

COUNTY COURT, CITY AND COUNTY OF DENVER, COLORADO

The People of the State of Colorado,
ex rel. Kenneth L. Smith,

v.

MICHAEL L. BENDER, et al.,
Defendants.

Kenneth L. Smith, *in propria persona*
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↑COURT USE ONLY↑

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Case No:

BRIEF IN SUPPORT OF CRIMINAL PROSECUTION OF NAMED DEFENDANTS

Respectfully submitted,
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ARGUMENT

The sole purpose of C.R.S. § 16-5-209 is to provide an effective remedy to victims of crimes that would otherwise go unpunished on account of sloth, indolence, political partisanship, and/or corruption on the part of state officials. This statute is the only reasonable assurance Coloradans have that this promise of the Constitution, as declared by the United States Supreme Court in the days of our state's infancy, will be kept:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.¹

While every breach of public trust is a matter for concern, few can be more serious than those committed by the men and women of our judiciary. As famed orator Daniel Webster, referred to as the “Defender of our Constitution,” once remarked:

There can be no office in which the sense of ... responsibility is more necessary than in that of a judge; especially of those judges who pass, in the last resort, on the lives, liberty, and property of every man. ... The judiciary power, on the other hand, acts directly on individuals. The injured may suffer without sympathy or the hope of redress. The last hope of the innocent, under accusation and in distress, is in the integrity of his judges. If this fail, all fails; and there is no remedy on this side the bar of Heaven.²

It can never be a trivial matter when a judge willfully lays her hand on the scales of Justice for her own pecuniary benefit and indeed, no man can be judge in his own cause. *Bonham's Case*, 8 *Co. Rep.* 114 [1610]. The State's refusal to prosecute a crime so notorious, so egregious, and so brazen in its scope as a judge deciding a case in which she is a proper party defendant can never be justified in a nation purporting to be governed by the rule of law.

¹ *United States v. Lee*, [106 U.S. 196, 220](#) (1882).

² Daniel Webster, *The Writings and Speeches of Daniel Webster*, (Boston: Little, Brown, & Co., 1851), Vol. III, pp. 6-7.

I. CRIMINAL LIABILITY OF THE NAMED JUSTICES

C.R.S. § 18-8-404(1) states: “A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly:

- (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or
- (b) Refrains from performing a duty imposed upon him by law; or
- (c) Violates any statute or lawfully adopted rule or regulation relating to his office.”

Dispensing with the obvious, Justices of the Colorado Supreme Court are “public servants,” as defined by C.R.S. § 18-8-901(3)(o). It is black-letter law that intent can be inferred by a trier of fact from the facts and circumstances of a case, *e.g.*, *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975), and extinguishment of a civil lawsuit that could result in an award of \$30,000,000 in compensatory and punitive damages certainly qualifies as a “benefit.”

A person acts "knowingly" with respect to conduct or to a circumstance described by a statute defining an offense “when he is aware that his conduct is of such nature or that such circumstance exists,” C.R.S. § 18-1-501(6), and an objectively inexplicable failure of the justices of our state’s highest court to properly interpret simple statutes certainly carries with it a presumption of knowing conduct. While the proposed defendants -- some of which boast degrees from Harvard (Mullarkey), Stanford (Kourlis), and Cal-Berkeley (Hobbs) Law Schools³ -- can legally raise the defense of gross incompetence, it is doubtful that any sane jury would seriously entertain it and in any event, such an admission would warrant removal from office. *Colo. Const. art. VI, § 23; see also, e.g., Mississippi Com’n on Judicial Performance v. Chinn*, 611 So.2d 849 (Miss. 1992).

³ See the Justices’ biographies at <http://www.courts.state.co.us/supct/supctjustices.htm>; (Kourlis’ bio is archived at <http://www.courts.state.co.us/supct/justices/kourlis.htm>).

Still, the most compelling evidence of the Justices' culpable mental state is found in their own published opinions. Understandably, they are replete with high-minded (and, technically correct) statements, which are tantamount to a confession. Justice Bender's dissent in *Julien* -- joined by Justice Martinez -- is especially remarkable in that regard:

A judge who is free of bias is a necessary prerequisite to maintaining public confidence in the judicial system because "[j]udicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based."

