Case No. 07-35962

United States Court of Appeals
for the Ninth Circuit

Brian P. Carr
Plaintiff-Appellant

versus

Sam Reed, in his official capacity as Secretary of State of the State of Washington, Wanda Briggs in her official capacity as Chair of the State of Washington Commission of Judicial Conduct, and Rob McKenna, in his official capacity as Attorney General of the State of Washington and representing in their official capacity as representatives of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eiesland, Rich Melnick, John Hagensen, Kelli E. Osler, Joel Penoyar, (J.) C. C. Bridgewater, J. Robin Hunt, Gerry L. Alexander, Barbara Madsen, Mary E. Fairhurst, Susan Owens and James M. Johnson
Defendants-Respondents

Appeal from an Order of the United States District Court
for the Western District of Washington, Case No. C07-5260RJB
The Honorable Robert J. Bryan, Judge Presiding

Brief of Plaintiff-Appellant

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Preliminary Statement

The plaintiff-appellant was deprived of his rights to liberty and property without due process and the plaintiff-appellant was not provided equal protection under the law as required by the Fourteenth Amendment of the U.S. Constitution in proceedings in the State of Washington under RCW 26.50 (Domestic Violence). While the statute itself provides for due process and equal protection under the law, the defendants-respondents ignored the requirements of the statute and the state constitution. The plaintiff-appellant is seeking declaratory relief as well as damages. Ancillary relief is sought in election requirements and judiciary oversight to restore due process and the rule of law to the Washington judiciary.

Jurisdiction

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as a case arising under 28 U.S.C. § 1367, 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 1983, 42 U.S.C. § 1985 (3), and 42 U.S.C. § 1986 as a case seeking to enforce rights and privileges secured by the laws of the United States as authorized by 28 U.S.C. § 2201 (a) and 28 U.S.C. § 2202 as well as under the Fourteenth Amendment of the U.S. Constitution guarantees of Due Process and Equal Protection of the Law. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292 as the trial court issued a final decision on November 5, 2007[1] and a Notice of Appeal was filed on November 15, 2007.[2]

Issues

1 Did the plaintiff-appellant demonstrate clear violations of the Washington state constitution and, implicitly, the oaths of office of the defendants-respondents?

2 Is the appointment of commissioners administrative rather than judicial in nature?

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1 Record 63.
2 Record 66.

3 Can judicial immunity be granted when there was no valid appointment for the individual and the individual knew there was no valid appointment?

4 Can judicial immunity be granted when an individual has only limited jurisdiction and knowingly conducts hearings and issues orders which are beyond the jurisdiction of the court?

5 Can appellate courts be granted judicial immunity when there is only a single party before the court, the appellate court knowingly does not provide the right of appeal, and the decision rendered is a knowing and intentional violation of the individual's oath of office?

6 Can judicial immunity be granted when an individual knowingly and intentionally violates their oath of office?

7 Is injunctive relief barred by the Rooker-Feldman doctrine when the requested relief corresponds with all decisions of the state courts and does not contradict any decision of the state courts? Can issues and relief which were not addressed by the state courts cause the matters to be inextricably intertwined?

8 Is injunctive relief barred by *res judicata* when the underlying issues were not addressed by any decision of the state courts?

9 Is it acceptable for an elected official to be responsible for determining who is eligible to run against that individual in future elections? Is an apparent lack of qualified candidates willing to support the rule of law indicative of the validity of the requirements currently in place?

10 Can the state restrict access to ballots (via petitions) specifically based on the economic status of the potential candidate?

11 Can injunctive relief for sexual bias in the processing of domestic violence matters be barred by *res judicata* when the parties, relief sought, and evidence provided are all different?

12 Can the Washington Commission on Judicial Conduct (CJC) ignore violations of the state constitution and statutes with the result of continued deprivation of due process for all citizens of Clark County?

Statement of Facts

In the state of Washington, the District Court is a court of limited jurisdiction[3] and can process many RCW 26.50 (domestic violence) requests, but in cases where there is a shared residence (as in the cases cited herein), the Superior Court, the court of general jurisdiction[4], must hold the hearing and issue the Order (RCW 26.50.020 (5) (c)). In Clark County, the Superior Court chose not to hear these cases, but delegated the authority to the District Court.[5] Unfortunately there does not appear to be any legal way to delegate these matters.

