FILED
United States Court of Appeals
Tenth Circuit

February 27, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONRAD TRUMAN,

Plaintiff - Appellant,

v.

CRAIG JOHNSON,

Defendant - Appellee.

UTAH COUNTY ATTORNEY'S OFFICE, a division of Utah County,

Defendant.

No. 22-4017

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:17-CV-00775-TS)

Shawn P. Bailey, Peck Baxter Watkins & Bailey, Logan, Utah (Loren K. Peck and Shaun L. Peck, Peck Baxter Watkins & Bailey, Logan, Utah; Mark R. Moffat and Ann Marie Taliaferro, Brown, Bradshaw & Moffat, Salt Lake City, Utah, with him on the briefs), for Plaintiff-Appellant.

Peter Stirba (Shannon K. Zollinger with him on the briefs) Clyde Snow & Sessions, P.C., Salt Lake City, Utah, for Defendant-Appellee.

Before **BACHARACH**, **EID**, and **ROSSMAN**, Circuit Judges.

BACHARACH, Circuit Judge.

This is a civil case that grew out of a fatal gunshot to Conrad Truman's wife. In a prior criminal case, the key question was whether the gunshot had come from Mr. Truman (murder) or his wife (suicide). The State of Utah alleged murder, relying in part on a medical examiner's testimony that the wife couldn't have shot herself based on (1) where she had fallen and (2) the dimensions of the house where the shooting had taken place. With the medical examiner's testimony, Mr. Truman was convicted of murder and obstruction of justice.

But Mr. Truman's attorneys later learned that the medical examiner had obtained incorrect information from the prosecutor (Craig Johnson) and the police. With the discovery of the true dimensions of the house, the state court granted a new trial to Mr. Truman. In granting a new trial, the state court commented that none of the attorneys had recognized the errors in the information given to the medical examiner.

After obtaining a new trial, Mr. Truman moved to dismiss the charges, claiming that the prosecutor and the police had knowingly given false information to the medical examiner. The state court declined to dismiss the charges, but Mr. Truman obtained an acquittal at the new trial.

Following the acquittal, Mr. Truman sued under 42 U.S.C. § 1983, claiming in part that Mr. Johnson had knowingly given false information to

the medical examiner and intentionally elicited false testimony about the dimensions of the house.[1] The district court granted summary judgment to Mr. Johnson, relying on issue preclusion.[2]

Mr. Truman appeals,[3] and we consider three main issues:

1. **Whether the state court's finding (that Mr. Johnson hadn't known of the errors) had been essential to the grant of a new trial.** The state court granted a new trial, finding that the correct dimensions of the house had been newly discovered. In characterizing the actual dimensions as newly discovered, the state court commented that none of the attorneys had recognized the error until after the trial.

   Issue preclusion would have applied only if the state court's comment had been essential to the grant of a new trial. In federal district court, Mr. Johnson didn't characterize this comment as essential to the grant of a new trial. On appeal, though, Mr. Johnson argues that the state court granted a new

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[1] Mr. Truman also asserted other claims in district court. On appeal, though, Mr. Truman confined his opening brief to his claim involving false testimony about the dimensions of the house. In his reply brief, Mr. Truman added that the prosecutor had fabricated evidence about gunshot residue and financial motives. But the reply brief was too late to initiate an appellate argument involving the gunshot residue and financial motives. *United States v. Mendoza*, 468 F.3d 1256, 1260 (10th Cir. 2006).

[2] The district court also commented that Mr. Truman had only weak evidence of Mr. Johnson's knowledge. Appellant's App'x vol. 19, at 4960. But the federal district court ultimately relied solely on issue preclusion, not a weakness in Mr. Truman's evidence.

[3] This is the second appeal. In the prior appeal, we

- reversed the grant of Mr. Johnson's motion to dismiss and
- affirmed a grant of summary judgment to the police officers.

Truman v. Orem City, 1 F.4th 1227 (10th Cir. 2021).

trial based on a finding that none of the attorneys had known of the errors.