Judicial impartiality is so important to our system of justice that we become concerned if there is even an appearance of partiality....

The primary rationale for requiring disqualification on the basis of appearances "stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. Allegations of judicial bias may serve to erode this public confidence." ...

"It is fundamental to the vitality of our judicial system that litigants believe in the fairness of the process. An unfavorable decision perceived to be the result of an impartial consideration may be bearable, but **an unfavorable decision tainted by even the appearance of partiality cannot be condoned.**" ...

I do not stand alone in my belief. The Due Process Clause of the Constitution safeguards the right to impartial judges and requires recusal of judges who are or who appear to be biased. Consistent with this principle, a Colorado statute, procedural rules, and the Code of Judicial Conduct all provide guidelines to ensure that due process requirements are satisfied and that parties to civil and criminal cases are the beneficiaries of unassailably fair and impartial judges.⁴

The majority did not take issue with those commendable sentiments, stating: "If a judge has a bias or prejudice that in all probability will prevent him or her from dealing fairly with a party, the judge must not preside over the case."⁵ The Justices were therefore on notice that a problem existed -- one demanding the same circumspect analysis they performed in *Julien*.

⁴ *People v. Julien*, 47 P.3d 1194, 1201-02 (Colo. 2002) (Bender, J., dissenting) (quotations omitted; emphasis added).

⁵ *Id.* at 1197 (citation omitted).

The only remaining question is whether the perpetrators committed an act outside the scope of their legal authority, refrained from performing an affirmative legal duty, or violated rules relating to their office. And quite frankly, you have the pick of the litter.

A. C.R.S. § 18-4-404(1)(a): Unauthorized Exercise of Official Authority

1. The Justices Acted Without Subject-Matter Jurisdiction

It is axiomatic that issuance of a judicial decision is an act relating to the office of an Article VI judge. However, a judge's authority is circumscribed by the enabling legislation creating his or her office, and other strictures imposed by Colorado and federal law. Where authority to act is given to a particular officer via statute, its exercise by any other officer is forbidden by implication. *Atchison, T. & S. F. R. R. v. People*, 5 Colo. 60 (1879). Colorado statutory law vests the right and duty to hear an initial appeal from a final state district court decision (with certain [inapplicable] statutory exceptions) in the Colorado Court of Appeals. *C.R.S. § 13-2-102(1)*. As a matter of law, the Colorado Supreme Court has no more legal authority to decide such a matter than Governor Ritter.

While the Colorado Supreme Court had the right to interpret that statute pursuant to C.R.S. § 13-4-110(1)(a), they do not have the right thereunder to rewrite it to their liking. Article III of the Colorado Constitution was intended to prohibit the Court from writing laws under the guise of interpreting them. *Wimberly v. Ettenberg*, 194 Colo. 163, 167, 570 P.2d 535 (1977). Article VI, section 2 severely limited the Court's jurisdiction, which it could not expand on its own motion. *People ex rel. City of Aurora v. Smith*, 424 P.2d 772 (Colo. 1967); *Bill Dreiling Motor Co. v. Court of Appeals*, 468 P.2d 37 (Colo. 1970). Even the General Assembly was strictly prohibited from expanding its jurisdiction via legislation. *People v. Carter*, 527 P.2d 875 (Colo. 1974). As

a matter of law, this one is a slam-dunk: the Court’s action in hearing the case is indisputably “an act relating to [their] office but constituting an unauthorized exercise of [their] official function.”

2. The Justices Acted Without Personal Jurisdiction

Even if, *arguendo*, the Colorado Supreme Court could have heard the appeal, six of the seven individual Justices had an affirmative obligation to recuse themselves. It “certainly violates the Fourteenth Amendment ... to subject [a man’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The test the United States Supreme Court has consistently used in determining whether a judge has an interest in a case sufficient to constitutionally require recusal is “whether the ‘situation is one ‘which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true.’”” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (citations omitted). Colorado law goes even further, placing an affirmative statutory obligation upon judges to recuse: "Any judge who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." *C.R.S. § 16-6-201(2)* (emphasis supplied).