While the Superior Court can appoint commissioners under the Washington state constitution to process these matters[6], these constitutional commissioners can not 'exceed three in number' in any given county.[7] There were already two constitutional commissioners and there were six District Court judges. The Washington state statutes also provide for Family Court commissioners under RCW 26.12 who are not limited in number, but have extremely limited jurisdiction[8] and can only complete the initial portions of RCW 26.50 requests, ex parte hearings and temporary restraining orders[9]. When faced with this dilemma the Clark County Superior Court apparently decided to simply ignore the numeric limit on constitutional commissioners and appointed eight such commissioners.[10]

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3 RCW 3.
4 RCW 2.08 and Washington State Constitution, Article 4, Section 6.
5 *A Process Evaluation of the Clark County Domestic Violence Court* by Kleinhesselink and Mosher, Washington State University Vancouver, 2003.
6 *State v. Karas* - 108 Wn. App. 692 (2001)
7 Washington State Constitution, Article 4, Section 23
8 *Ordell v. Gaddis*, 99 Wn.2d 409 (1983)
9 RCW 26.12.060 (6) and RCW 2.24.040
10 Record 36 ¶6, pg 5-26, 36-3, and 36-4.

This violation of the numeric limits of the constitution was further aggravated by the Superior Court's decision to try to keep these appointments secret. They apparently put in place barriers to appeal so that their violations of the constitution would not be exposed.[11] However, in an environment where there were no appeals and no proper jurisdiction under the rule of law, Clark County District Court made numerous other 'shortcuts' in the process such as omitting the required ex parte hearings[12].

Domestic violence cases are problematic due to the urgency of a quick decision and the lax requirement of only probable cause. In such cases some errors are virtually certain especially with the shortcuts taken by the District Court. There were such errors in two cases which involved Mr. Carr, the plaintiff-appellant. Mr. Carr was able to overcome the barriers to appeal and document the appointments of four constitutional commissioners in both 2004 and 2005[13].

The Washington state Court of Appeals, Division II was faced with a serious dilemma with this appeal[14]. Washington state case law is quite clear about the effect of invalid orders (such as the appointment of commissioners beyond the numeric limit of the constitution) declaring that any resulting orders and arrests are themselves void ab initio[15]. To rule consistent with law would be highly disruptive and overturn several years of domestic violation orders (likely over a thousand orders) as well as any subsequent arrests and convictions. However, the only alternative was to ignore obvious violations of the state constitution, itself a violation of their oath of office. Sadly, the Court of Appeals chose the latter and intentionally and knowingly concealed the violations of the state constitution and violated their oaths of office[16].

11 Record 17 ¶14-16, Record 21 ¶ 34-42, and Record 36 ¶2-5
12 RCW 26.50.070 (3), Record 36 ¶3, and Record 56 ¶7.
13 Record 36 pg 5-26, 36-3, and 36-4.
14 Record 36-5.
15 *Barker v. Barker*, 31 Wn. (2d) 506 (1948) and *Beyerle v. Bartsch*, 111 Wash. 287 (1920).
16 Record 36 pg 27-35.

Mr. Carr submitted a Petition for Review to the Washington state Supreme Court[17] which presented them with the same dilemma as faced by the Court of Appeals. The state Supreme Court also chose to ignore violations of the state constitution and violate their oaths of office[18]. The absence of previous appeals to these serious violations of the rule of law as well as the complicity of the Court of Appeals and state Supreme Court raised the question of whether the restrictions on judicial candidates by the state had encouraged and supported this widespread neglect of the rule of law with the Supreme Court determining who can oppose them in future elections and restricting access to petitions as a method of ballot access solely based on the economic status of the potential candidate.

In apparent recognition that the previous appointments of all the District Court judges as constitutional commissioners were not valid, in 2006 and 2007 the Clark County Superior Court did not begin hearing RCW 26.50 matters as required by statute, but instead appointed all the District Court judges as Family Court commissioners under RCW 26.12. These commissioners are not limited in number, but have extremely limited jurisdiction[19] and can only complete the initial portions of RCW 26.50 requests, ex parte hearings and temporary restraining orders[20]. RCW 26.50 matters continued to be heard by the District Court and as Superior Court matters without valid jurisdiction, but the lack of jurisdiction was different.

Additional issues in this case are the sexual bias demonstrated in the decisions of the Clark County courts and the lack of action on the part of the Washington state Commission on Judicial Conduct (CJC) in light of clear violations of the Washington state constitution and, therefore, oaths of office.

17 Record 56-5.
18 Record 27-2 pg 60.
19 *Ordell v. Gaddis*, 99 Wn.2d 409 (1983)
20 RCW 26.12.060 (3) and RCW 2.24.040

The Federal District Court incorrectly granted judicial immunity to all the judges and the CJC and incorrectly held that the injunctive relief sought was barred by the Rooker-Feldman doctrine and *res judicata* or, in the case of restrictions to ballot access, overlooked the central points of Mr. Carr's arguments.

Argument

1. More Than Three Constitutional Commissioners

Washington State Constitution, Article 4, Section 23 states

> There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, *not exceeding three in number*, who shall have authority to perform like duties as a judge of the superior court at chambers....

