

Police Misconduct and Civil Rights Law Report

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FIGHTING THE COLLATERAL ESTOPPEL DEFENSE IN SECTION 1983 LITIGATION

By Lynne Wilson*

Introduction

If you've ever been blind-sided by a motion to dismiss based on a collateral estoppel or issue preclusion defense, you probably vowed never to let it happen again. In the twenty years since 1980, when the Supreme Court ruled definitively that the common law doctrine of collateral estoppel applies to Section 1983 suits, many courts have used issue preclusion as an easy way to dismiss a case without reaching the merits of the constitutional claim. *Allen v. McCurry*, 449 U.S. 90 (1980) (decision of state court on federal constitutional claim raised in criminal suppression hearing held assertable as collateral estoppel defense to damage action under 42 U.S.C. § 1983).

Most courts have agreed that *Allen* applies only to pretrial suppression rulings where the defendant was **convicted** since it was the "opportunity to appeal the decision" which makes "a denial of a motion to suppress

followed by a conviction arguably subject to collateral estoppel treatment." Michael Avery, et al, *Police Misconduct: Law and Litigation* § 9:6 (3d Ed. 2000) (*PMLL*). In most federal circuits, an unfavorable suppression ruling prior to an acquittal has no preclusive effect in a subsequent Section 1983 case because the plaintiff had no "opportunity to appeal the court's ruling. *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991) (pointing out that before the acquittal, an interlocutory appeal would be improper and that after it, an appeal was rendered moot).

Section 1983 litigation is now in such a state of siege that in some circuits, collateral estoppel bars relitigation of the issue of probable cause in a subsequent Section 1983 suit even where the defendant in the prior criminal case was *acquitted*. See, e.g., *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994); *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987). Bizarre, and fundamentally unfair, rulings now seem commonplace in the district courts. See, e.g., *Oberg v. Jones*, U.S. Dist. W.D. Wa., Cause No. C00-5122RJB, Order of November 14, 2000 Granting Defendants' Motions for Summary Judgment at p. 8 (dismissing Fourth Amendment claims against two officers where municipal court ruled in a pretrial hearing

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on the misdemeanor charges that another officer's contact with the plaintiff "did not constitute an unreasonable Fourth Amendment violation" of his rights).

This article is an attempt to present a road map of the rather byzantine world of collateral estoppel as it is currently used by individual defendants as an affirmative defense to Section 1983 claims. Federal courts are required to apply the appropriate state preclusion law, thus no effort is made to explore the variations of each state's law on this issue. While the broader outlines of the dilemma are addressed, your own research will refine these guidelines to your particular situation. State law can make a crucial difference in how collateral estoppel plays out in Section 1983 cases. *Compare Health v. Cast*, 813 F.2d 254 (9th Cir. 1987) (a motion to suppress evidence was not a final judgment for purposes of collateral estoppel under California law) with *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994) (opposite conclusion under Nevada law).

What follows is a summary of the common law collateral estoppel doctrine, the numerous exceptions that can be used to counter its defensive use, the impact of relevant Supreme Court rulings, such as *Allen*, as well as some additional arguments that can be used to defeat the defense. Also explored are some tactical considerations for criminal defense attorneys who are in the pretrial phase of a case with a potential Section 1983 damages claim. It is possible to work your way around the preclusion dilemma, but only if you arm yourself with knowledge about how to deal with it. Also not covered here is the related "offensive" use of collateral estoppel in Section 1983 suits. Those aspects are covered thoroughly in Erica Thompson, *The Application of Judicial and Collateral Estoppel in Section 1983 Suits to Prior Administrative Police Board Proceedings*, 4 *Police Misconduct and Civil Rights Law Report* 13 (1993) (*PMCLR*), and *PMLL* § 9:7.

The Collateral Estoppel Doctrine in Section 1983 Litigation

The Supreme Court grounded the *Allen* decision in the Full Faith and Credit Clause of the Constitution as enunciated in federal law. *Allen*, 449 U.S. at 96.

The...judicial proceedings of any court of any State...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State..."

28 U.S.C. § 1738.

The *Allen* court held that "full faith and credit" requires federal courts to apply collateral estoppel principles to Section 1983 suits. In so doing, the Court held that 42 U.S.C. § 1983 bore no resemblance to the federal habeas corpus statute that "expressly rendered **null and void** any state-court proceeding inconsistent with the decision of a federal habeas court." *Allen*, 449 U.S. at 98 n.12 (comparing 42 U.S.C. § 1983 with 28 U.S.C.

§ 2254). Furthermore, in passing Section 1983, Congress gave no reason to believe that it intended to "provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Allen*, 449 U.S. at 104. Thus, the doctrine of collateral estoppel applies in a Section 1983 action even where federal habeas corpus relief is unavailable. *Allen*, 449 U.S. at 105 (reversing holding that the inability to obtain federal habeas corpus relief made Section 1983 the only route to a federal forum for McCurry's constitutional claim).

Basic Principles of Collateral Estoppel or Issue Preclusion

Section 1738 requires, to determine the effect of a state court judgment in subsequent federal litigation, that reference be made to the preclusion law of the state in whose courts the judgment was rendered. Thus, the court entertaining the Section 1983 claim must look to the law of the state where the criminal judgment was rendered to assess whether the collateral estoppel law in that state would preclude relitigation of the precise issue.

While each state has its own version of the collateral estoppel doctrine, a federal common law collateral estoppel doctrine also exists. However, nearly every state (as well as the federal common law) follows some version of the common law issue preclusion concepts as articulated in the Restatement (Second) of Judgments (Restatement).