The only exception to this iron-clad rule is the “Rule of Necessity,” empowering a judge to hear a case when the “failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.” *United States v. Will*, 449 U.S. 200, 214 (1980) (internal quotation omitted). While not explicitly addressing application of the Rule, the *Will* Court outlined its well-known contours:

The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- where no provision is made for calling another in, or

where no one else can take his place -- it is his duty to hear and decide, however disagreeable it may be.⁶

“Where all are disqualified, none are disqualified.” *Pella v. American Bar Ass'n*, 542 F.2d 56, 59 (8th Cir. 1976). In most jurisdictions, this problem is easily avoided and therefore, the rule is strictly construed. See, e.g., *West Virginia v. Dietrick*, 444 S.E.2d 47 (W.Va. 1994) (husband got warrant from magistrate wife, who failed to contact circuit judge); *Huffman v. Judicial Discipline and Disability Cmte.*, 42 S.W.3d 386 (Ark. 2001) (judge holding stock in company seeking TRO was disciplined; the other judge was “ill”). And even where the case is close, responsible judges invariably choose in favor of recusal:

Resolution of this appeal thus requires us to interpret and evaluate the conduct and statements of two of our current colleagues. Should the petitioners prevail in this appeal, their litigation could proceed to trial and our two colleagues could be called as material witnesses. Under these unusual circumstances, although this is a close case, we believe that in the interests of justice it is better for us to resolve all doubts in favor of recusal.⁷

The “Rule of Necessity” cannot apply here by definition, as there is a statutory provision for calling other judges in. Specifically, judges of the Colorado Court of Appeals may “serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court,” *C.R.S. § 13-4-101*. And in Colorado, “any state court” apparently **means** “any state court.”⁸ In addition, “retired” judges and justices hear cases in Colorado all the time.

⁶ *Will*, 449 U.S. at 214 (quotation omitted).

⁷ *Lorenz v. New Hampshire Administrative Ofc. of the Courts*, 858 A.2d 546, 2004.NH.0000133 ¶ (N.H. 2004).

⁸ As the Colorado Supreme Court recently explained:

The court has a fundamental responsibility to interpret statutes in a way that gives effect to the General Assembly's intent in enacting that particular statute. Such is best achieved by looking at the language of the statute and giving the words their plain and ordinary meaning. If the statutory language unambiguously sets forth the legislative intent, other rules of statutory interpretation need not be employed. It is essential that courts refrain

See, e.g., *People v. Rossman*, 140 P.3d 172 (Colo.App. 2006) (Justice Howard Kirshbaum sat by assignment of the Chief Justice, pursuant to Colo. Const. art. VI, § 5(3) and § 24-51-1105). As at least sixteen and as many as three dozen experienced appellate judges were independent with respect to this case, and were legally qualified to sit in their stead, the Justices had a clear duty under the United States and Colorado constitutions and applicable statutory law to recuse themselves. Furthermore, they had a compelling moral reason to do so, as their predecessors cogently explained a century ago:

The first ideal in the administration of justice is that the judge must be free from bias and partiality. **Men are so agreed on this principle that any departure therefrom shocks their sense of justice.** ... We are equally certain that when ... a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.⁹

3. The Justices Are Not Legally “Authorized” to Commit a Federal Crime

Even if, *arguendo*, the Justices could have heard the appeal, their actions would still result in criminal liability under C.R.S. § 18-8-404. Specifically, the statute criminalizes acts “constituting an unauthorized exercise” of an official’s function. More to the point, **no Colorado official is legally “authorized” to commit a federal crime.**

from rendering opinions that are inconsistent with the legislative intent. Therefore, courts must construe the statute as a whole in order to give "consistent, harmonious and sensible effect to all its parts."

Carlson v. Ferris, 85 P.3d 504, 508 (Colo. 2003) (citations omitted).

⁹ *People ex rel. Burke v. District Court*, 60 Colo. 1, 4, 152 P. 149 (1915) (internal citation omitted; emphasis added).