This numeric limit was affirmed by the voters in 1981 and the Washington Supreme confirmed that the limit meant just what it said[21]. However, the defendant-respondent Harris signed orders appointing the defendants-respondents Eiesland and Melnick (Clark County District Court Judges) as constitutional commissioners as well as the two publicized constitutional commissioners (the honorable Collier and Schienberg)[22] and all the other judges of the Clark County District Court[23] with the record including orders appointing Clark County District Court judges Anders and Schreiber as constitutional commissioners[24].

These appointment orders were made in violation of the Washington constitution and were invalid for that reason. They violated the rights of the plaintiff and numerous other Clark County residents' right to be heard by a judge rather than a commissioner. Further, Washington law is clear on the effect of Orders made when the court did not have

21 *Ordell v. Gaddis*, 99 Wn.2d 409 (1983)
22 http://web.archive.org/web/20041211012414/http://www.clark.wa.gov/courts/superior/judges.html
23 *A Process Evaluation of the Clark County Domestic Violence Court* by Kleinhesselink and Mosher, Washington State University Vancouver, 2003.
24 Record 36 ¶6, pg 5-26, 36-3, and 36-4.

jurisdiction. An order can be 'declared void for the reason that the ... court did not have jurisdiction to enter such decree.'[25] It is also well established that all subsequent actions based on the void order are void ab initio or void from the beginning[26]. Any Orders for Protection, arrests and convictions based on the invalid appointment Orders are similarly void.

The plaintiff clearly demonstrated that the appointment orders for constitutional commissioners were made in violation of the Washington state constitution and were invalid with copies supported by declaration of four appointment orders for both 2004 and 2005.[27]

2. Commissioner Appointments Administrative

The trial court held that 'the function of appointing commissioners is integrally related to normal judicial functions... [and] is protected by absolute immunity'[28], but this is clearly contrary to case law as the appointment of assistants is an administrative task shared with numerous other positions such as a sheriff appointing a deputy. *Forrester v. White*, 484 U.S. 219 (1988) states:

> it does not serve to distinguish judges from other public officials who hire and fire subordinates. In neither case is the danger that officials will be deflected from the effective performance of their duties great enough to justify absolute immunity. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions,

Clearly only qualified immunity is available for such tasks as appointing commissioners, but qualified immunity applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which is obviously the case when the numeric limits of the state constitution are ignored. The immunity which was granted to

25 *Beyerle v. Bartsch*, 111 Wash. 287 (1920) and *Barker v. Barker*, 31 Wn. (2d) 506 (1948).
26 *Beyerle v. Bartsch*, 111 Wash. 287 (1920)
27 Record 36 ¶6, pg 5-26, 36-3, and 36-4
28 Record 63 pg13 ln10-12

defendants-respondents Harris, B. Johnson and Nichols for their part in making and concealing these invalid appointments was unfounded.

3. Judicial Immunity Without Valid Appointment

The trial court granted absolute immunity to defendants-respondents Melnick and Eiesland as they were judges (of the District Court) and their decisions involved pending cases before them, but overlooks the fact that they issued orders of the Superior Court while the proceedings were those of the District Court. As noted previously, the orders appointing them as Superior Court Commissioners were made in violation of the state constitution and were not valid. It is also clear that these defendants-respondents knew their appointment orders were not valid.[29] Absolute immunity does not apply when there is '*clear absence of all jurisdiction*'[30] and these District Court judges had no jurisdiction to issue Superior Court orders any more than they had jurisdiction to enter orders for the Ninth Circuit Court.

4. Judicial Immunity When Knowingly Exceeds Jurisdiction

Family Court are courts of extremely limited jurisdiction[31] and do not have the broad 'general jurisdiction' of the Superior Court or that referred to in *Stump v. Sparkman*, 435 U.S. 349 (1978). Defendants-respondents Hagensen and Osler routinely processed RCW 26.50 (domestic violence) matters in Clark County without the ex parte hearings required in RCW 26.50.070 (3) and issued restraining orders (or Orders for Protection) which were not temporary and for which they do not have jurisdiction.[32] While Family Court

29 Record 17 ¶14-16, Record 21 ¶ 34-42, and Record 36 ¶2-5.
30 *Bradley v. Fisher*, 80 U.S. 335 (1871) and restated in *Stump v. Sparkman*, 435 U.S. 349 (1978)
31 RCW 26.12, *Ordell v. Gaddis*, 99 Wn.2d 409 (1983).
32 In *State v. Karas* - 108 Wn. App. 692 (2001) it was found that Superior Court Commissioners could issue Orders for Protection which were not listed in the statutory powers of said commissioners because of the broad powers provided to these commissioners under the Washington State Constitution, Article 4, Section 23. However, these constitutionally empowered commissioners are limited in number, *Ordell v. Gaddis*, 99 Wn.2d 409 (1983). While Family Court Commissioners do not count in the numerical limit, they also only have the powers provided via statute in RCW 2.24.040 which only includes holding ex parte hearings (6) and issuing temporary restraining orders (3).