This argument misconceives the requirements for a new trial. To obtain a new trial, Mr. Truman had to prove that he'd been unaware of the earlier errors in the information given to the medical examiner. The evidence could be newly discovered regardless of what the prosecutor had known. So the state court didn't need to decide whether the prosecutor had known about the earlier error. As a result, the state court's comment about the prosecutor's lack of knowledge wasn't essential to the grant of a new trial.

2. **Whether Mr. Johnson showed that the state court had based its denial of Mr. Truman's motion to dismiss on the same burden that would apply under § 1983.** A similar issue arises in connection with the state court's refusal to dismiss the criminal charges. This ruling would trigger issue preclusion only if Mr. Johnson had shown that the issues were identical in the motion to dismiss the state criminal charges and in the § 1983 claim. The issue would have differed if Mr. Truman had shouldered a greater burden in seeking dismissal of the criminal charges than he would have shouldered under § 1983.

   For the § 1983 claim, Mr. Truman must prove knowledge by a preponderance of the evidence. But when the state court denied Mr. Truman's motion to dismiss the criminal charges, the court didn't identify the burden falling on Mr. Truman. Because we don't know which burden the state court applied, we can't know whether the court would have reached the same finding under a preponderance standard. So Mr. Johnson hasn't proven that the state court applied the same burden that applies under § 1983.

3. **Whether the language in the state court's order, which acknowledged the availability of a civil remedy, was broad enough to encompass a civil remedy under § 1983.** In declining to dismiss the criminal charges, the state court acknowledged the availability of civil remedies if Mr. Truman were to obtain exoneration. Mr. Truman characterizes his acquittal as an exoneration, and Mr. Johnson doesn't question that characterization. This exoneration triggered the availability of a civil remedy for the knowing use of false

> evidence under § 1983. So the state court's refusal to dismiss the criminal charges doesn't foreclose a civil remedy under § 1983.

I. Based on new evidence of the medical examiner's reliance on erroneous information, Mr. Truman obtains an acquittal.

At the original trial, the State relied largely on the dimensions of Mr. Truman's house. Mr. Truman acknowledged that he was in the house when the gun fired, stating that he had heard the gunshot when his wife was standing right outside the bathroom. Mr. Truman claimed that his wife had committed suicide.

The medical examiner considered this account, but rejected it based on what the police and prosecution had said about the room sizes. Relying on what the police and prosecution had said, the medical examiner testified that Mr. Truman's account would have been impossible given the location of the wife's body and blood spatters.

After the trial, the medical examiner learned that he'd been given the wrong dimensions for the rooms. With the correct information, the medical examiner concluded that Mr. Truman's account had matched the location of his wife's body and the blood spatters. This conclusion led the medical examiner to change his opinion, stating that suicide was a possibility.

With the change in the medical examiner's opinion, the state court granted Mr. Truman's motion for a new trial. In granting a new trial, the state court acknowledged that the correct dimensions had been newly

discovered because none of the attorneys had known of the errors. Mr. Truman then moved to dismiss the criminal charges, arguing that the prosecutor and the police had knowingly given false information to the medical examiner.

The state court declined to dismiss the criminal charges, finding that Mr. Truman had not proven the prosecutor's knowledge of the errors in room sizes. But the court acknowledged that Mr. Truman would enjoy civil remedies if he were exonerated. Mr. Truman later obtained an acquittal and sued Mr. Johnson under § 1983.

On the § 1983 claim, Mr. Johnson sought summary judgment, invoking issue preclusion based on the state court's finding that he had not known of the errors. In invoking issue preclusion, Mr. Johnson relied on the state court's denial of Mr. Truman's motion to dismiss and the grant of a new trial. The federal district court awarded summary judgment to Mr. Johnson based on the state court's refusal to dismiss the criminal charges. But the district court declined to address whether the order granting a new trial would have triggered issue preclusion. Mr. Truman appealed.

II. Our review is de novo based on the standard for summary judgment.

We conduct de novo review based on the same standard that applied in district court. *SEC v. GenAudio Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). The application of issue preclusion to the facts is a pure question of law,

triggering de novo review. *See United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002).

In determining the availability of issue preclusion, the district court and our court must view the evidence and all reasonable inferences favorably to Mr. Truman. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court could grant summary judgment to Mr. Johnson only in the absence of a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a).