Distilled to essentials, 18 U.S.C. § 242 makes it a federal crime for anyone to willfully subject another to the deprivation of federal rights while acting under color of law. The Supreme Court explained the requisite mental state by stating that

willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.¹⁰

Thus, once a federal “right has been defined and made specific by court decisions, the right is encompassed by § 242.” *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir. 1979). In the very year that Colorado became a state, the United States Supreme Court established that citizens have the federal right to have claims based on federal civil rights law heard in a state’s court of general jurisdiction, *Clafin v. Houseman*, 93 U.S. 130 (1876); see also, *Boulder Valley Sch. Dist. R-02 v. Price*, 805 P.2d 1085 (Colo. 1991) (adjudicating a federal rights claim). As *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (*per curiam*), deprived Movant of the right to have federal civil rights claims heard in the district courts of this state, the Justices acted willfully, as the word is defined in § 242. In the celebrated case of Judge David Lanier, prosecuted under this statute for forcing his penis down the throat of a comely litigant, the Sixth Circuit adds:

In *Screws*, the Court held that the reference to willfulness in § 242 requires proof of a specific intent or purpose “to deprive a person of a federal right made definite by decision or other rule of law.” It is not material whether or not the defendant was thinking in constitutional terms; rather, a defendant acts willfully when he “acts in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.”¹¹

The Lanier Court further addressed the question of what constitutes an act under color of law:

¹⁰ *Screws v. United States*, 325 U.S. 91, 105 (1945).

¹¹ *United States v. Lanier*, 33 F.3d 639, 1994.C06.40712, ¶ 75 (6th Cir. 1994) (Versuslaw) (citations omitted).

An act is under color of law when it constitutes a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." "Under 'color' of law [also] means under 'pretense' of law." "Acts of officers who undertake to perform their official duties are included..."¹²

Again as applied to the facts of this case, as the Lanier Court explains, the Justices' acts were done under color of law for purposes of § 242, irrespective of the true scope of their actual legal authority. Hence, **the mere issuance of the decision in *Smith v. Mullarkey* is conclusive proof of every element of the crime.**

As Movant's burden of demonstrating that a crime has been committed has thus been met, it serves no purpose to outline all the avenues under which a competent prosecutor would proceed and as such, all Movant need do is incorporate the Exhibits to the Motion itself by reference. In particular, Exhibit F is in essence a thirty-page single-spaced legal brief, outlining the extensive array of violations of federal and Colorado law committed by the Justices. But at the end of the day, one salient observation bears repeating:

When our judges cook the books, the stench is unmistakable. As [Professor Karl] Llewellyn remarked, "[s]uch action leaves the particular point moderately clear: **the court has wanted [the result] badly enough to lie to get it.**"¹³

II. CRIMINAL LIABILITY OF COURT OF APPEALS JUDGES

It is also undeniable that, but for the wrongful transfer of this case by a panel of the Colorado Court of Appeals, as alleged in Paragraph 47 of the Affidavit, this crime would never have been possible. In light of the clarity and simplicity of C.R.S. § 13-2-102(1), it is inconceivable that a competent appellate court judge would not have known that he or she had jurisdiction over the appeal as presented. In turn, this proves the existence of a criminal conspiracy, knowingly parti-

¹² *Id.* at ¶ 77 (citations omitted).

¹³ *Motion for Relief Pursuant to C.R.S. § 16-5-209*, Exhibit F at 1 (emphasis in original).

cipated in by four judges of the Court of Appeals, including most notably, Chief Judge Janice B. Davidson.¹⁴

Standing on its own, this act implicates the more serious federal offense of conspiracy against rights, as proscribed by 18 U.S.C. § 241. Review of an approved jury instruction in a very recent Tenth Circuit case should be instructive in this regard, as it indicates just what must be proven to warrant a criminal conviction (as genericized here):

ONE: The defendant whose case you are considering entered into a conspiracy with one or more persons to injure, oppress, threaten or intimidate [...];
TWO: The conspiracy was directed at the deprivation of a right which is secured or protected by the Constitution or laws of the United States [...];
THREE: The defendant acted willfully to deprive [the victim] of such right, and
FOUR: The defendant acted under color of law.

