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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KASEY GRAHAM,) NO. CV 10-4618-RGK(E)
)
Plaintiff,)
)
v.) REPORT AND RECOMMENDATION OF
)
MR. OROZCO (LAPD), et al.,) UNITED STATES MAGISTRATE JUDGE
)
Defendants.)
)
)

This Report and Recommendation is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

Plaintiff, formerly a detainee in the Metropolitan Detention Center and now a federal prisoner, recently was a defendant in a criminal proceeding in this Court. See United States v. Kasey Robert Graham, CR 09-1084-PSG. Plaintiff eventually pled guilty in this

1 criminal proceeding. Id.

2

3 On June 30, 2010, prior to the conclusion of the criminal
4 proceeding, Plaintiff filed this pro se civil rights action for
5 damages pursuant to 42 U.S.C. section 1983. The Complaint alleged
6 claims against five Los Angeles police officers, Officers Orozco,
7 Washington, Mendoza, Laster and Spencer. Plaintiff's claims concerned
8 two searches, one at a residence on Brighton Avenue on May 19, 2009,
9 and another at the Harvard Motor Inn on July 14, 2009. Plaintiff
10 alleged that Defendants violated the Fourth and Eighth Amendments,
11 assertedly by falsifying police reports and search warrant affidavits,
12 and by conspiring to present allegedly perjured testimony to the grand
13 jury in support of an indictment.

14

15 On July 7, 2010, the Court issued a Memorandum and Order
16 dismissing the Complaint with leave to amend. Plaintiff did not file
17 a timely First Amended Complaint. Therefore, on August 23, 2010, the
18 Magistrate Judge filed a Report and Recommendation recommending
19 dismissal of the action without prejudice for failure to prosecute.

20

21 On September 10, 2010, the Court received a letter from Plaintiff
22 alleging that he had placed an amended pleading in the institution
23 mailbox on August 4, 2010. On September 10, 2010, the Magistrate
24 Judge issued a Minute Order withdrawing the Report and Recommendation
25 and granting an extension of time to file a First Amended Complaint.
26 On September 24, 2010, Plaintiff filed a First Amended Complaint,
27 naming as Defendants Los Angeles police officers Orozco, Washington,
28 Mendoza and Alutto [sic] and "ATF Special Agent" Sonnendecker, all in

1 their individual and official capacities.

2
3 On September 28, 2010, the Magistrate Judge issued an Order
4 directing service of the Summons and First Amended Complaint by the
5 United States Marshal on Defendants Orozco, Washington, Mendoza and
6 Aluotto (the "police officer Defendants") in their individual and
7 official capacities and on the federal Defendant, Mr. Sonnendecker, in
8 his individual capacity.

9
10 On November 16, 2010, the Magistrate Judge issued a Minute Order
11 indicating that the United States Marshals Service had advised the
12 Court that Plaintiff had failed to provide information or
13 documentation necessary to effect service. The same Minute Order
14 required Plaintiff to show cause in writing why the action should not
15 be dismissed for failure to prosecute. Plaintiff did not file a
16 timely response. Therefore, on December 22, 2010, the Magistrate
17 Judge filed a Report and Recommendation recommending dismissal of the
18 action for failure to prosecute.

19
20 On December 30, 2010, Plaintiff filed a "Motion for
21 Reconsideration of Court[']s Dismissal, etc." On January 4, 2011, the
22 Magistrate Judge issued a Minute Order withdrawing the Report and
23 Recommendation and ordering Plaintiff to provide the Marshals Service
24 with the information or documentation necessary to effect service.

25
26 On May 13, 2011, Defendant Mark Sonnendecker filed a Motion to
27 Dismiss the First Amended Complaint. On July 15, 2011, the police
28 officer Defendants filed a Motion to Dismiss the First Amended

1 | Complaint. On October 13, 2011, the Court issued an "Order Denying
2 | Motions to Dismiss."

3 |
4 | On October 20, 2011, the police officer Defendants filed an
5 | Answer to the First Amended Complaint. On November 1, 2011, these
6 | same Defendants filed a Motion for Judgment on the Pleadings. On
7 | November 2, 2011, the Magistrate Judge ordered Plaintiff to file
8 | opposition to this motion within thirty days of the date of the Order.