Restatement (Second) of Judgments § 27

Restatement § 27 states:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

An issue is "actually litigated" when it is "properly raised...submitted for determination, and is determined." An issue may be submitted and determined on a motion to dismiss or a motion for summary judgment. A determination may be based on a failure "of proof as well as on the sustaining of the burden of proof." Restatement § 27, cmt. d. Conversely, a judgment is not conclusive in a second action "as to issues which might have been but were not litigated and determined in the prior action." *Id.* cmt. e.

Furthermore, if an issue has been determined, but the judgment is not dependent on it, relitigation of the issue in a subsequent case is not precluded. *Id.* at cmt. h ("[s]uch determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they are made"). Conversely, if the

determination was a "necessary step" in the formulation of a decision and judgment, it is conclusive in the second action so long as it was "actually recognized" by the trier as "necessary to the first judgment." *Id.* at cmt. j.

The modern trend has been to eliminate the "mutuality of parties" criteria. *Allen*, 449 U.S. at 94. Some courts, however, continue to require it where the particular state law on this issue has not changed. *Farred v. Hicks*, 915 F.2d 1530 (11th Cir. 1990) (under Georgia law collateral estoppel does not bar search and seizure claim where officers were not parties to the criminal case). With the elimination of this requirement in most states, a litigant who was not a party in the first case can use collateral estoppel "offensively" in the second suit against the plaintiff who litigated and lost the issue in the first case. *Allen*, 449 U.S. at 95. In the context of police misconduct litigation, this means that an individual defendant officer can "offensively" raise collateral estoppel as a defense even though he or she was not represented in the criminal case. However, a Section 1983 plaintiff may not "offensively" assert an earlier determination in his or her favor against an individual defendant officer who was not represented in the prior state criminal proceeding. *Duncan v. Clements*, 744 F.2d 48, 51 (8th Cir. 1984).

The policies underlying issue preclusion are "no less applicable when the first of the actions is a criminal proceeding." Restatement § 85 cmt. c. Because § 27 requires that the issue in the criminal prosecution be "actually litigated," issue preclusion does not apply where the "criminal judgment was based on a plea of *nolo contendere* or a plea of guilty." Restatement § 85 cmt. b (noting that a defendant who pleads guilty may be "estopped in subsequent civil litigation from contesting facts representing the elements of the offense" under the law of evidence).

Exceptions to Issue Preclusion

The basic policy underlying common-law collateral estoppel is that a party is entitled to only one fair opportunity to litigate an issue even if the issues are not argued with clarity and intensity in the first proceeding. The key consideration is that the issue was raised by the party sought to be precluded and that the party had a full and fair opportunity to litigate, even if he or she did not take advantage of it. *Simmons v. O'Brien*, 77 F.3d 1093, 1097 n.4 (8th Cir. 1996). Courts will thus only apply collateral estoppel when the party against whom the prior decision is invoked had a "full and fair opportunity to litigate" the issue in the prior case. *Allen*, 449 U.S. at 95; *Hubbert v. City of Moore*, 923 F.2d 769, 772-73 (10th Cir. 1991) (prior finding of probable cause against a criminal defendant is binding on her in subsequent civil rights claim against arresting officers because she had a "full and fair opportunity" to litigate).

Thus, the five exceptions to the collateral estoppel doctrine as enumerated in Restatement § 28 focus on

different aspects of the "full and fair opportunity to litigate" and relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted [because of an intervening change in the law]; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts ...; or
- (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action...; or
- (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest ..., (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to

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be precluded...did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Under § 28(1), the availability of review for the correction of errors has become critical to the application of issue preclusion. However, the exception applies “only when review is precluded as a matter of law.” Restatement § 28 cmt. a. It does not apply in cases where review is available but is not sought.

Under § 28(2), the distinction between an issue of fact and an issue of law “is often an elusive one,” with courts sometimes referring to an issue as a “mixed question of fact and law.” Restatement § 28cmt. b. The usual rule is that if the issue was actually litigated and determined and the determination was essential to the judgment, preclusion will apply. *Id.*

The exception in § 28(4) is most important in police misconduct litigation involving an acquittal in the criminal proceeding. The general rule is that an acquittal is not conclusive in a subsequent civil action arising out of the same event because the burden of proof in the earlier criminal action cannot be reconstructed in the second civil one. Restatement § 85 cmt. g (referring to heavier burden of proof in the first action than in the second action as well as the lack of a right to appeal).

Contexts in Which the Collateral Estoppel Defense is Raised in § 1983 Cases

Prior Conviction or Guilty Plea at State Criminal Trial Level. With respect to factual issues that are essential elements of the criminal charges and where the issues were actually litigated, a conviction will almost always pose a bar to a subsequent Section 1983 action. *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999) (assault conviction bars suit for excessive force); *Anela v. City of Wildwood*, 790 F.2d 1063 (3d Cir. 1986) (no collateral estoppel effect of guilty plea where the Fourth Amendment issues raised in the Section 1983 case were not actually litigated and determined by a valid, final judgment). In addition, a claim asserted under Section 1983 that implies the invalidity of an earlier criminal conviction cannot be brought until the conviction has been vacated or set aside. *Heck v. Humphrey*, 512 U.S. 477 (1994). However, the favorable termination rule in *Heck* has no application to Section 1983 plaintiffs who are no longer in custody. *Spencer v. Kemna*, 118 S. Ct. 978 (1998). See generally John L. Stainthorp, *Heck v. Humphrey: The Consequences of Limiting Prisoner Section 1983 Suits*, 4 *PMCLRLR* 206 (1995).

