 367 (D. Oregon 2017); *Oracle American., Incorporated v. Hewlett Packard Enterprise Company*, 328 F.R.D. 543 (N.D. Cal. 2018); *Phan v. Costco Wholesale Corp.*, 2020 WL 5074349 (N.D. Cal. 2020); *Peschel v. City of Missoula*, 664 F.Supp.2d 1137 (D. Mont. 2009); *Pettit v. Smith*, 45 F.Supp.3d 1099 (D. Arizona, 2014); *Silvestri v. General Motors Corporation.*, 271 F.3d 583 (4th Cir.2001); *In re Slimick v. Silva*, 928 F.2d 304 (9th Cir.1990); *United Artists Corporation v. La Cage Aux Folles, Incorporated.*, 771 F.2d 1265 (9th Cir.1985); *United States v. Kitsap Physicians Service.*, 314 F.3d 995 (9th Cir.2002); and *United States v. National Medical Enterprises, Incorporated.*, 792 F.2d 906 (9th Cir.1986).

The Court has deprived me of Due Process continuously throughout 7 years now. I was repeatedly deprived of the most basic rights to Due Process to the point that I couldn't move past getting even the most basic rights vindicated by the Court, and Defendant and his Counsel were allowed to blatantly violate all the applicable laws and Rules of Procedure and of Professional Conduct.

7. Post-Trial:

After the trial, I filed a motion for a new trial, a motion to recuse the judge, and various other motions.

At some point, my access to PACER was revoked (and I will remind the reader that this was not the first time). I had repeatedly informed the Court and Opposing Counsel that I was having ongoing issues with PACER and that I was not waiving my right to be served documents by mail or by email. This information was ignored (until later on). I was literally in the process of regaining access to PACER (Exhibit 32), and had repeatedly made requests that any documents filed be emailed to me to the lead attorney named by Defendants, and Defense Counsel's direct supervisor (Exhibits 33). My requests were blatantly ignored. Eventually Defense Counsel stated that an order had been filed. I sent requests to the Deputy Court Clerk to have any orders emailed to me. He refused, and stated that he would mail me the Court's order. Defense Counsel finally emailed me the order.

In the order, which I received 16 days after it was filed, the District Judge had refused to forward the motion to recuse the judge to a different judge, stated that I had 30 days to appeal, and that I was being given an additional 30 days on top of that, and that I could request an extension of time within 30 days.

In the past, the District Court had repeatedly ignored my notices of appeal. When the District Court finally acknowledge my notice of appeal, they stated that my "request for review" would be put in a stack with all the others, and I never heard anything about it since.

I had been trying to find the applicable rules for appealing, and wrote an appeal, intending to title it an appeal. Because of my past experience, and because I could not find the instructions on how to appeal within the extremely short window I had, I titled the document "Amended Motion for Mistrial". This also contained an updated argument on why the judge should be recused. I filed it within 30 days from when the order was filed. The Court rejected it. I filed a timely Motion for Reconsideration. The Court rejected that. I filed a timely Notice of Appeal.

8. Appellate Litigation:

After nearly a year of litigation in the Court of Appeals, Defense Counsel's arguments were defeated. The Court Appeals then issued an order. They cited a case that nobody in this case had cited - *Swimmer v. IRS*, a 1987 9th Circuit case, premised on *Stark v. Lambert*, an 8th Circuit case. They made an argument that nobody had made.
The author of the order argued that one must appeal underlying judgment within 30 days and that the deadline can only be extended up to 30 days, though they made no claim as to when final judgment was rendered. The author of the order stated that they only had jurisdiction to review the Court's order responding to my motion for reconsideration (which was construed as a second motion for reconsideration, after my "amended motion for mistrial" was construed as a first motion for reconsideration).

This was an order granting summary disposition to Defendant.

I filed a petition for panel rehearing, and it was not considered, and rejected wholly without explanation. I filed an emergency motion for reconsideration, and the clerk dismissed it without forwarding it to any judge.

In Defense Counsel's objections to my emergency motion for reconsideration, he demonstrated a continued misunderstanding of the issue argued by the Court.

My requests for transcripts have been repeatedly either rejected or ignored. When I attempted to purchase audio recordings for all the hearings and the trial, the Court charged my bank account, but never provided me any audio recordings. When I tried to reach out

to the Deputy District Clerk, he kept requesting that I perform tasks, and then ignored me after I completed the tasks.

IX. LEGAL ISSUES

1. Original Argument

In appeals, Defense Counsel filed a motion for summary disposition. While the Court of Appeals contended the same *conclusion* as Defense Counsel, their supporting arguments were different. Defense Counsel's arguments were deficient, and were defeated meritoriously and lawfully. His conclusion relied on lackadaisically ignoring the relevant laws, and failed to even flesh out an argument supporting his request of the Court.