Commissioners are authorized to *'cause the orders and findings of the family court to be entered in the same manner as orders and findings are entered in cases in the superior court*' (RCW 26.12.060 (6))[33], their jurisdiction is restricted to that of the Family Court and to '*exercise all the powers and perform all the duties of court commissioners*' (RCW 26.12.060 (3)) which is only the statutory powers of commissioners and only includes temporary restraining orders[34]. By refusing to hold ex parte hearings and issuing Orders for which they do not have jurisdiction, defendants-respondents Hagensen and Osler have deprived numerous residents of Clark County of the right to due process in RCW 26.50 (domestic violence) matters[35] to include the plaintiff-appellant in this matter who is still seeking an ex parte hearing in case 04-2-008908-9[36]. While the plaintiff-appellant could simply submit another petition, the Clark County courts do not process the petitions as required by statute and there is, hence, no forum in Clark County where these matters are handled with due process. The efforts made by the Clark County courts to conceal the lack jurisdiction of defendants-respondents Hagensen and Osler demonstrates that they knew they had no jurisdiction in these matters. When a court of limited jurisdiction knowingly hears subject matter and enters orders outside its jurisdiction, judicial immunity is not available.

For defendants-respondnets Eiesland, Melnick, Hagensen, and Osler, there is a further lack of jurisdiction in that in no case did they ever hold the ex parte hearing required in RCW 26.50.070 (3) and which must be 'in person or by telephone'. As this hearing is a prerequisite for issuing the temporary Order for Protection and holding the later hearings, these defendants-respondents did not have jurisdiction to make further decisions in the

33 This clause can be a little confusing, but what it really says is that once the Family Court is finished with its matters (ex parte hearings and temporary restraining orders), the decisions are automatically transferred to the Superior Court for completion. The Family Court is not given the broad jurisdiction of the Superior Court, it remains a court of extremely limited jurisdiction, but those decisions it enters are then matters for the Superior Court. As a commissioner, their decisions can be reviewed by the Superior Court for ten days and are then Superior Court decisions which can be appealed through the Court of Appeal.

34 The powers are listed in RCW 2.24.040 which only includes the issuing of temporary restraining orders (3)and holding ex parte hearings (9).

35 Record 17 ¶18, Record 21 ¶46,47,51, and Record 56 ¶7.

36 Record 21 rlf17.

matters cited.

5. Appellate Judicial Immunity When Knowingly Prevents Appeal

Defendants-respondents Penoyar, Bridgewater, and Hunt are judges of the Court of Appeals, Division II which is a court of limited jurisdiction created by RCW 2.06 with jurisdiction defined by RCW 2.06.030. As a court of limited jurisdiction, it is not accorded the broad relief of a court of general jurisdiction as described in *Stump v. Sparkman*, 435 U.S. 349 (1978). Further, the plaintiff-appellant's former wife never submitted a respondent's brief or paid the sanctions imposed on her (as far as the plaintiff-appellant knows), so it appears that the Court of Appeals never had jurisdiction over her in case 32671-0-II. As the plaintiff-appellant's brief was unopposed, the role of the Court of Appeals was more administrative rather than judicial. There were not '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court*' as described in *Forrester v. White*, 484 U.S. 219 (1988). In this case, the primary responsibility of the Court of Appeals is to determine what of the relief sought by the appellant can be legally granted and to grant that relief. In this capacity they only have the qualified immunity which applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which is obviously the case when violations of the state constitution are ignored. The damages cited by the plaintiff were the result of the failure of these defendants-respondents to fulfill their oath of office and support and uphold the state and federal constitution.

Further, the Court of Appeals intentionally and knowingly concealed the violations of the state constitution through fabricating facts which were not present in the record to include the claim that both parties '*each testified about whether the temporary protective order should be extended*' and '*on January 19, 2005,* [the plaintiff] ... *filed another temporary protective order, which was denied*'.[37] The normal acts (whether judicial

37 This second petition is completely the invention of the Court of Appeals in order to conceal the actions of

or administrative) of an appellate court is to review the record presented to it and draw out the relevant facts, not to fabricate events not present in the record in order to conceal violations of statutes and constitutions. These fabrications are so outside the realm of normal appellate acts as to preclude immunity in its own right according the test of '*the nature of the act itself (whether it is a function normally performed by a judge)*' as specified in *Stump v. Sparkman*, 435 U.S. 349 (1978).