9 |
10 | On November 14, 2011, Defendant Sonnendecker filed an Answer to
11 | the First Amended Complaint. On December 8, 2011, Defendant
12 | Sonnendecker filed a Motion for Judgment on the Pleadings. On
13 | December 9, 2011, the Magistrate Judge ordered Plaintiff to file
14 | opposition to this motion within thirty days of the date of the Order.

15 |
16 | Plaintiff did not file a timely opposition to either of the
17 | Motions for Judgment on the Pleadings. Therefore, on January 31,
18 | 2012, the Magistrate Judge issued a Report and Recommendation
19 | recommending dismissal of the action for failure to prosecute.

20 |
21 | On February 16, 2012, Plaintiff filed a "Motion to Reconsider or
22 | Motion of Written Statement of Objections" and supporting affidavit, a
23 | notice of change of address, and a motion for an extension of time.
24 | On February 21, 2012, the Magistrate Judge issued a Minute Order
25 | withdrawing the January 31, 2012 Report and Recommendation and
26 | granting Plaintiff an extension of time to file responses to the
27 | Motions for Judgment on the Pleadings.

28 | ///

1 On March 16, 2012, Plaintiff filed: (1) a document titled
2 "Responding to: Sonnendecker's Motion to Dismiss [sic] First Amended
3 Complaint, etc.," constituting Plaintiff's Opposition to Defendant
4 Sonnendecker's Motion for Judgment on the Pleadings, accompanied by
5 exhibits; (2) a document titled "Response to Defendant [sic] Motion
6 and Exhibits, etc.," constituting Plaintiff's Opposition to the Police
7 Officer Defendants' Motion for Judgment on the Pleadings, accompanied
8 by exhibits.

9
10 On March 20, 2012, the police officer Defendants filed a Reply.
11 On March 26, 2012, Defendant Sonnendecker filed a Reply.

12
13 **STANDARDS GOVERNING MOTIONS FOR JUDGMENT ON THE PLEADINGS**

14
15 Judgment on the pleadings is proper if the moving party
16 "clearly establishes on the face of the pleadings that no material
17 issue of fact remains to be resolved and that [the moving party] is
18 entitled to judgment as a matter of law." Hal Roach Studios v.
19 Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989).
20 Where the motion for judgment on the pleadings is used to raise the
21 defense of failure to state a claim, the motion is governed by the
22 standards used to assess the sufficiency of the complaint under Rule
23 12(b)(6) of the Federal Rules of Civil Procedure. McGlinchy v. Shell
24 Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988); Ludahl v. Seaview
25 Boat Yard, 869 F. Supp. 825, 826 (W.D. Wash. 1994); see also Enron Oil
26 Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th
27 Cir. 1997) ("A judgment on the pleadings is properly granted when,
28 taking all allegations in the pleading as true, the moving party is

1 entitled to judgment as a matter of law.") (citation and internal
2 quotations omitted). As a general rule, the Court may not consider
3 material beyond the pleadings without converting the motion to a
4 motion for summary judgment. See Fed. R. Civ. P. 12(c); Heliotrope
5 General, Inc. v. Ford Motor Co., 189 F.3d 971, 979-80 (9th Cir. 1999);
6 Owest Communications Corp. v. City of Berkeley, 208 F.R.D. 288, 291
7 (N.D. Cal. 2002). Although the Court may consider matters properly
8 the subject of judicial notice, (see United States v. 14.02 Acres of
9 Land More or Less in Fresno County, 547 F.3d 943, 955 (9th Cir.
10 2008)), the Court may not take judicial notice of the truth of
11 findings of fact made in other cases. See Wyatt v. Terhune, 315 F.3d
12 1108, 1114 (9th Cir.), cert. denied, 540 U.S. 810 (2003).