If you should find from your consideration of all the evidence as to each defendant that any of these elements has not been proved . . . beyond a reasonable doubt, then you should find the defendant not guilty.¹⁵

Of course, it is black-letter law that a conspiracy can be proven by either an agreement or an act in furtherance of the conspiracy, *see, e.g., United States v. Record*, 873 F.2d 1363 (10th Cir. 1989), even if the act is lawful in itself. *Black's Law Dictionary* 309 (6th ed. 1990). The right of access to the courts is certainly a right protected by federal law, and it was indisputably deprived here. Moreover, the defendants acted willfully and under color of law; accordingly, the legally unjustifiable transfer of the appeal to the Colorado Supreme Court, thereby facilitating the crime, is the “act in furtherance” converting this into a violation of Section 241. As the commission of a felony is certainly an unauthorized exercise of a public official’s function, criminal liability also

¹⁴ The names of individual Panel members are not known by Movant.

¹⁵ *United States v. LaVallee*, No. 03-1515, 2006.C10.0000277, ¶¶ 54-58 (10th Cir. 2006) (Ver-suslaw).

attaches to the Court of Appeals judges.

III. CRIMINAL LIABILITY OF JOHN SUTHERS AND FRIEDRICK HAINES

If it had not been done before, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) established beyond cavil that the Colorado Attorney General is not “the government’s” attorney, but the people’s attorney. In the course of that litigation, the Attorney General’s office made an array of damning admissions directly applicable to this matter.

First and foremost, the Attorney General concedes that his oath of office requires him to support the constitution. To wit, the Supreme Court was reminded that the Attorney General

shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter.¹⁶

Additionally, the faithful performance of those duties necessarily require independence from other branches of government:

The majority view recognizes the important watchdog role an independent Attorney General performs in state judgment. In this rule, the Attorney General may temper or even disregard an agency’s legal objectives, **and in rare cases may even justify legal action against a client.**¹⁷

Although the Attorney General does not have direct legal authority to prosecute a crime of this nature, *People ex rel. Tooley v. District Court*, 190 Colo. 486, 549 P.2d 774 (1976), its common-law authority with respect to this matter is otherwise boundless. The Attorney General can urge the district attorney to prosecute, join and/or even file an independent action pursuant to C.R.S. §

¹⁶ Answer Brief of Attorney General Ken Salazar, *Exhibit 1 at 12* (quoting Colo. Const., Art. XII, § 8). Movant’s copy was obtained by virtue of his role as an amicus in the *Davidson* case.

¹⁷ *Id.* at 3 (boldtype emphasis added; text underlined in original).

16-5-209 where necessary for the protection of the public interest.¹⁸ As the affirmative duty to protect the public interest thus attaches to the office and is “imposed upon him by law,” C.R.S. § 18-8-404 also reaches Attorney General Suthers and Deputy Attorney General Friedrich Haines, if they acted with the intent to obtain a benefit (avoidance of liability in tort) for another (the Justices being sued).

Assistant Attorney General Navarro and Solicitor General Gilbert go on to observe that when the Attorney General acts in his official capacity, he is not a garden-variety private attorney with an unswerving duty of loyalty to his client. Rather, “his highest responsibility [is] to the people of Colorado -- his protection of the public interest as expressed in the Colorado Constitution.”¹⁹ And while he does have an affirmative duty to defend public officials in civil litigation, C.R.S. § 24-31-101(4), like any other attorney, he can neither aid nor abet the commission of a crime.

A. The Attorney General’s Complicity in This Matter

The guilt of Attorney General Suthers and Deputy Attorney General Haines is predicated not on an act, but a deliberate omission. Both gentlemen are legally trained, and surely knew that the Justices had committed a federal offense in rendering a decision in an appeal wherein they had an obvious financial interest. As both men are members of the Supreme Court bar, they presumably knew that if they openly admitted to that Court that a manifest injustice had occurred, it would be far more inclined to correct the error than if they did not. *Cf., Salinas v. United States, 547 U.S. _____, 126 S.Ct. 1675 (2006)* (Solicitor General openly acknowledged error; the Court corrected it). But for the willful and knowing inaction of Messrs. Suthers and Haines, in violation of their

¹⁸ See, *Id.* at 17-24 and esp., p. 19 (in re: the Attorney General’s power “to bring any action which he deems necessary for protection of the public interest”).