Defendants-respondents Alexander, Madsen, Fairhurst, Owens and J. Johnson are members of the Washington Supreme Court and improperly denied the petition in case 78768-9. The Washington Supreme Court is similarly a court of limited jurisdiction (Washington State Constitution, Article 4, Section 4, and RCW 2.04.010) and is not accorded the broad relief of a court of general jurisdiction as described in *Stump v. Sparkman*, 435 U.S. 349 (1978). Further, the granting or denying of petitions for review is an administrative function as there is not '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court*' as described in *Forrester v. White*, 484 U.S. 219 (1988).[38] In this capacity they only have the qualified immunity which applies '*unless his actions violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which is obviously the case when violations of the state constitution are ignored. The damages cited by the plaintiff-appellant were the result of the failure of these defendants-respondents to fulfill their oath of office and support and uphold the state and federal constitution.

The granting of judicial immunity to appellate judges is particularly troublesome as it has been noted that when a judge errs, '*the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort*'[39], but if the

defendants-respondents B. Johnson and Nichols in early January of 2005 to improperly schedule that hearing in their efforts to conceal the violations of the state constitution.

38 The petitions are reviewed on face only without any disputes between parties.

39 *Bradley v. Fisher*, 80 U.S. 335 (1871) and reiterated in *Forrester v. White*, 484 U.S. 219 (1988).

appellate court knowingly abdicates their responsibility, there must be an alternative recourse.

6. Immunity When the Oath of Office is Knowingly Violated

There is an apparent lack of recent decisions concerning judicial immunity by the U.S. Supreme Court. In the ground breaking decision of *Stump v. Sparkman*, 435 U.S. 349 (1978), they rely heavily on *Bradley v. Fisher*, 80 U.S. 335 (1871), from more than 100 years earlier, but ignore *Randall v. Brigham*, 74 U.S. 523 (1869) from just two years earlier. The common themes and contrasts between these three decisions is revealing. The underlying theme for these cases as well as *Forrester v. White*, 484 U.S. 219 (1988) appears to be that in all cases the judge who was granted immunity was making a good faith effort to uphold their oath of office and do the right thing. After the fact, it was found that their efforts were sometimes misguided, unfounded (no jurisdiction) and just plain wrong (illegal). However, judges (and especially trial judges) have to make tough decisions every day and don't have the time to carefully research and consider every decision (cases need to move forward to some conclusion, sometimes in a very short time frame). Because of these difficulties, judges have been granted broad, special immunity from civil damages, but the U.S. Supreme Court has struggled with defining the limits of this immunity (as the contrasts between the four cases clearly shows). In *Forrester* there is a suggestion of the basis of these limits with:

> *Most judicial mistakes and wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.*

Of all the elements of due process, the right of appeal is certainly the most fundamental as it allows for the correction of the common errors which occur with even a good faith effort. However, efforts to conceal actions and interfere with the right of appeal strike at the very foundation of the rule of law. They are also indicative of intentional and

knowing violations of the basic oath of office for all such positions. Knowing and intentional violations of the oath of office are never normal judicial acts which would be afforded the absolute immunity from civil damages. The critical factor is an effort to conceal the improper or illegal actions (not the illegal or improper actions themselves which could be simple error or even negligence).

According to this criteria, if a judge in open court, before all parties and their attorneys, and on the record were to make an offer of a favorable (and legal) finding to one party in exchange for sexual favors and a threat of an unfavorable finding if the favors were not provided, the judge would not be subject to civil damages[40], but then there is virtually no possibility that the offending judge would actually be able to carry out the threatened result. However, if the same offer were made in an improper ex parte communication, efforts were made to keep the offer secret, and these elements were proved then the offending judge would be subject to civil damages.

According to this standard, each of the defendants-respondents cited previously knowingly and intentionally violated their oath of office which is, intrinsically, not a normal judicial act and, hence, judicial immunity is not applicable.

7. Rooker-Feldman Doctrine Requires Inextricably Intertwined

The trial court claimed a lack of jurisdiction based on Rooker-Feldman doctrine citing:

> Any issue raised in the suit that is "inextricably intertwined" with an issue resolved by the state court in its judicial decision is also barred from consideration by the federal court *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003) [41]

However, by the criteria established in *Doe & Assoc. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001); *Samuel v. Michaud*, 980 F. Supp 1381, 1411 (D. Idaho 1996) of:

40 A finding of diminished mental capacity might be appropriate under these circumstances.

41 Record 63 pg7ln28

> Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.

but this is clearly not the case. While many of the issues in this case were raised before the state courts, none of the decisions of the state courts addressed these issues. Indeed, the lack of a right of appeal (Count IV of the Complaint) was not and could not be raised before the appellate courts, but is a fundamental right of the plaintiff-appellant from the Fourteenth Amendment. Simply claiming that the issues are inextricably intertwined does not make it so.