13
14 **PLAINTIFF'S CRIMINAL PROCEEDINGS**

15
16 The Court takes judicial notice of the docket and file in United
17 States v. Kasey Robert Graham, CR 09-1084-PSG. See Mir v. Little
18 Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may
19 take judicial notice of court records). The file in that case
20 reflects the following:

21
22 On October 16, 2009, the Government filed a seven-count
23 Indictment charging Plaintiff with: (1) possession with intent to
24 distribute crack cocaine on May 19, 2009; (2) possession with intent
25 to distribute cocaine on May 19, 2009; (3) possession of a firearm by
26 a felon on May 19, 2009; (4) possession of a firearm with an
27 obliterated serial number on May 19, 2009; (5) possession of a firearm
28 in furtherance of a drug trafficking crime on May 19, 2009;

1 (6) distribution of crack cocaine on July 14, 2009; and (7) possession
2 with intent to distribute a mixture containing crack cocaine on
3 July 14, 2009.

4
5 On June 7, 2010, Plaintiff filed a motion to suppress the
6 evidence seized on May 19, 2009 at the Brighton address, and a motion
7 to suppress the evidence seized on July 14, 2009 at the Harvard Motor
8 Inn. Plaintiff alleged that Defendant Aluotto's application for a
9 search warrant at Brighton and Defendant Washington's application for
10 a search warrant at the Harvard Motor Inn contained materially false
11 statements and omissions. The Honorable Philip S. Gutierrez, United
12 States District Judge, held a hearing on these motions on June 28,
13 2010. On June 29, 2010, Judge Gutierrez denied both motions in
14 reasoned orders.

15
16 On February 9, 2011, Plaintiff filed another motion to suppress
17 the evidence seized on July 14, 2009 at the Harvard Motor Inn. On
18 February 28, 2011, Judge Gutierrez denied this motion.

19
20 On March 8, 2011, a jury trial commenced. On March 11, 2011,
21 Plaintiff signed a plea agreement and pleaded guilty to possession of
22 a firearm in furtherance of a drug trafficking crime on May 19, 2009
23 (Count Five) and possession with intent to distribute a mixture
24 containing crack cocaine on July 14, 2009 (Count Seven). In the plea
25 agreement, Plaintiff admitted to a factual basis for the plea, and
26 agreed not to "contest the facts agreed to in this agreement" ("Plea
27 Agreement for Defendant Kasey Robert Graham," filed March 11, 2011 in
28 United States v. Kasey Robert Graham, CR 09-1084-PSG, p. 2).

1 Plaintiff also waived his right to appeal the conviction (id., p. 13).
2 In an attached "Certification of Defendant," Plaintiff stated that he
3 was pleading guilty because he was guilty of the charges. In return,
4 the Government agreed, among other things, to: (1) dismiss the
5 "Information Re: Prior Conviction for a Felony Drug Offense, etc."
6 filed on March 11, 2010; (2) recommend a two-level reduction in the
7 Federal Sentencing Guidelines offense level (provided that Plaintiff
8 demonstrated an acceptance of responsibility for the offenses up to
9 and including the time of sentencing); and (3) refrain (with certain
10 provisos) from seeking a sentence above the high end of the Guidelines
11 range with respect to Count Seven plus the mandatory minimum imposed
12 on Count Five (id., p. 3). At the sentencing hearing on October 3,
13 2011, Judge Gutierrez sentenced Plaintiff in accordance with the plea
14 agreement. Judgment was entered on October 5, 2011, and a corrected
15 Judgment was entered on October 17, 2011.

16
17 **SUMMARY OF ALLEGATIONS OF FIRST AMENDED COMPLAINT**
18

19 Plaintiff alleges that the police officer Defendants
20 intentionally falsified police reports and search warrant applications
21 in order to secure Plaintiff's indictment in the criminal proceeding,
22 assertedly in violation of the Fourth Amendment (First Amended
23 Complaint, p. 5). Plaintiff also alleges that the police officer
24 Defendants conspired with "AFT Agents" to present perjured testimony
25 to the grand jury in Plaintiff's criminal proceeding, which assertedly
26 was "material to Plaintiff's federal indictment" (id.).