There is a conflict in the federal circuit courts as to whether “Section 1983 incorporates the common law rule that an officer making an arrest that leads to a conviction may not be sued for false arrest, malicious prosecution, or false imprisonment.” *PMLL* at 9-14 & n.2. In terms of issue preclusion, resolution is highly dependent on the state law to be applied. In one state, a conviction does

not necessarily bar a later civil rights claim for a “campaign of harassment” including illegal arrests. *Earle v. Benoit*, 850 F.2d 836 (1st Cir. 1988) (conviction for trespassing which was later reversed did not establish probable cause). In another state, where probable cause is a complete defense to false arrest, a subsequent civil claim may be barred even if the criminal conviction is later reversed on appeal. *Hanson v. City of Snohomish*, 852 P.2d 295 (Wash. 1993) (first conviction established probable cause as a defense to a malicious prosecution claim even though remanded second trial on same charges resulted in an acquittal). See also *Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999) (barring Section 1983 false arrest case where plaintiff’s convictions had been dismissed for failure to meet speedy trial requirement); *Rodriguez v. Beame*, 423 F. Supp. 906 (S.D.N.Y. 1976) (pretrial order in suppression hearing that confessions were not coerced precluded plaintiff’s Section 1983 claims even though appeal from criminal conviction was pending).

The relevant state law must be applied to each stage of the criminal process to see if the subsequent claim might be precluded. With respect to issues other than those “essential” to the conviction, the U.S. Supreme Court applied Virginia law and held that a guilty plea entered in a state criminal proceeding would not bar a subsequent Section 1983 action where the issues to be determined in the later case were neither “actually litigated” nor necessary to support the judgment entered in the prior proceeding. *Haring v. Prosise*, 462 U.S. 306, 316-17 (1983) (Fourth Amendment challenge to search and seizure never made during state criminal proceeding). The Court stated further that the defendant’s guilt on the charges against him was “simply irrelevant to the legality of the search under the Fourth Amendment or to [his] right to compensation from state officials under Section 1983.” *Id.* at 316. “A defendant’s decision to plead guilty may have any number of other motivations[.]” *Id.* at 318. See also *Linnen v. Armainis*, 991 F.2d 1102, 1106 (3d Cir. 1993) (a guilty plea is not an implied admission that a search and an arrest were legal); *Anela*, 790 F.2d 1063 (no preclusive effect of guilty plea where Fourth Amendment issues of fact were never subjected to an adversarial proceeding); *Slayton v. Willingham*, 726 F.2d 631, 634 (10th Cir. 1984) (civil rights claims not barred under Oklahoma law where issue of legality of search “was neither necessary to nor actually decided by” state court’s judgment based on *nolo contendere* plea).

Acquittal or Charges Dismissed at State Criminal Trial Level. Because the government has no right to appeal an acquittal, a plaintiff in a Section 1983 case will of necessity in most cases need to relitigate the factual issues that were necessary to the acquittal even if those issues were favorably decided in his or her favor. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979) (applying to offensive collateral estoppel the requirement

that the party against whom estoppel is asserted had a full and fair opportunity to litigate); *Kinslow v. Ratzlaff*, 158 F.3d 1104, 1106 n.3 (10th Cir. 1998) (no reported cases in which an individual government official has been precluded from litigating an issue because of a ruling adverse to the state in a prior criminal prosecution). Thus, even if the state court dismissed charges because of underlying constitutional violations (lack of probable cause, illegal search, etc.), that ruling can have no preclusive effect in the subsequent Section 1983 litigation. *Bilida v. McCleod*, 211 F.3d 166, 171 (1st Cir. 2000) (no preclusion where suppression ruling was in Rhode Island “an intermediate ruling that led simply to an abandonment of the prosecution”). *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985) (upholding Section 1983 verdict for defendant officers where criminal charges were dismissed based on state court ruling that arrest was unconstitutional); *Duncan v. Clements*, 744 F.2d 48, 51-52 (8th Cir. 1984) (rejecting argument that officer was “virtually represented” by the State of Missouri at the state suppression hearing). Most courts hold that collateral estoppel cannot be used offensively against individual police officers who were not in privity with the state in the criminal proceedings. *McCoy v. Hernandez*, 203 F.3d 371 (5th Cir. 2000) (defendant officers not collaterally estopped under Texas law from relitigating issue of legality of search and arrest); *Kinslow*, 158 F.3d 1104 (prior state court ruling that dismissed charges for lack of probable cause did not preclude officers from litigating issues regarding legality of arrest); *Gentile v. Bauder*, 718 S.2d 781 (Fla. 1998) (collaterally estopping police officer from raising qualified immunity defense based on criminal court’s finding lack of probable cause held to violate officer’s due process rights).