The Court picked up the slack, in their order in question, in which they granted summary disposition to the moving party. The Court of Appeals made an argument that nobody in this case had made, which was premised on a case that nobody in this case had cited. They argued that "second motions for reconsideration do not extend the deadline to appeal". They cited *Swimmer v. IRS*, a 1987 9th Circuit case, itself premised on *Stark v. Lambert*, an earlier 8th Circuit case, which was premised entirely on the fact that at that time, motions for reconsideration did not extend the time to appeal.

Upon Motion for Panel Rehearing, the Court openly refused to consider my arguments, refused to provide any clarification, and openly stripped me of the right to file any further motions in either case, in a blanket manner, without any rational basis, with multiple pending claims and requests for relief still open.

The Court, without any reasonable doubt whatsoever, made a material error of fact when contending what the scope of their jurisdiction was, even through the lens of Swimmer. The validity of *Swimmer* is questionable, given that it is contrary to *Clay v. United States* 537 US 522 Supreme Court 2003, and other Supreme Court case law, and that both it and its precedent (*Stark v. Lambert*) relied on a version of the Rules that is now obsolete as of the 1993 Amendments.

The act of making an original argument in their summary dispositive order, and then depriving me of right to have my motion for panel rehearing considered (along with various other motions) deprives me of my rights as a party of the Court to Due Process, guaranteed by the 5th Amendment.

For the Court to 'decline the exercise of jurisdiction' when they received my petition for a panel rehearing, is an act which was called "treason" by the United States Supreme Court, in 1821, in *Cohens v. Virginia*, and again, in 2021, in *Texas v. California.*

Cohens v. Virginia 6 Wheat, 264, 1821

> We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

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2. The 9th Circuit's Error as to the Scope of their Jurisdiction

The 9th Circuit's Order states:

> On November 21, 2022, appellant filed a notice of appeal, which was timely only as to the district court's October 25, 2022 order denying appellant's second motion for reconsideration. See Swimmer v. IRS, 811 F.2d 1343 (9th Cir. 1987) (second motion for reconsideration does not toll time to appeal underlying judgment). The scope of this appeal is therefore limited to review of the October 25, 2022 order denying appellant's post-judgment motion.

My motion for reconsideration did (even through the lens of Swimmer) toll the deadline to file an appeal regarding the Court's order before that.

See *Perez v. Berryhill*, No. 17-15278 (9th Cir. Dec. 21, 2017):

> [T]he second motion for reconsideration tolled the time within which to file a notice of appeal from that first post-judgment order. See Fed. R. App. P. 4(a)(1)(B); Swimmer v. Internal Revenue Serv., 811 F.2d 1343, 1344 (9th Cir. 1987) (holding that second motion for reconsideration tolled time to appeal from denial of first post-judgment motion).

See also *Swimmer v. I.R.S*, 811 F.2d 1343 (9th Cir. 1987):

> Even though the notice of appeal came more than sixty days after the court order denying this motion, the time for appeal was extended by the second post-

judgment motion. [...] [T]he second motion extended the time for appeal so that Swimmer's challenge to the denial of his first motion is timely.

The Court of Appeals were objectively wrong when they claimed, "The scope of this appeal is [...] limited to review of the October 25, 2022 order". Even through the lens of Swimmer, they ALSO HAD jurisdiction to review my "Amended Motion for a Mistrial", and the Court's responsive order to that. This is material and important, because the Amended Motion for Mistrial was intended as, and formatted as, an appeal, and could be construed as a Notice of Appeal, or an Appellate Brief. And in *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. _ (2022), the US Supreme Court stated,

> In applying the Federal Rules of Civil Procedure, this Court looks to the 'substance' of an underlying motion, even when a movant has 'labeled' or 'couched' its language in a particular rule. Gonzalez v. Crosby, 545 U.S. 524, 531 (2005).

Furthermore, if the District Court hadn't previously repeatedly neglected to forward my appeals to the Court of Appeals, and then lied that they had, I promise I would have labeled that filing "Notice of Appeal".

In *Cohens v. Virginia* 6 Wheat, 264, 1821, the US Supreme Court stated,

> We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

The US Supreme Court stated this again in *Texas v. California* 593 U. S. _ (2021).

The Court of Appeals must consider my Amended Motion for a Mistrial. Without doing that, the Court's order is unequivocally unlawful.

3. *Swimmer* is Contrary to Supreme Court Case Law, 28 USC Ch. 83, Obsolete as of 1993, and not Supported by the Language of the Federal Rules of Appellate Procedure

The principle used to reject my appeal is contrary to *Clay v. United States* 537 US 522 Supreme Court 2003, and contrary to 28 U.S. Code Chapter 83. *Swimmer v. IRS* and its precedent *Stark v. Lambert* were rendered obsolete by the 1993 Amendment to the

Rules they were based on. The interpretation in *Swimmer v. IRS* is not supported by any clear language in Federal Appellate Procedure Rules 3, 4 or 26.

In *Clay v. United States* 537 US 522 Supreme Court 2003, the Court stated,

> [A] federal judgment becomes final for appellate review [...] when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment. See e. g., *Quackenbush v. Allstate Ins. Co.*, 517 U. S. 706, 712 (1996).