¹⁹ *Id.* at 30.

clear duty under law, thereby exacerbating the crime, the injury Movant suffered probably would not have happened.

Mr. Haines' guilt in this matter is undeniable. He openly violated his oath of office, willfully ignored his affirmative obligation to inform the proper authorities that his clients had committed a federal criminal offense, and unlike our Solicitor General, actively aided and abetted the crime through his silence. Mr. Suthers' guilt is predicated on his knowledge of the affair, as imparted to him by Movant in personal discussion during a Republican Party county committee meeting in February, 2006 and in subsequent correspondence.

B. Misprision of Felony

On August 10, 1995, Michael J. Fortier was formally charged with misprision of a felony in connection with the bombing of the Murrah Building in Oklahoma City. *See, United States v. Fortier, 180 F.3d 1217 (10th Cir. 1999)*. That statute (18 U.S.C. § 4) states:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

It would be remarkable indeed if an average citizen like Fortier could be punished under this statute, but a former United States attorney and now state Attorney General such as John Suthers and an experienced deputy like Fred Haines are somehow exempt from this provision. As such, this qualifies as a breach of duty imposed upon them by law, and an independent basis for criminal prosecution.

IV. THE DENVER DISTRICT ATTORNEY'S REFUSAL TO PROSECUTE WAS DONE IN BAD FAITH

Those of us old enough to remember Watergate also remember its basic lesson: It wasn't the crime that got Nixon into trouble; it was the cover-up. Whether it was Zipper-gate, Plame-gate, or Pearly-gate (the pedophile priest scandal), bureaucracies reflexively attempt to cover up their scandals.

The Colorado Supreme Court is no different. It could have solved this problem by enforcing the Constitution as against its own underlings a decade ago, but chose a less principled path. The Justices knew that they could count on support from corrupt colleagues in the Tenth Circuit²⁰ and a feckless system of judicial discipline²¹ and criminal enforcement in their conscious attempts to paper over their crimes. And, as evidenced by Mr. Reeve's letter of February 28th, the Morrissey regime did not disappoint their black-robed benefactors.

A. Lying About the Facts and "Plausible Deniability"

Judicial misconduct is like a bear in the woods: while you may not always see him, when you find his paw-print in the mud, you know he's out there. While few litigants can ever expect to see a wad of bills being slipped under a robe, or the kind of judicial "favor-trading" described by Prof. Dershowitz,²² the paw-prints -- irrational decisions, in irreconcilable conflict with precedent

²⁰ See, *Disciplining Federal Judges*, at <http://home.earthlink.net/~19ranger57/federaljudges.html>.

²¹ See, *Disciplining Judges in Colorado*, at <http://home.earthlink.net/~19ranger57/jdcken.html>.

²² Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford U. Press, 2001), p. 116:

"It is widely known that many state court judges and some lower court judges play favorites among litigants and lawyers. Roy Cohn once famously quipped, "I don't care if my opponent knows the law, as long as I know the judge." In the old days, it was financial corruption -- cash changed hands. Then it became the "favor bank," in which

-- are generally unmistakable. Professor Karl Llewellyn bluntly observed that dishonest judges routinely engage in

manhandling ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.²³

When our judges cook the books, the stench is unmistakable. As Llewellyn remarked, “[s]uch action leaves the particular point moderately clear: the court has wanted [the result] badly enough to lie to get it.”²⁴

Mr. Reeve’s letter betrays unmistakable evidence of the fact that he received the same memo: To wit, if you assiduously ignore both the facts and the law, you can arrive at any conclusion you want to. Furthermore, in the odd chance that you are ever challenged on it, all you have to do is play dumb.