27 ///

28 ///

1 **I. Alleged Falsification of Police Reports and Search Warrant**
2 **Applications (Claim 1)**

3
4 **A. Brighton Incident**

5
6 Plaintiff alleges that "officers," apparently the police officer
7 Defendants, claimed to have received information from a confidential
8 informant that a person named "Harlem Rob" was selling rock cocaine at
9 an address on Halldale Avenue (First Amended Complaint, p. 5). The
10 officers allegedly set up surveillance at the Halldale Avenue location
11 during the week of May 15, 2009 (id.). The officers allegedly
12 arranged a controlled buy at which Plaintiff assertedly was not
13 present (id.). The officers allegedly claimed that they observed
14 Plaintiff parking a black SUV in front of the location, and that they
15 observed Plaintiff use keys to enter the residence (id.). The
16 officers allegedly later observed Plaintiff and another person exit
17 the location, and allegedly saw Plaintiff open the SUV hood so that
18 the other person could remove something from the engine area (id., pp.
19 5, 5(b)).

20
21 The officers claimed to have followed Plaintiff from the Halldale
22 Avenue location to an address on Brighton Avenue, where they
23 reportedly saw Plaintiff use keys to enter that location, then exit
24 and return to the Halldale location (id.). Officers reportedly
25 observed several people enter and exit the Brighton location (id.).
26

27 Plaintiff now alleges that he never had keys to either the
28 Halldale or the Brighton address, never owned a black SUV, and was

1 never at the Halldale address during the week of May 15, 2009 (id., p.
2 5(b)). Plaintiff also now alleges that, to his asserted knowledge, no
3 one ever came to the Brighton location to purchase drugs (id.).
4

5 **B. Harvard Motor Inn Incident**
6

7 Plaintiff alleges that the officers claimed to have seen
8 Plaintiff exit a Harvard Motor Inn room on July 14, 2009 and walk to a
9 blue Mustang (id., p. 5(b)). Defendant Washington allegedly prepared
10 an affidavit asserting that Washington had observed Plaintiff
11 supplying the Mustang's driver, Lisa Holmes, with rock cocaine (id.,
12 p. 5(c)). Washington allegedly claimed to have observed a man named
13 Jackson arrive at the hotel in Plaintiff's vehicle, enter the hotel
14 room, and then exit (id.). Washington allegedly claimed to have
15 followed Jackson and observed Jackson put something in the console of
16 the car, later determined to be rock cocaine (id.). Plaintiff now
17 denies that he sold any drugs to either Holmes or Jackson (id.).
18

19 Plaintiff alleges that Defendant Mendoza prepared a police report
20 after a search of the Harvard Motor Inn in which Mendoza allegedly
21 claimed to have seen Plaintiff standing on a different street corner
22 from that described in Washington's affidavit (id., pp. 5(c)-5(d)).
23 Mendoza allegedly claimed to have seen Jackson arrive at the hotel
24 with two females, and claimed to have seen Plaintiff let the three
25 into the room (id., p. 5(d)). Mendoza allegedly claimed to have seen
26 Jackson exit the room with a clear plastic bag containing a substance
27 Mendoza allegedly said resembled cocaine base and then drive away
28 (id.). Mendoza also allegedly claimed to have seen Plaintiff engage

1 in a transaction with a man and two women (id.). Defendant Orozco
2 allegedly falsely claimed that the hotel room was registered to
3 Plaintiff and that Plaintiff had a room key (id.).
4

5 Plaintiff alleges that the officers did not observe Plaintiff
6 participate in any transaction (id.). Orozco allegedly deliberately
7 falsified the claim that Plaintiff rented the hotel room under the
8 name Robert Graham (id.). Plaintiff allegedly had no identification
9 under that name, never had a key to the hotel room, and never
10 possessed the items found in the room that were the subject of the
11 criminal charges (id.).
12

13 **II. Alleged Conspiracy (Claim 2)**
14

15 Following Plaintiff's arrest, Defendant Washington allegedly
16 sought Plaintiff's cooperation, assertedly saying that Washington had
17 been in contact with federal authorities, and that as a result of the
18 new charges it would be "easy to get the feds to take the case" (id.,
19 p. 5(e)). While Plaintiff was in County Jail awaiting a preliminary
20 hearing, Plaintiff allegedly received word that the state had dropped
21 the charges and the federal authorities had picked up the case (id.).
22