Coopers & Lybrand v. Licesay, 427 US 468:

> [T]he purpose of the finality requirement 'is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.' [Cohen v. Beneficial Industrial Loan Corp., 337 U.S.], at 546.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court stated that appeals should generally be consolidated into one appeal, at the end of litigation with the District Court.

Noteworthy is the fact that all of these Supreme Court cases (except *Cohen*) were decided subsequently to *Swimmer v. IRS*. Obviously, more recent Supreme Court case law supersedes older Circuit Court case law.

Indeed, a thorough review of *28 U.S. Code Chapter 83* must conclude in the objective determination that the Court of Appeals ONLY has jurisdiction to review District Court decisions -- that a litigant MUST file a motion for a new trial, and may file a motion for reconsideration after that, and then when the District Court's decision is final, then may appeal to the Circuit Court.

Additionally, the precedent for *Swimmer v. IRS* - that is, *Stark v. Lambert*, rests, in its entirety, on the version of the Rules of Federal Appellate Procedure, Rule 4(a)(iv)(A) which, at the time of both *Swimmer* and *Stark*, did not contain motions for reconsideration in the list of such motions that extend the time to appeal. An amendment to the rule in 1993 rendered *Stark* absolutely obsolete. The Court's decision in *Swimmer* was also also based in part on the now-obsolete version of the Rules, and the fact that Swimmer's

assertions were (ostensibly, at least) not meritorious on their face. This case is substantially different than Swimmer, to the point of being a polar opposite.

Additionally, there is nothing in the rules that reflects the 9th Circuit's reading.

XI. CONCLUSION

The reality is that this is a case of arbitrary disparate treatment against me, based on pro se status, which in this case, is a protected status (*Faretta v. California*, 422 U.S. 806 (1975): "In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation"), or other unlawful cause. It is beyond question that my rights have been divested repeatedly, unlawfully, over the course of nearly a decade. It should not be proper that I should the one burdened with continuous unpaid labor under the compulsion of having my rights divested because of other people's openly committed deliberate misconduct which is on record.

Unequivocally, my filing that was titled "Amended Motion for Mistrial" was filed within the deadline to appeal. This was intended to be an appeal, and contained all the elements of an appeal, an appellate brief, and a notice of appeal. The Court must apply the standards equally both when the government benefits from their decision and when the populace benefits from the same decision, and the Court construed a filing as it was formatted rather than as it was titled in *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. _ (2022), and even did so in *Swimmer v. IRS*. That filing would have been titled "Notice of Appeal" had not the District Court previously repeatedly ignored my notices of appeal, and had they not finally openly acknowledged receipt of the notice of appeal, and promised that it would be handled appropriately, and then evidently deliberately neglected to do so, in blatant violation of the law.

Unequivocally, the Court of Appeals had jurisdiction to review the "Amended Motion for Mistrial". But they directly stated they did not. This was unequivocally erroneous. And as explained above, this is an important material error.

Neither Defendant, nor the Court can provide any lawful or logical basis against the facts that (1) my "Amended Motion for Mistrial" was filed within the deadline to appeal, and (2), that the Court of Appeals unequivocally had jurisdiction to review that filing, (3) that their statement regarding the scope of their jurisdiction was wrong, and (4) that they deliberately "decline[d] the exercise of jurisdiction, which [was] given" (quoting *Cohens v. Virginia*).

After a thorough review of Federal Appellate Procedure Rule 3, it must be concluded, objectively, that I complied wholly with that Rule. Nobody has, or can, cite any part of that rule that I did not wholly comply with. The "Amended Motion for Mistrial" fulfills all the requirements under FRAP Rule 3 (Part (c)). The Notice of Appeal fulfills all the requirements under Rule 3. The Rule specifically states (in Part (c)(4)), "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal."

In *Texas v. Calfornia*, 593 U. S. ____ (2021), the US Supreme Court poses a hypothetical where a District Court chooses to "decline the exercise of jurisdiction which is given" (The Court quoted *Cohens v. Virginia*), and, in the "suppose[d]" hypothetical, the Appellate Court affirmed. The Court goes on to state,

> What would we do? **We would reverse in the blink of an eye.** We might also wag a finger at the lower courts and remind them that a federal court's obligation to hear and decide cases within its jurisdiction is "virtually unflagging." Colorado River Water Conservation Dist. v. United States, 424 U. S. 800, 817 (1976); see also, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 126 (2014); Sprint Communications, Inc. v. Jacobs, 571 U. S. 69, 77 (2013). We might emphasize that federal courts do not have freewheeling discretion to spurn categories of cases that they don't like. [Emphasis added.]

And although in the context of *Cohens*, the US Supreme Court was, in 1821, obligated to hear certain cases, the argument is unquestionably applicable here, where such an obligation existed without question.

Dated: November 29, 2023

Respectfully Submitted,

Brian Best
Petitioner