For example, the Court of Appeals was presented with the question of:

> Can the Superior Court in any given county make more than three valid simultaneous appointments of Commissioners who aren't Family Court Commissioners?[42]

but the Court of Appeals answered in its unpublished opinion which stated in part:

> Carr argues that his due process rights and his right to have a judge adjudicate his case were violated because Clark County allegedly appointed more than three court commissioners. However, a family law commissioner is not a "commissioner" within the meaning of the constitutional provision limiting the number of court commissioners in counties...[43]

The Court of Appeals answered a completely different question which was unrelated to the case at hand. The relief sought of

> Declaring void ab initio all Orders and Decisions which are signed by an alleged Commissioner in 2004 and 2005 who were one of more than three Commissioners appointed under and in violation of the Washington State Constitution, Article 4, Section 23 and that all arrests and convictions which were based on these void ab initio decrees are similarly void.[44]

does not contradict any state decision and is completely in line with the other state decisions cited previously.[45] The care with which the Court of Appeals avoided making any answer to important jurisdictional issues[46] allows the federal court to

42 Record 36-5 pg8.
43 Record 36 pg34.
44 Record 21 rlf2.
45 *Ordell v. Gaddis*, 99 Wn.2d 409 (1983), *State v. Karas* - 108 Wn. App. 692 (2001), *Barker v. Barker*, 31 Wn. (2d) 506 (1948) and *Beyerle v. Bartsch*, 111 Wash. 287 (1920).
46 It is interesting to note that in its decision the Court of Appeals mentions the issue of individual jurisdiction but

answer the unaddressed questions.

8. ***Res Judicata*** for Issues Not Addressed by State Courts

The trial court stated:

> The doctrine of *res judicata*, or claim preclusion, bars any future claims that were raised, or could have been raised, in a prior action. *Owens v. Kaiser Foundation Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001). In order to bar a later suit under the doctrine of *res judicata*, an adjudication must (1) involve the same claim as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies. *Blonder-Tongue Laboratories v. Univ. of Ill. Found*., 402 U.S. 313, 323-24 (1971); *Davis Wright & Jones v. National Union Fire Ins. Co.*, 709 F.Supp. 196 (W.D.Wa.1989), *aff'd,* 897 F.2d 1021 (9th Cir.1990).[47]

It is the absence of a final judgment on the merits which is missing in the state decisions.

According to *Allen v. McCurry*, 449 U. S. 90 (1980):

> In reviewing the legislative history of [42 U.S.C. §] 1983 in *Monroe v. Pape*, [365 U.S. 167 (1961)] supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S., at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176. This understanding of [42 U.S.C. §] 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.[48]

It is exactly these circumstances where 42 U.S.C. § 1983 overrides *res judicata* and

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then in its entire opinion does not identify any individual or their jurisdiction. Had individual jurisdiction been established in the opinion, the issues would have been 'inextricably intertwined', but then the Court of Appeals would have to admit that they were affirming clear violations of the state constitution.

47 Record 63 pg8ln16-24.

48 Italics and full references were added by the plaintiff-appellant to comply with FRAP 32 (a) (6)

collateral estoppel as the state courts intentionally and knowingly violated their oath of office and prevented the appeal of serious constitutional claims through fabrications of the record and answering questions unrelated to the case at hand while remaining silent on the actual issues raised.

9. Elected Officials Determining Qualifications for Opponents

The trial court stated:

> Federal courts have upheld state laws that make being a lawyer admitted to practice a qualification to hold state judicial office. *See O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994)...[49]

However, this neglects the basis for plaintiff-appellant's complaint which states:

> the Washington Supreme Court plays a critical role in determining who can practice law before said courts (RCW 2.48.060). The Supreme Court in Washington has the ability to determine who run against them in upcoming elections. This circular restriction infringes on Fourteenth Amendment, U.S. Constitution Equal Protection under the Law rights as it has the potential for creating a privileged class of practitioners. While this can be acceptable for the practice of law if there are adequate alternatives (such as pro se representation), it is unacceptable for any elected office.[50]

The state and trial court cited numerous cases where the requirement that candidates for judicial office be attorneys was held as constitutional and in the best interest of the state, but they neglected the actual complaint which was that the Supreme Court could dictate absolutely who would be able to run against them in future elections. While there might be many circumstances in which the Supreme Court could promulgate requirements which are in the best interest of the state, that is apparently not the case here. Here we have the Clark County courts intentionally violating the restrictions of the state constitution and the state Court of Appeals and state Supreme Court knowingly ignoring these violations. There is a distinct problem with the current judiciary and a broader range of candidates could only benefit, hopefully with candidates who are committed to the preserving the rule of law rather than ignoring it whenever it is inconvenient.

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49 Record 63 pg9ln20-28
50 Record 21 ¶84.

The plaintiff-appellant suggested an alternative interpretation of the Washington state constitutional restrictions[51] which would interpret 'Territory of Washington' as a geographical region and so would also include individuals admitted to practice before the federal courts, both district and military.[52] While this is certainly an unlikely interpretation of the clause as noted by the state[53], an unlikely but constitutionally acceptable interpretation is preferable to a simpler interpretation which is unconstitutional and must be invalidated. It is sufficient for there to be an alternative method of qualifying for an elected office which is not controlled by the currently elected officials. The legislature, executive branch, or even federal courts are all acceptable agencies to provide alternative requirements for an elected judicial office.