23 Thereafter, Plaintiff's counsel allegedly told Plaintiff that the
24 "ATF" (Bureau of Alcohol, Tobacco and Firearms) wanted to know if
25 Plaintiff was willing to cooperate (id.). Plaintiff allegedly refused
26 (id.). On August 3, 2009, Defendant Sonnendecker and another agent
27 assertedly arrested Plaintiff on a federal warrant (id., p. 5(f)).
28 Defendant Sonnendecker allegedly asked if Plaintiff would be willing

1 to cooperate (id.). Plaintiff allegedly agreed to do so, and
2 assertedly was given a cell phone and released (id.). Later, after
3 Plaintiff allegedly failed to provide information, Sonnendecker
4 assertedly told Plaintiff that "it wasnt [sic] looking good if
5 [Plaintiff] did not . . . get him somebody soon" (id.). Soon
6 thereafter, a warrant allegedly issued for Plaintiff's arrest (id.).
7

8 **III. Alleged Perjury Before the Grand Jury**
9

10 Plaintiff alleges that, in federal grand jury testimony on
11 October 16, 2009, Defendant Sonnendecker testified falsely that he,
12 Sonnendecker, had been present during the search at Brighton and had
13 recovered a Glock handgun, and that he also had been present during
14 the hotel investigation (id.). Sonnendecker also allegedly testified
15 falsely that Plaintiff "had bailed out at the time that they had
16 released Plaintiff" (id.). Sonnendecker allegedly gave this
17 assertedly false testimony in retaliation for Plaintiff's "non-actions
18 in production of cooperation" (id., p. 5(g)).
19

20 **DEFENDANTS' CONTENTIONS**
21

22 The police officer Defendants contend:
23

24 1. Plaintiff's claims alleging the falsification of affidavits
25 and reports to effect false charges, and the conspiracy claim,
26 assertedly are barred by the doctrines of collateral estoppel,
27 judicial estoppel and witness immunity;

28 ///

1 2. The conspiracy claim allegedly fails as a matter of law; and

2

3 3. The claim of perjury before the grand jury allegedly is not
4 asserted against the police officer Defendants, who in any event
5 allegedly are entitled to absolute immunity on any such claim.

6

7 Defendant Sonnendecker contends:

8

9 1. Plaintiff allegedly fails to allege Defendant Sonnendecker's
10 personal involvement in the alleged falsification of affidavits and
11 reports;

12

13 2. The doctrine of collateral estoppel allegedly bars
14 Plaintiff's claims;

15

16 3. The doctrine of judicial estoppel allegedly bars Plaintiff's
17 claims; and

18

19 4. Plaintiff allegedly has failed to state a conspiracy claim.

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DISCUSSION

I. The Doctrine of Judicial Estoppel Bars Plaintiff's Claims Concerning the Police Officer Defendants' Allegedly False Reports and Affidavits and Plaintiff's Claim Concerning Defendant Sonnendecker's Allegedly False Testimony Concerning the Gun.

The doctrine of judicial estoppel protects the integrity of the judicial system by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001) (citation omitted). Courts invoke judicial estoppel "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant 'playing fast and loose' with the courts." Id. at 782 (citation and internal quotations omitted). "Federal law governs the application of judicial estoppel in federal court." Samson v. NAMA Holdings, LLC, 637 F.3d 915, 935 (9th Cir. 2011) (citation and internal quotations omitted).

To determine whether application of the doctrine is appropriate, the Court should consider: "(1) whether a party's later position is clearly inconsistent with its original position; (2) whether the party

1 has successfully persuaded the court of the earlier position; and (3)
2 whether allowing the inconsistent position would allow the party to
3 derive an unfair advantage or impose an unfair detriment on the
4 opposing party." United States v. Liquidators of European Federal
5 Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) (citation and
6 internal quotations omitted). The Court additionally should consider
7 "whether the party to be estopped acted inadvertently or with any
8 degree of intent." Samson v. NAMA Holdings, LLC, 627 F.3d at 935.