III. The order granting a new trial didn't trigger issue preclusion.

In district court, Mr. Johnson relied not only on the denial of Mr. Truman's motion to dismiss but also on the order granting a new trial. The district court didn't address the effect of the order granting a new trial. But we may consider this order as an alternative basis to affirm. *Stewart v. City of Oklahoma City*, 47 F.4th 1125, 1132 n.5 (10th Cir. 2022).

Under Utah law, the party invoking issue preclusion (Mr. Johnson) bears the burden of proof. *Timm v. Dewsnup*, 851 P.2d 1178, 1184 (Utah 1993).[4] This burden requires proof that the issue is identical in the old and

[4] Federal courts give preclusive effect to state-court judgments "whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). This preclusion extends to suits under § 1983. *Truman v. Orem City*, 1 F.4th 1227, 1242 (10th Cir. 2021). So we consider issue preclusion under Utah law.

new cases. *Oman v. Davis Sch. Dist.*, 194 P.3d 956, 965 (Utah 2008).[5] Given this burden, Mr. Johnson needed to show that (1) the state court had found no knowledge on his part and (2) this finding had been essential to the grant of a new trial. *See Zufelt v. Haste, Inc.*, 142 P.3d 594, 597–98 (Utah Ct. App. 2006) (stating that issue preclusion applies only if the same issue was essential and decided in the prior case).

In granting a new trial, the state court discussed Mr. Truman's need to prove newly discovered evidence. The evidence was new, the state court commented, because none of the attorneys had known the correct dimensions. But the state court had no need to comment on Mr. Johnson's knowledge of the dimensions.

To assess whether the evidence was newly discovered, the state court had to consider the awareness of Mr. Truman's attorney—not the prosecutor (Mr. Johnson). *See Utah v. Loose*, 994 P.2d 1237, 1241 (Utah 2000).

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[5] Issue preclusion also requires

- application of the issue to a person or entity that was a party or in privity with a party in the prior case,
- complete, full, and fair litigation of that issue in the prior case, and
- entry of a final judgment on the merits in the prior case.

Omar v. Davis Sch. Dist., 194 P.3d 956, 965 (Utah 2008). We need not consider these requirements.

The state court found that Mr. Truman's attorney hadn't known that the medical examiner was relying on the wrong dimensions. With that finding, a new trial would have remained appropriate if Mr. Johnson had fabricated the evidence and withheld it from the defense. *See United States v. Agurs*, 427 U.S. 97, 111 (1976). So Mr. Johnson's knowledge or lack of knowledge was not essential to the grant of a new trial, and the ruling didn't trigger issue preclusion.

IV. The denial of Mr. Truman's motion to dismiss didn't trigger issue preclusion.

The same was true of the denial of Mr. Truman's motion to dismiss. In denying this motion, the state court again found that the prosecutor hadn't known of the errors. But the state court never identified the applicable burden of proof. So Mr. Johnson hasn't shown that the state court applied the same burden of proof that exists under § 1983.[6]

In addition, the state court specified that if Mr. Truman were exonerated, he'd have civil remedies. Mr. Truman characterizes his

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[6] The state court's language on the burden of proof might be considered ambiguous. Some courts suggest that the interpretation of an ambiguous state court order involves a question of fact. *See, e.g.*, *Rivera v. Sheriff of Cook Cnty.*, 162 F.3d 486, 489 (7th Cir. 1998) ("The question is what the [state court judge] sought to convey, not what a rule of law compels the state to do; it is a question of fact for the same reason that 'the state of a man's mind is as much a fact as the state of his digestion.'" (quoting *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885))). Other courts treat interpretation of a state court's order as a question of law. *See, e.g.*, *SEC v. United Fin. Grp., Inc.*, 576 F.2d 217, 222 (9th Cir. 1978) ("The interpretation of [a state court] judgment is a question of law

acquittal as an exoneration, and Mr. Johnson doesn't question this characterization. That exoneration triggered the availability of a civil remedy under § 1983. So issue preclusion would be unavailable irrespective of the burden imposed in state court.