10. Petition Access Restricted by Economic Status

The trial court stated:

> Since plaintiff apparently does not qualify for a judicial position because he has not been admitted to practice law in the State of Washington, it does not appear that he had standing to raise this issue. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (To demonstrate constitutional standing, a plaintiff must prove that (1) he or she suffered an injury in fact; (2) the existence of a causal connection specifically traceable to the unconstitutional conduct of defendants; and (3) the likelihood that a favorable outcome will redress the injury.).[54]

However, the complaint stated:

> just as the traditional poll tax was found to be discriminatory against low income citizens, this either / or alternative is discriminatory against citizens of moderate means, those who would be most likely to challenge an incumbent with the promise of upholding the rule of law and putting an end to expediency above legality. A potential candidate of moderate means could be construed to be able to pay the filing fee (by going into debt for example), but would be needlessly discouraged by this fee in a fashion

51 Washington State Constitution, Article 4, Section 17
52 Record 37 pg13.
53 Record 43 pg9ln24-26
54 Record 63 pg10ln8-13

> similar to poll taxes discouraging low income voters.[55]

The plaintiff-appellant was seeking a wider option of candidates for judicial office who would support the rule of law, a right of a voter, not just a candidate. This is consistent with *Bullock v. Carter*, 405 U.S. 134 (1972) which states:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review.[56] However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.

The plaintiff-appellant decrying the lack of candidates committed to supporting the rule of law in Washington judiciary was a legitimate basis for objecting to the restriction of petitions to only indigent candidates.

If a potential candidate has assets which can be sold to cover the filing fee or has income that would allow the taking on of debt sufficient to cover the filing fee, then petitions would not be an option, even if paying the fee would leave the candidate penniless, homeless, and unable to support their self or their family. This rather draconian restriction defeats the purpose of adding petitions as it leaves economic status as a central criteria for eligibility to be a candidate via petitions.[57] This is contrary to law as:

> Closer scrutiny is required in such cases because '[e]conomic status is not a measure of a prospective candidate's qualifications to hold elective office.' *Clements [v. Fashing]*, 457 U.S. [957 (1982)] at 964[58]

from *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994). It is not proper for Washington state to restrict access to petitions based on the economic status of the prospective candidate, against those of moderate means in this case, but based on economic status just the same.

11. Different Relief and Basis for Sexual Bias

55 Record 21 ¶88.
56 Cf. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Snowden v. Hughes*, 321 U.S. 1 (1944).
57 Record 37 pg14.
58 Italics and full references were added by the plaintiff-appellant to comply with FRAP 32 (a) (6)

The trial court never directly addressed the claim of sexual bias but instead simply lumped it with the other claims as claim number 6. With this broad stroke, Rooker-Feldman doctrine and *res judicata* were applied to this relief.[59] The court also applied judicial immunity to this claim, but as the relief sought was an injunction sealing records[60], this would not apply to the judges, but to the state (represented by defendant-respondent McKenna) where judicial immunity would not apply and was not discussed.[61]

Rooker-Feldman doctrine and *res judicata* do not apply in general to the sexual bias claim as discussed herein on pages 17 and 19. However, they also do not apply as the evidence provided was different (anecdotal evidence from two cases[62] versus controlled samples covering over 100 cases[63]) and the relief sought was different (a simple review of other cases[64] versus the sealing of records where the sexual bias was established[65]).

These differences are important as the plaintiff-appellant never had the opportunity to fully develop full evidence of sexual bias. The claim of actual sexual bias could not be raised earlier as the only time to acquire and introduce evidence was a matter of days between when the decisions were reached and the closing of the record for the appeal. The relief sought would not overturn any decision of the state court (Rooker-Feldman does not apply) and there was no opportunity where the full issue of sexual bias '*could have been raised*'[66] Further, the issue was never settled '*on the merits*'.[67] The trial court's basis for dismissing this cause of action was unfounded.

12. Injunctive Relief for CJC Inaction

59 Record 63 pg8 ln15, pg9ln23, pg12ln6-19.
60 Record 21 rlf14-15.
61 Record 63 pg9 ln14-15, pg14ln2-5.
62 Record 36-5 arg14.
63 Record 17 pg7-9.
64 Record 36-5 arg14.
65 Record 21 rlf14-15.
66 *Owens v. Kaiser Foundation Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001).
67 *Blonder-Tongue Laboratories v. Univ. of Ill. Found*., 402 U.S. 313, 323-24 (1971); *Davis Wright & Jones v. National Union Fire Ins. Co.*, 709 F.Supp. 196 (W.D.Wa.1989), *aff'd,* 897 F.2d 1021 (9th Cir.1990).