9
10 **A. Inconsistency**

11
12 In the plea agreement, Plaintiff (concededly also known as
13 "Harlem Rob") expressly admitted that, on May 19, 2009, Plaintiff
14 possessed with intent to distribute approximately 28.2 grams of crack
15 cocaine and approximately 373.8 grams of cocaine, some of which was
16 found on a shelf inside a closet used by Plaintiff at the Brighton
17 location ("Plea Agreement for Defendant Kasey Robert Graham," filed
18 March 11, 2011 in United States v. Kasey Robert Graham, CR 09-1084-
19 PSG, pp. 1, 9). Plaintiff also admitted that he had hidden a Glock
20 handgun in the closet near the drugs, and that he possessed the gun in
21 furtherance of his possession of crack cocaine and cocaine with the
22 intent to distribute (id.). Plaintiff further admitted that, on
23 July 14, 2009, Plaintiff knowingly possessed with intent to distribute
24 approximately 24.13 grams of crack cocaine, located in a hotel room
25 Plaintiff was using at the Harvard location (id., p. 10).

26
27 These factual admissions are clearly inconsistent with
28 Plaintiff's present allegations that Plaintiff is not guilty of the

1 criminal charges, that the police officer Defendants submitted reports
2 and affidavits falsely alleging Plaintiff's involvement in the
3 Brighton and Harvard events, and that Defendant Sonnendecker testified
4 falsely before the grand jury concerning the recovery of the gun. See
5 Bradford v. Wiggins, 516 F.3d 1189, 1195-96 (10th Cir. 2008)
6 (plaintiffs estopped from challenging probable cause to arrest them
7 for disorderly conduct in disobeying officers' orders to leave scene,
8 where they had admitted in plea proceedings that they had disobeyed
9 officers' orders); Davis v. Clark, 2010 WL 679037, at *6 (D. Idaho
10 Feb. 23, 2010) (judicial estoppel prevented plaintiff from denying
11 that he threatened officers with a knife, where he had admitted doing
12 so in a plea hearing).

13
14 **B. Inducement of Judicial Reliance**

15
16 Under Rule 11(b)(3) of the Federal Rules of Criminal Procedure,
17 the Court in Plaintiff's criminal case could not enter judgment on
18 Plaintiff's guilty plea in the absence of a determination that there
19 existed a factual basis for the plea. In reliance on Plaintiff's
20 plea-related admissions described above, the Court in Plaintiff's
21 criminal case expressed satisfaction that there was a factual basis
22 for Plaintiff's plea (see Corrected Judgment filed October 17, 2011 in
23 United States v. Kasey Robert Graham, CR 09-1084-PSG). Through
24 Plaintiff's plea-related admissions (which are clearly inconsistent
25 with the operative allegations in the present case), Plaintiff induced
26 the reliance of the Court in Plaintiff's criminal case. See Lowery v.
27 Stovall, 92 F.3d 219, 224-25 (4th Cir. 1996), cert. denied, 519 U.S.
28 1113 (1997) ("[j]udicial acceptance means only that the first court

1 has adopted the position urged by the party . . . as part of a final
2 disposition") (citation and internal quotations omitted; original
3 ellipses); Wells v. Coker, 2011 WL 4381488, at *4-5 (C.D. Ill.
4 Sept. 20, 2011) (applying judicial estoppel where plaintiff convinced
5 the court to accept his plea).

6
7 **C. Unfair Advantage or Detriment**

8
9 Finally, to allow Plaintiff to take factual positions in the
10 present case that are inconsistent with the factual positions
11 Plaintiff took in his plea in the criminal case would allow Plaintiff
12 to derive an unfair advantage or would impose an unfair detriment on
13 the Defendants. It is evident that in the present action Plaintiff
14 knowingly is attempting to advance allegations which flatly contradict
15 his plea. Plaintiff acknowledges his plea,¹ but attempts to excuse
16 the contradiction by claiming that in the criminal case he had been
17 too "scared to think justice would prevale [sic]" (see Plaintiff's
18 Opposition to Defendant Sonnendecker's Motion for Judgment on the
19 Pleadings, fourth page, "Introduction"; see also Plaintiff's
20 Opposition to the Police Officer Defendants' Motion, p. 2).

21
22
23 ¹ Any challenge in this action to the validity of
24 Plaintiff's plea would be barred by Heck v. Humphrey, 512 U.S.
25 477, 486-87 (1994) (holding that, in order to pursue a claim for
26 damages arising out of an allegedly unconstitutional conviction
27 or imprisonment, or for other harm caused by actions whose
28 unlawfulness would render a conviction or sentence invalid, a
civil rights plaintiff must prove that the conviction or sentence
has been "reversed on direct appeal, expunged by executive order,
declared invalid by a state tribunal authorized to make such
determination, or called into question by a federal court's
issuance of a writ of habeas corpus").