Most decisions regarding whether a criminal defendant who has been acquitted (or where the charges have been dismissed) is precluded from asserting a Fourth Amendment Section 1983 claim where the state court ruled against him or her on a pretrial motion rest on whether or not the state has provided a “full and fair opportunity to litigate,” including “the opportunity to appeal an adverse ruling — an opportunity denied to acquitted defendants.” *Lomaz v. Hennosy*, 151 F.3d 493, 499 n. 8 (6th Cir. 1998) (noting the split). *Compare Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995) (under New York law, a party has had no full and fair opportunity to litigate an issue if denied an opportunity to appeal it) and *Wilson v. Steinhoff*, 718 F.2d 550 (2d Cir. 1983) (state court order denying motion to suppress evidence seized in apartment search was not a “final judgment” nor a precursor to the final unappealable judgment of acquittal in New York and had no collateral estoppel effect in subsequent civil rights suit) *with Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987) (acquitted civil rights claimant was collaterally estopped under Michigan law from raising issue of probable cause where state court ruled against him at preliminary hearing dur-

ing which he had a “full and fair opportunity” to litigate the issue); *Hubbert v. City of Moore*, 923 F.2d 769 (10th Cir. 1991) (same under Oklahoma law); *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989) (no bar to First and Fourth Amendment claims where decision in first action was affirmed on other grounds); and *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984) (same under Wisconsin law).

A key case on the side of preclusion is *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994). The *Haupt* court ruled that a Section 1983 plaintiff was collaterally estopped from litigating a false arrest claim when the issue of probable cause had been determined against him in a motion to suppress where he was acquitted. *Haupt*, 17 F.3d at 288. “If Nevada courts...would preclude Haupt from relitigating the issue of probable cause, then he is similarly precluded in federal court provided that he had a **full and fair opportunity to litigate the issue** in the prior proceeding.” *Id.*

Nevada’s law on collateral estoppel was clear that a ruling on a motion to suppress was a “final, conclusive determination of the issue,” even if an acquittal followed. *Id.* Rejecting Haupt’s arguments, the court held that a ruling on a motion to suppress was not interlocutory like a ruling on a motion for summary judgment in a civil case because in Nevada such a suppression ruling was “immediately appealable” in the “form of a writ of habeas corpus.” *Id.* In fact, Haupt had taken advantage of the writ and that the criminal court’s ruling on probable cause was upheld prior to his conviction. That a state appellate court had ruled against Haupt on the probable cause issue was a determining factor in *Haupt*. *Id.* at n. 2 (noting that Haupt could have appealed denial of the writ to the Nevada Supreme Court, but failed to do so).

The basic law of collateral estoppel requires that there be a “final judgment.” Therefore, a ruling on a motion to suppress must be “final” for collateral estoppel to apply. The ability to obtain appellate review of a ruling is crucial to determining the preclusive effect. The absence of appellate review makes “often unwarranted” an underlying premise of the estoppel doctrine — “a basic confidence that the result achieved in the initial litigation was substantially correct.” *Standefer v. United States*, 447 U.S. 10, 23 (1980), cited in *Church of Scientology of California v. Linberg*, 529 F. Supp. 945, 955-956 (C.D.Cal. 1981) (no collateral estoppel effect of suppression ruling where it was not appealable). Also, it is well-settled that a prior judgment (such as a suppression ruling) does not preclude relitigation of the issues “if the right to appeal that judgment was destroyed by events beyond the control of the losing litigant, i.e., the appeal became moot.” *Lindberg*, 529 F. Supp. at 956. *See also* Restatement § 28(1) and cmt. a (“the availability of review for the correction of errors has become critical to the application of the preclusion doctrine”); *Mueller v. J.C. Penney Co.*, 219 Cal.Rptr. 272 (Cal.App. 4th Dist. 1985) (a significant factor in determining whether a judgment is

sufficiently final for collateral estoppel purposes is whether the decision was in fact reviewed on appeal).

Special Collateral Estoppel Issues in Section 1983 Fourth Amendment Cases

The Fourth Amendment poses particular difficulties for any issue preclusion assessment. For example, although most Fourth Amendment challenges require a careful judicial assessment of the “totality of circumstances” or the precise facts, Fourth Amendment inquiries are often considered “mixed questions of law and fact.” *Ferenc v. Dugger*, 867 F.2d 1301 (11th Cir. 1989) (issue of lawfulness of search was question of law based on facts necessarily established in first trial). In addition, pretrial motions to suppress evidence in a criminal context often involve much different legal issues or burdens of proof than those posed for the Fourth Amendment analysis in the civil rights context. *See, e.g., Linberg*, 529 F. Supp. at 963 (ultimate issue decided in denial of motion to suppress was whether a “flagrant” or “egregious” Fourth Amendment violation occurred which was not the same legal issue to be decided in the civil suit). Thus, the exception defined in Restatement § 28(2) may apply, depending on the circumstances.

Lack of Probable Cause to Arrest. Whether a determination of probable cause at a preliminary hearing precludes a subsequent suit for false arrest raises distinct issues depending on the type of preliminary hearing, whether there existed a “full and fair opportunity to litigate” the probable cause issue, as well as what legal claims are asserted in the civil suit. For example, where the integrity of the evidence is not at issue at the preliminary hearing on probable cause but is challenged in the civil suit, collateral estoppel will not apply to defeat a claim for malicious prosecution. *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987) (applying Indiana law). In addition, where the civil rights claim involves a conspiracy under Section 1983, collateral estoppel may not apply to an adverse state court ruling on probable cause. *Robinson v. Marcus*, 895 F.2d 649 (10th Cir. 1990) (probable cause determination not a bar to conspiracy claim); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (same). *But see Sykes v. James*, 13 F.3d 515 (2d Cir. 1993) (conspiracy claim barred by prior finding by hearing officer in revocation hearing regarding alleged false testimony).