The trial court declared:

> pursuant 28 U.S.C. § 1367 (a federal district court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution"). The state law claims against the CJC are based upon the same facts as are the claims under 42 U.S.C. § 1986 and the Fourteenth Amendment, and form part of the same case or controversy as the Section 1986 claims. Accordingly, this court may and should exercise supplemental jurisdiction over the state law claims.[68]

However, the court went on to grant absolute immunity to defendant-respondent Briggs claiming that the CJC performs quasi-judicial and prosecutorial functions. In support it cited numerous cases none of which dealt with government employees considering the actions of other government employees and the impact of their joint oaths of office. Further, the court neglected the critical difference which is the use of the word '*shall*' in the duties of the CJC versus the '*may*' which is common in the description of disbarment proceedings.

The plaintiff-appellant made complaints to the Washington Commission of Judicial Conduct (CJC) of violations by the defendants-appellants (those listed as private individuals) of the state and U.S. constitutions, the law, and their oaths of office. These were violations of Washington Judicial Code of Conduct Canon 1 which states '*Judges shall uphold the integrity and independence of the judiciary*' and in comments '*Although judges should be independent, they must comply with the law*'. The plaintiff-appellant also complained that the defendants-respondents violated Canon 3, '*Judges shall perform the duties of their office impartially and diligently*.'[69]

Washington State Constitution, Article 4, Section 31 states:

> *Whenever* the commission receives a complaint against a judge or justice ... the commission *shall* first investigate the complaint ... *and then* conduct

68 Record 63 pg17ln13-17
69 Record 21 ¶92, Record 56 ¶1-4.

> initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint....
>
> *Whenever* the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct..., the commission *shall* conduct a public hearing or hearings and *shall* make public all those records of the initial proceeding that provide the basis for its conclusion.
>
> Upon the completion of the hearing or hearings, the commission in open session *shall* either dismiss the case[70], or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice.[71]

It is worthy of note that the constitutional charter for the Commission of Judicial Conduct (CJC) does not list any discretionary investigations. The CJC must investigate all allegations until it is determined whether or not there is probable cause of a violation. The CJC can not choose not to investigate an allegation simply because, for example, it is politically unwise. Further, the receipt of four appointment orders when the state constitution limits such orders to three certainly exceeds the requirements of probable cause of a violation and the CJC did not hold the mandatory public hearings and public disclosure which is required by the state constitution in light of probable cause of a violation.[72]

The trial court went on to say:

> plaintiff has no right to dictate the extent of the investigation conducted: a review of the complaint may be all the investigation the CJC needs to reach a decision to dismiss the complaint.[73]

The defendants-appellants misconstrued the relief sought as "*binding the CJC to*

70 Presumably the justification for dismissing the case is due to some defect in the evidence of a violation as there is no other exception for this progression from the previous step in the process.
71 Italics added by plaintiff-appellant.
72 Record 56 ¶1-5,pg1-14, Record 56-2, Record 56-3, Record 56-4.
73 Record 63 pg15ln3-5.

initiate, pursue and impose sanctions, just because somebody "alleges" a violation of state or federal law."[74] when, in fact, the requirement to investigate is already imposed on the CJC by the state constitution. The relief sought only requires the CJC to pursue sanctions when there is probable cause of a violation of the law while the judge was performing official duties.[75] Further, these sanctions can be as benign as censure. This requirement is a simple interpretation of the constitutional clause which allows the CJC to dismiss a case after investigating the allegations, further specifying that if the alleged violation of law was conducted in an official capacity then dismissal is only possible when there is no probable clause. This is consistent with the oath of office of all government officials to support and uphold the constitution as that includes all statutes which are created in accordance with the constitution (i.e. the law). Turning a blind eye on violations of the law (as defined by the constitutions) is never acceptable under the oath of office.

Conclusion

U.S. v. Lee 106 U.S. 196, (1882) states

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives.

The defendants-appellants claimed that they can ignore constitutionally mandated restrictions and actions and violate the constitutions, statutes, and their oaths of office with impunity, but the members of the Washington state judiciary are not permitted to simply ignore the rule of law. The plaintiff-appellant asks that the Court of Appeals remand this matter to the District Court directing that the trial

74 Record 41 pg6ln10.
75 Record 21 rlf19,

court take those actions necessary to return the Washington state judiciary to the rule of law.

Respectfully submitted, December 31, 2007 (Vancouver, WA).

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Certification

I certify that pursuant to FRAP 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached opening brief uses a 14 point proportionately spaced font with serifs and contains less than 14,000 words (8,686 at last count).

True and accurate copies of this Brief were served on the defendants-respondents by mailing with the United States Postal Service using First Class Mail. Two copies of this Brief were mailed to each counsel for the defendants-respondents at:

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