1 Plaintiff's claim of fright in the criminal case should not enable him
2 to manipulate the justice system to his own unfair advantage or to the
3 unfair detriment of the Defendants. See Bradford v. Wiggins, 516 F.3d
4 at 1195 (party who accepts benefits of plea agreement and then makes
5 inconsistent statements in a subsequent section 1983 action "would
6 derive an unfair advantage if not estopped from pursuing [the section
7 1983] claims"); Thore v. Howe, 466 F.3d 173, 183 (1st Cir. 2006)
8 (applying judicial estoppel where plaintiff's allegations that his
9 plea was the product of fraud were unsupported; defendants reasonably
10 thought that plaintiff's admissions in the plea colloquy "protected
11 them from exactly this lawsuit"); Lowery v. Stovall, 92 F.3d at 225
12 (finding "too much to take" plaintiff's argument that he did not
13 commit the assault as to which he had pled guilty).

14
15 In sum, the application of judicial estoppel is appropriate in
16 the present case. Having pled guilty and accepted the benefits of
17 that plea, and having admitted that he possessed with intent to
18 distribute the drugs found at the Brighton and Harvard locations and
19 the gun found at the Brighton location, Plaintiff should not be
20 permitted to pursue a civil rights action challenging the veracity of
21 the reports, affidavits and testimony which supported the charges to
22 which Plaintiff pled guilty.² Judicial estoppel bars Plaintiff's
23 claims against the police officer Defendants and Plaintiff's claim
24 against Defendant Sonnendecker alleging that Sonnendecker falsely

25 _____
26 ² Judicial estoppel does not extend to Plaintiff's
27 allegation that Defendant Sonnendecker purportedly testified
28 falsely to the grand jury concerning Plaintiff's bail status.
However, as discussed below, Defendant Sonnendecker is immune
from suit on that claim.

1 testified to the grand jury concerning the discovery of the gun.

2
3 **II. Defendant Sonnendecker Is Immune From Suit For Allegedly**
4 **Testifying Falsely Concerning Plaintiff's Bail.**

5
6 A witness other than a complaining witness is immune from suit
7 for his or her testimony in judicial proceedings. Malley v. Briggs,
8 475 U.S. 335, 340-41 (1986); Briscoe v. LaHue, 460 U.S. 325, 330-34
9 (1983); Paine v. City of Lompoc, 265 F.3d 975, 980-81 (9th Cir. 2001).
10 Thus, Defendant Sonnendecker is immune from suit for his allegedly
11 false testimony to the grand jury, including his allegedly false
12 testimony concerning Plaintiff's bail status.

13
14 **RECOMMENDATION**

15
16 For the foregoing reasons, IT IS RECOMMENDED that the Court issue
17 an Order: (1) accepting and adopting this Report and Recommendation;
18 (2) granting all Defendants' Motions for Judgment on the Pleadings;
19 and (3) dismissing the action with prejudice.³

20
21 DATED: April 10, 2012.

22 _____/s/_____
23 CHARLES F. EICK
24 UNITED STATES MAGISTRATE JUDGE

25 ³ In light of this recommendation, the Court need not,
26 and does not, reach the remaining issues raised by Defendants,
27 including whether collateral estoppel bars some or all of
28 Plaintiff's claims. The Court does observe, however, that
federal law, not state law, governs the preclusive effect of a
prior federal judgment such as the judgment in Plaintiff's
criminal case. See McQuillion v. Schwarzenegger, 369 F.3d 1091,
1096 (9th Cir. 2004).

1 | **NOTICE**

2 | Reports and Recommendations are not appealable to the Court of
3 | Appeals, but may be subject to the right of any party to file
4 | objections as provided in the Local Rules Governing the Duties of
5 | Magistrate Judges and review by the District Judge whose initials
6 | appear in the docket number. No notice of appeal pursuant to the
7 | Federal Rules of Appellate Procedure should be filed until entry of
8 | the judgment of the District Court.

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