A. Mr. Johnson didn't show that the state court had applied the same burden of proof that would apply under § 1983.

In denying the motion to dismiss, the state court found that Mr. Johnson hadn't realized the errors in the dimensions given to the medical examiner. But Mr. Truman's burden of proof differs here from what Utah law would have required in the earlier criminal case. *See Lucero v. Kennard*, 125 P.3d 917, 928 n.7 (Utah 2005) (observing that the state court must "dismiss a case with prejudice in instances where prosecutorial misconduct is so severe that lesser sanctions could not result in a fair trial"). So we must consider whether the state court complied with Utah law, which would have required Mr. Truman to present greater proof to justify dismissal of the charges than he'd need to present under § 1983. And if the state court did require Mr. Truman to prove more in the criminal case than he would need to prove under § 1983, we'd need to consider the effect of the differing burdens.

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respecting which this Court is not bound by the lower court's determination."). We need not decide whether interpretation of the state court's language involves a question of law or fact. Either way, Mr. Johnson didn't show that the state court had applied the same burden of proof that would have applied under § 1983.

This issue arises from time to time. For example, the government might sue civilly for conduct that had resulted in an acquittal. The Supreme Court has held that the acquittal doesn't prevent civil liability because the government had to prove the conduct beyond a reasonable doubt in the criminal case and only by a preponderance of evidence in the civil case. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62 (1984); *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1982).

Utah takes the same approach. For example, the Utah Supreme Court considered in *Johns v. Shulsen* whether the government could revoke parole based on offenses that had resulted in an acquittal. 717 P.2d 1336 (Utah 1986). The Utah Supreme Court concluded that issue preclusion didn't apply because

- the government's earlier prosecution of the underlying offenses had required proof beyond a reasonable doubt and
- the government could obtain revocation of parole based only on a preponderance of the evidence.

Id. at 1338.

The Utah Supreme Court adopted a similar approach in *Gressman v. State*, 323 P.3d 998 (Utah 2013). There criminal and civil cases rested on the same element: the materiality of newly discovered evidence. But the Utah Supreme Court explained that the claimant had faced different burdens in the criminal and civil cases: the claimant could obtain vacatur

of his conviction only by proving a reasonable likelihood that the newly discovered evidence would have sparked a different result; in the later civil case, the claimant had needed to show that the newly discovered evidence constituted clear and convincing proof of factual innocence. *Id.* at 1010. Because the burdens had differed, the court couldn't apply issue preclusion even though the ultimate issue (materiality of the newly discovered evidence) was the same. *Id.*

The Utah Supreme Court's distinction is just as applicable here. In *Johns* and *Gressman*, the element was the same (either commission of crimes or materiality of newly discovered evidence). Here too the element is the same: the prosecutor's knowledge that the medical examiner had relied on incorrect dimensions of the house. So we must consider whether the state court had imposed a burden greater than a preponderance of the evidence.

The question exists only because the state court didn't specify Mr. Truman's burden of proof. Whatever the burden was, it required Mr. Truman to present more than just a preponderance of the evidence. For example, the state court noted that (1) dismissal was an "extreme remedy" and (2) a new trial is typically an adequate remedy for prosecutorial misconduct. Appellant's App'x vol. 14, at 3566. Based on the state court's language, the federal district court acknowledged that Mr. Truman had a greater burden in the earlier criminal case, stating that he could obtain

dismissal of the charges only upon "clear evidence of grave misconduct." Appellant's App'x vol. 19, at 4960; *see Lucero v. Kennard*, 125 P.3d 917, 928 n.7 (Utah 2005) (stating that a trial court can dismiss a criminal prosecution with prejudice if the prosecutor's misconduct had been severe enough to prevent a fair trial).