In one recent case, the estate of a passenger killed in a one-car accident brought a Section 1983 claim in federal court alleging that police officers violated her due process rights. The officers allegedly did so by taking her from a car in which she was riding with a female friend and placing her in a truck with her intoxicated, abusive boyfriend who immediately wrecked the truck. *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). The female friend was also a plaintiff, with Section 1983 claims for false arrest, malicious prosecution and violation of equal protection, alleging that the officers arrested her solely because they believed her to be a lesbian. Prior

to filing the Section 1983 claims in federal court, both plaintiffs filed tort suits in the Kentucky state courts, which were subsequently dismissed. *Id.* at 864-865.

The officers asserted a collateral estoppel defense on each of the Section 1983 claims. In a carefully analyzed opinion, the *Stemler* court stated that false arrest claim was precluded by the state court’s ruling on her tort claims that probable cause to arrest her for DUI existed. *Id.* at 871. However, though the state court also dismissed the malicious prosecution claim on the probable cause finding, the *Stemler* court stated that it would not uphold the collateral estoppel defense as to her Section 1983 malicious prosecution claim, since the state civil court made no “findings with regard to any claim of fabrication of evidence” and the state criminal court made no “findings on this issue that were necessary to the final judgment.” *Id.* at 872.

More importantly, the *Stemler* court denied the officers’ collateral estoppel defense as to the equal protection claim because the probable cause determination “does not preclude a plaintiff from pursuing a claim that the state chose to prosecute her due to invidious discrimination.” *Id.* It noted that the Supreme Court has recently “reconfirmed the availability of an equal protection claim despite the existence of probable cause.” *Id.* at 873, citing *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996) (“the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment”).

Unreasonable Searches. Search warrant cases present particular challenges on motions to dismiss based on a defendant officer’s collateral estoppel defense. Unlike preliminary hearings on probable cause, search warrants are nearly always issued *ex parte* with the criminal defendant having no knowledge of, let alone involvement in, the evidentiary hearing if one actually takes place. Few courts have dealt with this question in the context of a collateral estoppel defense. One court held that a Section 1983 claim for an illegal search warrant was precluded where plaintiffs did have a full evidentiary hearing on a motion to suppress at the state court level. *Searing v. Hayes*, 684 F.2d 694 (10th Cir. 1982). The plaintiffs, charged with possession of marijuana with intent to sell, argued that collateral estoppel did not apply since they did not have a “full and fair opportunity to litigate” the legality of the search warrant where the state court denied them a *Franks* hearing on the question of whether the affiant made a knowingly false statement in procuring the search warrant. *Id.* at 696. The *Searing* court disagreed and precluded the Section 1983 claims, holding that because the plaintiffs failed to meet the threshold requirements for the *Franks* hearing, they had not been denied such an opportunity to litigate. *Id.* at 697.

Based on slightly different facts, another court ruled otherwise. *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984). *Fontaine* involved Section 1983

case in which the plaintiff claimed a wrongful search of his property that resulted in an unregistered firearm possession charge. The defendant officer raised the collateral estoppel defense in a motion for summary judgment, asserting that under Massachusetts law the denial of a motion to suppress in the criminal proceeding estopped the Section 1983 case. The court disagreed, holding that collateral estoppel would not preclude the federal claim where the plaintiffs had not "actually litigated" the probable cause for the search warrant since the only issue raised at the suppression hearing was whether the specific firearm seized was outside the scope of the search warrant. *Id.* at 11. "Since there is no dispute that Restivo never litigated the issue of probable cause for the warrants at his suppression hearing, we are of the view that collateral estoppel does not bar Restivo's Section 1983 claim." *Id.* See also *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985) (collateral estoppel did not preclude illegal search claim where state court initially denied but ultimately granted motion to suppress); *Coney v. Smith*, 738 F.2d 1199 (11th Cir. 1984) (collateral estoppel applied to illegal search case where state court proceedings were not made part of the record before the district court).

Coerced Confessions. As with other issues raised in pretrial motions, collateral estoppel is not necessarily a bar to a Section 1983 claim based on allegedly coerced confessions. Even where a Section 1983 plaintiff challenges the voluntariness of the confession in a pretrial motion to suppress, the civil rights claim is not necessarily barred by a denial of that motion where the "motion to suppress the confession is a preliminary evidentiary determination only; [where] it does not represent a final adjudication of whether beatings coerced Owens' confession and cannot be given preclusive effect." *Owens v. Treder*, 873 F.2d 604, 608 (2d Cir. 1989) (denial of motion to suppress did not preclude, under New York law, because whether beatings coerced the confession "may ultimately be determined by the jury" and the jury verdict was based on additional evidence).

In one interesting issue preclusion case, a Section 1983 plaintiff claimed that his convictions for second degree murder and first degree burglary were based on a confession that was coerced through racial slurs and beatings. *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996). The defendant officers raised a collateral estoppel defense, asserting that the excessive force and racial slur claims "were necessarily litigated and decided against Simmons at the state suppression hearing." *Id.* at 1095. The court agreed that the claims were precluded under *Allen* even though "Simmons was much more explicit about the scope of his claims in his Section 1983 complaint than in his motion to suppress." *Id.* at 1097 n.4. In the motion to suppress Simmons merely stated that he was subjected to "mental, physical and psychological distress," while in the Section 1983 complaint, Simmons depicted a night of torture in which

the officers kicked him, punched him and used racial slurs against him. In holding the Section 1983 claims precluded, the court stated:

[I]t is not required for issue preclusion that the issues be raised, or even argued, with the same level of clarity or intensity in each proceeding. For issue preclusion to apply, the issue raised in the second proceeding need only have been raised in the first proceeding... There is no further requirement that the party actually take advantage of that opportunity to fully and fairly litigate the issue.