Given the state court's apparent application of a burden greater than it would be under § 1983, the federal district court couldn't apply issue preclusion. For the § 1983 claim, Mr. Truman must prove knowledge by only a preponderance of the evidence. Because this burden is less than it was in state court, a factfinder could find Mr. Truman's satisfaction of his burden under § 1983 while crediting the state court's finding. Because the state court's finding could coexist with Mr. Truman's satisfaction of his burden here, his claim isn't subject to issue preclusion. *See Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 477–78 (Utah 2011) (stating that factual issues aren't identical when they're decided under fundamentally different legal standards); *accord* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4422, at 638 (3d ed. 2016) ("Failure to carry a special burden of persuasion characterized as requiring clear and convincing evidence or some like showing does not preclude a later attempt to prove the same issue by a preponderance of the evidence.").

B. The state court's language was broad enough to encompass the availability of a civil remedy under § 1983.

Even if the issues had otherwise been the same in the § 1983 claim and in the motion to dismiss the criminal charges, Mr. Truman argues that the state court could prevent later use of issue preclusion. In responding to this argument, Mr. Johnson does not question the power of the state court to prevent the later use of issue preclusion. *See* 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4424.1, at 695 (3d ed. 2016) (stating that a court should be able to directly limit possible issue preclusion in a new action). So we consider whether the state court exercised that power when denying the motion to dismiss.

This inquiry turns on whether the state court explicitly acknowledged the availability of civil remedies.[7] We answer *yes*. The court said that if

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[7] Mr. Johnson argues that "[i]f a court order is not intended to be given preclusive effect, Utah law requires that the prior court *explicitly* say so in its order." Appellee's Resp. Br. at 39 (emphasis in original). For this argument, Mr. Johnson relies on *Macris & Assocs., Inc. v. Neways, Inc.*, 16 P.3d 1214 (Utah 2000). There the Utah Supreme Court wasn't addressing a court's language limiting the preclusive effect of a ruling. To the contrary, the court was addressing the scope of the earlier ruling. The scope of that ruling turned on the scope of a stipulation that the parties had reached on damages. *Id.*

The plaintiff in *Macris* argued that the parties in the prior case hadn't intended the stipulation to cover all damages. *Id.* at 1224. In that context, the Utah Supreme Court said that if the parties had intended to except certain damages from the stipulation, the parties should have said so. *Id.* The opinion contains no mention of a need for courts to explicitly

Mr. Truman were to obtain exoneration, he "will have administrative and civil remedies rather than a remedy [of] dismissal of this matter." Appellant's App'x vol. 14, at 3566. Given this language, Mr. Truman argues that the state court prevented issue preclusion in a later civil claim for constitutional violations because

- Mr. Truman ultimately obtained an exoneration through his acquittal, and Mr. Johnson doesn't suggest otherwise; and
- the state court recognized the availability of civil remedies for Mr. Johnson's alleged conduct (knowing use of false evidence).

When Mr. Truman was waiting for his new trial, the state court said that he'd have civil remedies if he were to obtain an "exonerat[ion]." *Id.* He later obtained an acquittal, and both sides have apparently assumed that the acquittal constituted an "exoneration" within the terms of the state court's order. This assumption appears reasonable, and we too assume that the acquittal constituted an exoneration. *See, e.g.*, 1 Bouvier Law Dictionary 1019 (Stephen M. Shepard ed., 2012) ("Exoneration does not necessarily mean that a person is innocent or had no legal obligation; rather, it means only that the government has failed to present evidence sufficient to convict . . . ."); *Delaney v. Superior Court*, 789 P.2d 934, 809

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state limitations on preclusive effect. *See id.* In any event, the state court here did explicitly acknowledge the availability of civil remedies in the order denying the motion to dismiss.

(Cal. 1990) ("[I]n criminal proceedings, 'exoneration' is generally understood to mean an acquittal of charges.").

Given Mr. Truman's exoneration, we must consider what the state court meant by the availability of civil remedies. Despite the court's recognition that civil remedies would remain available, Mr. Johnson argues that the state court had intended its ruling to be "with prejudice."

The court didn't say, one way or another, whether its ruling was with or without prejudice. If the state court had intended its ruling to be "with prejudice," Mr. Truman couldn't reassert the arguments in the same criminal case. *See Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1215 (10th Cir. 2003) (Hartz, J., concurring) (stating "that when a court rules that a dismissal is 'with prejudice,' it is saying only that the claim cannot be refiled in that court"), *abrogated in part on other grounds*, *Jones v. Bock*, 549 U.S. 199 (2007). But Mr. Truman *could* reassert the claim in a new civil suit in federal court.