Id. See also *Gray v. Farley*, 13 F.3d 142 (4th Cir. 1993) (excessive force claim against officers who allegedly beat plaintiff in custody barred by suppression hearing ruling that confession was not coerced where a full hearing with testimony was held and the ruling was affirmed on appeal after conviction); *Baker v. McCoy*, 739 F.2d 281 (8th Cir. 1984) (state court ruling on admissibility of confession given preclusive effect).

Excessive Force. An adverse ruling on a probable cause motion does not necessarily preclude a Section 1983 claim for excessive force used during the arrest or for other claims not dependent on probable cause. *Ayers v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990) (excessive force and theft claims were not at issue during the motion to suppress in the criminal prosecution). However, although a conviction for resisting arrest may pose no bar to a Section 1983 excessive force case, a conviction for aggravated assault more than likely poses such a bar. Compare *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999) with *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999).

The precise facts presented in each case must be carefully analyzed under the particular state's claim preclusion law. In *Martinez*, for example, the court held that New Mexico collateral estoppel law did not preclude the plaintiff from pursuing the excessive force claim where the resisting conviction was based on a prearrest flight from the scene. *Martinez*, 184 F.3d at 1126. In holding that the excessive force claim was not precluded, the court looked at the precise basis for the state conviction and concluded that the "officers' actions in arresting Martinez once they caught up with him simply had no bearing on his conviction" for resisting. *Id.* The question of whether Martinez "resisted" by fleeing the scene was "a question separate and distinct from whether the police officers exercised excessive force in effectuating his arrest." *Id.* Thus, that Martinez resisted arrest "may coexist with a finding that the police officers used excessive force to subdue him." *Id.* at 1127.

By contrast, the plaintiff in *Sappington* was convicted of aggravated assault and his excessive force claim arose out of the same altercation with the officer that gave rise to the conviction. 195 F.3d at 236. Because conviction

for aggravated assault required proof that Sappington caused “serious bodily injury,” the court held that as a matter of law the force Sappington claimed was used by the officer in arresting him could not be deemed excessive. *Id.* at 237 (applying a *Heck* analysis but noting that the Section 1983 plaintiff had two previous convictions for aggravated assault against a peace officer).

Arguments in Opposition to the Collateral Estoppel Defense

Denial of a Full and Fair Opportunity to Litigate in the State Criminal Proceedings

The key consideration in deciding whether to give preclusive effect to a state court ruling in a subsequent federal civil rights case is whether the state court provided a “full and fair opportunity to litigate” the issue in question. *Allen*, 449 U.S. 90, 95 (1980) (“collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a **full and fair opportunity** to litigate that issue in the earlier case”). The *Allen* Court emphasized that this key limitation on collateral estoppel was essentially consistent with the remedial purposes of Section 1983, which included providing a federal remedy 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.” *Id.* at 100.

The practical reality is that it is extremely rare for a federal court to rule against giving full faith and credit to a state judgment on the basis that the state’s procedures were constitutionally inadequate. One of these rare cases is *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983). There, the plaintiff brought both injunctive Section 1983 and federal habeas corpus actions, alleging that his Fourth Amendment rights would be violated where he was being forced to undergo surgery for removal of a bullet in his chest which “might have” been probative in his criminal trial. The court carefully analyzed the procedural labyrinth which the plaintiff was in since while he was forced under habeas corpus to exhaust his state remedies, “[b]y litigating the Fourth Amendment issue in state court, Lee runs the risk of being precluded from relitigating that issue in a subsequent Section 1983 action.” *Lee*, 717 F.2d at 893. In electing to treat the case as solely one under Section 1983, the court looked at whether the Virginia court proceedings “satisfy the minimal procedural due process requirements of the fourteenth amendment.” *Id.* at 895 (declining to look strictly at Virginia’s collateral estoppel law).

After a careful examination of what occurred at the state court’s hearing regarding the bullet extraction, the *Lee* court concluded that the lower court’s denial of adequate time to consult experts and to prepare for the hearing was “so arbitrary and so fundamentally unfair as to invoke the Constitution.” *Id.* at 898. “[N]either state nor federal courts may grant preclusive effect to a prior judg-

ment rendered in a hearing conducted without constitutionally mandated due process protections. Because the second state proceeding in this case was so conducted, we give the resulting order no preclusive effect in this Section 1983 action.” *Id.* at 899, citing *Bickham v. Lashof*, 620 F.2d 1238, 1446 (7th Cir. 1980) (denial of “opportunity for a meaningful hearing” in state court rendered state judgment non-preclusive in subsequent Section 1983 action).

This key requirement for a “full and fair opportunity” to litigate applies equally to misdemeanor and felony criminal prosecutions. *Mueller v. J.C. Penney Co.*, 219 Cal.Rptr. 272 (Cal.App. 4th Dist. 1985) (misdemeanor conviction was final judgment for purposes of collateral estoppel where it was reviewed on appeal). It also applies to motions for probable cause hearings in juvenile court. *Fernandez v. Trias Monge*, 586 F.2d 848 (1st Cir. 1978) (concluding after careful examination of the record that federal constitutional claim was not “actually litigated” in the Puerto Rican juvenile court).

Misdemeanor trials pose the question of whether the “full and fair opportunity” to litigate applies in a form where the defendant may not have had the incentive to vigorously pursue a particular issue. Central to the “fair administration of the preclusion doctrine” is the notion that a party will be bound only if it had “an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding.” *Simmons*, 77 F.3d at 1095, citing Restatement § 28 cmt. j.

Different Factual or Legal Issues Being Decided

A conviction alone is not sufficient evidence of what issues were actually determined at the criminal trial. In addressing this question, one court stated that in a subsequent Section 1983 case, it was “incumbent upon the Section 1983 defendant to affirmatively establish that the jury’s or court’s verdict did in fact necessarily resolve those allegations against the criminal defendant.” *Richardson v. Fleming*, 651 F.2d 366, 376 (5th Cir. 1981).

[C]ollateral estoppel would have no application in a case where an alleged illegality occurred during an arrest, search or other criminal proceeding but such illegality was judicially found to be harmless or not necessarily controlling to a criminal defendant’s guilt nor would collateral estoppel apply to a situation where, although certain illegal or unconstitutional acts against a criminal defendant may have occurred, the defendant has chosen not to place those acts in issue in the trial of his case.

Id. at 374-5 (noting that the collateral estoppel defense will need to be tested on a case by case basis).

To determine whether collateral estoppel applies in a particular case, the criminal trial record must be examined to carefully assess whether the issues determined there were different from those presented in the civil case.

Campise v. Hamilton, 382 F. Supp. 172 (S.D.Tex. 1974); *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970). A Section 1983 claim is, for example, not precluded where it is based on different evidence than what was introduced at the criminal trial level and where two different issues were addressed. *McCutcheon v. City of Montclair*, 87 Cal.Rptr.2d 95 (Cal.App. 4th Dist. 1999) (plaintiff who spent four months in jail on rape charge not precluded from bringing civil rights claims because of preliminary ruling regarding probable cause to hold him over for trial). See also *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2d Cir. 1985) (collateral estoppel posed no bar where state administrative judge made no finding regarding probable cause on resisting and obstructing charges).

In *McCutcheon*, the court held that California collateral estoppel law did not preclude relitigation of the probable cause to arrest issue because the determination at the preliminary hearing involved looking at evidence in addition to what was available to the officer at the time of the arrest. 87 Cal.Rptr.2d at 101. It concluded that the finding of probable cause at the preliminary hearing did not have collateral estoppel effect because “it is apparent from the record that the evidence presented at the preliminary hearing was not the same as the evidence available to Officer Pipersky at the time of plaintiff’s arrest.” *Id.* (additional lineup evidence presented).

In ruling that the plaintiff was not estopped from bringing his claims, the *McCutcheon* court noted that a civil rights plaintiff would not be precluded where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. *Id.* “When an officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.” *Id.* See also *Whitley v. Seibel*, 676 F.2d 245 (7th Cir. 1982) (probable cause determination no bar to Section 1983 false arrest suit based on officer’s false representations to the prosecutor that he had disproved the plaintiff’s alibi).

In addition, the criminal court may decide a motion to suppress on grounds that are entirely different from the issues raised in a subsequent Fourth Amendment Section 1983 suit. A criminal court may rule that a particular defendant had no legitimate expectation of privacy in the premises searched but the later suit may be brought by a different party. *Linberg*, 529 F. Supp. 945. A civil rights plaintiff alleging excessive force would not necessarily be precluded by a resisting arrest conviction where distinct legal tests were applied in each case as to the degree of force used. *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997).

In *Nelson*, the conviction established that the arresting officer was justified in using “substantial force” in making the arrest. However, “substantial force” could

be objectively reasonable or excessive and unreasonable and a finding that the officer used excessive “substantial force” would not imply that the arrest was unlawful. *Id.* at 146, agreeing with *Simpson v. City of Pickens*, 887 F. Supp. 126, 129 (S.D.Miss. 1995) (it is possible for a finding of resisting arrest to coexist with a finding of police use of excessive force). See also *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997) (same under Kentucky law).

Where the briefing on a pretrial motion in a probable cause hearing is expressly limited to discussions of state rather than federal law, courts have held that the “omission of any federal case law...was not inadvertent.” *Fernandez v. Trias Monde*, 586 F.2d 848, 857 (1st Cir. 1978). Such an omission makes it clear that a state court judge ruling on such a motion decided it on state rather than federal grounds. Where a federal constitutional claim was not “actually litigated” in state court, collateral estoppel does not apply to preclude it in the Section 1983 case.

Different Evidentiary Burdens Applied in Criminal vs. Civil Proceedings

Where a different legal standard was applied to the same evidence at the criminal trial level, a subsequent civil action is not barred by an unfavorable ruling on a motion to suppress. *McGowan v. City of San Diego*, 256 Cal.Rptr. 537 (Cal. App. 4th Dist. 1989). For example, an action alleging false arrest and excessive force was not precluded where the criminal court denied a motion to suppress on a finding that blood was taken in “a medically approved manner” and that the degree of force did not “shock the conscience” sufficiently to suppress the evidence. *Id.* Because the issues raised in the civil case were not identical to those raised in the motion, collateral estoppel could not be applied to the questions of whether the Section 1983 plaintiff was “reasonably detained” or whether “reasonable force” was used. *Id.* at 539-540. Nothing in the record indicated that the municipal court had found that the force used was “reasonable” so as to support the application of collateral estoppel. *Id.* at 540.