The sole remaining question is what civil remedies the state court had in mind. The court specified the availability of civil remedies when addressing Mr. Johnson's alleged knowledge of the medical examiner's false information. Given this context, the state court's language encompassed a civil remedy for the prosecutor's knowing use of false information.

In oral argument, Mr. Johnson speculated for the first time that the state court might have intended to preserve only a negligence claim. We don't typically consider an appellee's arguments raised for the first time at oral argument. *See Adamscheck v. Am. Fam. Mut. Ins. Co.*, 818 F.3d 576, 588 (10th Cir. 2016) (rejecting an appellee's contention to affirm on an alternative ground because the contention had been raised for the first time at oral argument); *see also United States v. Gaines*, 918 F.3d 793, 800–801 (10th Cir. 2019) ("We typically decline to consider an appellee's contentions raised for the first time in oral argument."). But even if we were to consider Mr. Johnson's new argument, two considerations support a broader interpretation of the state court's language.

First, Mr. Truman didn't allege negligence when he requested dismissal of the charges. Why would the state court specify that Mr. Truman could obtain a civil remedy for conduct that he'd not even alleged?

Second, Mr. Truman had no conceivable civil remedy for negligence. For example, § 1983 didn't provide a remedy for conduct considered negligent. *See Daniels v. Williams*, 474 U.S. 327, 328–29 (1986). Nor did a remedy exist under Utah law because it immunized the prosecutor from liability for negligence. Utah Code § 63G-7-201(4)(e). Mr. Truman could avoid that immunity only if the prosecutor had intentionally or knowingly

used evidence that had been fabricated. Utah Code § 63G-7-202(3)(c)(v)(A).

For both reasons, we have little reason to believe that the state court intended to limit Mr. Truman to a negligence claim. Such a claim wouldn't fit Mr. Truman's allegations or the law, and the only available civil remedies fitting his allegation would require proof of intentional or knowing use of false evidence. Given the state court's recognition of a civil remedy following exoneration, the denial of Mr. Truman's motion to dismiss doesn't warrant issue preclusion.

VI. Conclusion

The grant of a new trial didn't justify issue preclusion. The state court granted a new trial based on the materiality of the newly discovered evidence. In granting a new trial, the court commented on Mr. Johnson's lack of knowledge. But a new trial would have remained proper whether or not Mr. Johnson had known that the medical examiner was relying on the wrong room sizes. Because the extent of Mr. Johnson's knowledge didn't affect the need for a new trial, this ruling didn't trigger issue preclusion.

Nor can we base issue preclusion on the denial of Mr. Truman's motion to dismiss the state criminal charges. We conclude, as the federal district court did, that Mr. Truman's burden in state court had exceeded the burden that he would have incurred under § 1983. Given this difference in burdens, a factfinder could find Mr. Johnson's knowledge based on a

preponderance of the evidence despite a contrary finding under a harsher burden of proof. And because Mr. Johnson bore the burden on issue preclusion, he needed to show that Mr. Truman had faced the same standard in state court—or a lower standard—than he does here. Mr. Johnson failed to make this showing. So the denial of Mr. Truman's motion to dismiss the criminal charges did not prevent civil liability. And the state court expressly acknowledged the continued availability of a civil remedy for what Mr. Truman had alleged. As a result, the denial of Mr. Truman's motion to dismiss the state criminal charges doesn't foreclose a civil remedy under § 1983.

Because the state court's orders didn't support issue preclusion, we reverse and remand for further proceedings consistent with this opinion.

No. 22-4017, *Truman v. Johnson*

EID, Circuit Judge, concurring in part and concurring in the judgment

I join the majority opinion with the exception of Part IV(B). Having concluded that collateral estoppel does not apply because the issues in the two proceedings are not identical, Maj. op. at 13, there is no reason to go on to consider whether the state trial court's statement qualifies as an express limitation of preclusive effect under Utah law, *id*. at 14.

Accordingly, I respectfully concur in part and concur in the judgment.