Similarly, where different evidentiary burdens are used in the two actions, collateral estoppel does not apply. *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972 (8th Cir. 1993) (no collateral estoppel effect of denial of motion to suppress where two different definitions of probable cause were involved); *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987). In *Bailey*, a malicious prosecution claim, the defendant officer asserted a collateral estoppel defense based on a determination of probable cause at a preliminary ruling. In holding that the ruling had no collateral estoppel effect, the *Bailey* court pointed out that the probable cause determination was designed to evaluate the “sufficiency, but not the integrity” of the evidence and the arrestee was not allowed to present his evidence or to cross examine the state’s witnesses. *Id.* at 369. The evidentiary burden was entirely different in the Section

1983 case where the plaintiff charged that the defendant officer could not have reasonably believed that he was committing disorderly conduct. More important, however, was the court's assessment of unfairness of the *ex parte* procedures used at the probable cause hearing: "We agree with the district court's ruling that "the lack of opportunity to cross-examine [is] of crucial importance in determining that Bailey did not have a full and fair opportunity to litigate the probable cause issue in this case." *Id.* at 370.

The Issue Presented was not Actually Litigated in the Court Below or was not Essential to the Judgment Rendered

With a state criminal conviction, it is important to assess what issues were "actually determined" in the criminal trial. As noted above, a Section 1983 claim for excessive force is not necessarily precluded by a conviction for resisting arrest or even for battery against a police officer. *Williams v. Liberty*, 461 F. 2d 325 (7th Cir. 1972) (ordering that the complete record of the earlier proceeding be examined); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970). As the *Kauffman* court noted, "[r]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel." *Kauffman*, 420 F.2d at 1274. *See also* Fed. R. Evid. 803(22) (evidence of a final judgment adjudging a person guilty is admissible "to prove any fact essential to the judgment").

In *Haupt*, the Ninth Circuit noted that a defendant in a criminal case might chose "for tactical reasons" not to litigate an issue such as probable cause. 17 F.3d at 289. In those situations, collateral estoppel might not apply. *Richardson v. Fleming*, 651 F.2d 366, 374 (5th Cir. 1981) (no preclusion where defendant chooses not to place certain acts at issue). In interpreting *Haupt*, however, another court has stated that "unless the plaintiff in a civil suit can demonstrate that the issue of probable cause was not litigated at the preliminary hearing for tactical reasons," the presumption under *Haupt* is that the "plaintiff had a full and fair opportunity to litigate the issue of probable cause to arrest." *McCutcheon*, 87 Cal.Rptr.2d at 101.

Conclusion

At some future point, the Supreme Court may rule one way or the other whether the collateral estoppel defense as enunciated in *Allen v. McCurry* extends as a matter of federal law to Section 1983 plaintiffs who were **acquitted** of the underlying criminal charges. As is clear from the above overview, it is only the opportunity to appeal a motion to suppress after a conviction that makes such a motion "arguably subject to collateral estoppel treatment." *PMLL* § 9:6. In the meantime, you may be lucky enough to practice in a jurisdiction where pretrial suppression motions are not "final judgments" for collateral estoppel purposes as a matter of state law. *Lombardi v. City of El Cajon*, 117 F.3d 1117 (9th Cir.

1997) (California suppression ruling not appealable and thus not a final judgment); *Johnson v. Watkins*, 101 F.3d 792 (2d Cir. 1996) (same in New York).

If you don't, successfully fighting a summary judgment motion on a collateral estoppel defense will require a thorough combing of the state court's record as well as in-depth research into the variations on collateral estoppel law that exist in your state as well as in your circuit. If you are also the criminal defense attorney with a case that has potential Section 1983 damages, there is also the option of foregoing a Fourth (or other federal) Amendment challenge to the evidence. The choice, however, between a potential defense or a federal forum for hearing a civil rights claim is in the end one that is "fundamentally unfair," as the dissenting Justices in *Allen v. McCurry* pointed out. 449 U.S. at 115 (Justices Blackmun, Brennan and Marshall, dissenting) (noting that the risk of conviction puts pressure on a criminal defendant to raise all possible defenses).

A last option to consider in these jurisdictions is to litigate all the constitutional claims in the state criminal pretrial proceedings under the state constitution if possible, thereby insulating any pretrial rulings from the effects of issue preclusion in the subsequent Section 1983 case. Because Section 1983 provides a remedy for only federal constitutional violations, a state ruling made on independent state constitutional grounds could never have a preclusive effect. Restatement § 86(2) (excepting effect of state judgment where federal court may make an independent determination of the issue in question).

CASE UPDATES

In the Supreme Court

After throwing the election to George W. Bush, the Supreme Court continued with the more mundane task of deciding the other cases on its docket. In *Selnig v. Young*, 121 S. Ct. (2001), the Court considered a challenge to Washington State's Community Protection Act. The Community Protection Act authorizes the "civil" commitment of persons who are "sexually violent predators" who suffer from a mental abnormality that makes it "likely" they will continue to engage in acts of sexual violence. *Id.* at 730. Pursuant to the Act, when it appears that a person that has committed a violent sexual crime is about to be released from prison a petition may be filed by the state seeking the continued civil commitment of the person. The Act provides for a hearing at which the respondent is entitled to counsel and to expert witnesses, both of which are provided by the state.

If following a hearing, the person is determined to be a sexually violent predator then he is "committed for control, care, and treatment to the custody of the department of social services." *Id.* The Act also provides that once a person is committed he is entitled to receive treatment to address his mental condition and to an annual