Notably, Reeve writes: “Without going into further legal analysis...”²⁵ This disingenuous phrase is a convenient responsibility-avoidance ploy. If he had performed reasonably competent legal analysis, he would have found that the availability of as many as three dozen non-conflicted judges meant that the Rule of Necessity didn’t apply and more importantly, that it was irrelevant to the issue of whether criminally sanctionable official misconduct had occurred. Surely, every attorney knows that state judges can be criminally prosecuted for their misconduct on the bench, *Ex parte Virginia*, 100 U.S. 339 (1880), and that no state court is at liberty to defy United States

personal favors are quietly stored and exchanged. I have seen it with my own eyes in the courts of Boston, New York, and elsewhere.”

²³ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.

²⁴ Llewellyn, *Common Law Tradition* at 135 (emphasis added).

²⁵ *Motion for Relief*, Exhibit G at 2.

Supreme Court precedent directly on-point.²⁶ And surely, every attorney knows that a state court can hear a claim based in federal law.²⁷ But even if, perchance, anyone could not know that and still pass the Colorado Bar examination, Movant made it a point to apprise him of that fact.²⁸

Deputy Attorney General Reeve goes on to state: “With respect to the reference in your letter to Mitch Morrissey dated January 26, 2007, to your being the victim of a “federal felony” by virtue of the actions of the Colorado Supreme Court, this office has jurisdiction under Colorado state law only and not the United States Code.”²⁹ This is, once again, a damning admission, as it is axiomatic that no Colorado public official is “authorized” to commit a federal felony. Either Mr. Reeve has blazed new trails in professional incompetence, or is being unduly economical with the truth.

As such, this Court’s attention is directed to *In re Pautler*, 47 P.3d 1175 (Colo. 2002), and the almost orgiastic display of high-minded hypocrisy displayed by Justice Kourlis. As she observed in *Pautler*, and was pointed out to Mr. Morrissey in a letter dated February 15, 2007:

Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest. ...

This court has spoken out strongly against misconduct by public officials who are lawyers.

“In the intervening years, this court has changed the Oath in a way that more specifically reflects the commitment to the basic precepts of the profession: fairness, courtesy, respect and honesty.” “To the extent [his] misconduct perpetuates the public's misperception of our profession, he breached public and professional trust.” “In sum, we agree with the

²⁶ The United States Supreme Court is the final judicial interpreter of the federal Constitution, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982), and in particular, its decisions interpreting the scope of the First Amendment's protections are binding.” *People v. Berger*, 185 Colo. 85, 89, 521 P.2d 1244 (1974).

²⁷ *Clafin, supra*; *Boulder Valley Sch. Dist R-02, supra*. (applying *Clafin*).

²⁸ *Motion for Relief*, Exhibit H at 1.

²⁹ *Motion for Relief*, Exhibit G at 2.

hearing board that deceitful conduct done knowingly or intentionally typically warrants suspension, or even disbarment.” “This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished.” “An attorney's post-incident conduct also bears upon aggravation and mitigation.” “The Rules of Professional Conduct apply to anyone licensed to practice law in Colorado.”³⁰

Deputy District Attorney Mark Pautler was suspended from the practice of law for deceiving a murder suspect. As Justice Kourlis observed,

In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. **Those standards apply regardless of motive.** Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender.³¹

If we are to believe Rebecca Love Kourlis, it is not merely unseemly but disgraceful for a lawyer to lie, even in a noble cause like catching a dangerous killer; how much more disgraceful can it be for a lawyer to lie in aiding and abetting a crime? To suggest that Mr. Reeve’s actions here constitute the employment of “such means as are consistent with Truth and Honor,” or are in any conceivable way treating the citizens he serves (to say nothing of “all persons whom I encounter through my practice of law”) “with fairness, courtesy, respect, and honesty”³² is to take indecent and even Clintonian liberties with the dictionary. If there were ever a case where a state district attorney acted in bad faith, this surely must be it.

³⁰ *Motion for Relief*, Exhibit E at 1-2 (emphasis in original).

³¹ *In re Pautler*, 47 P.3d at ___, 2002.CO.0000149 at ¶ 17 (Versuslaw) (emphasis added).

³² *Id.* at ¶ 16 (quoting the Colorado State Bar Oath of Admission (2002)).

CONCLUSION

As a self-confessed Republican, Movant draws inspiration from President Reagan, a man who understood the infeasible connection between human rights and freedom, that all human rights are individual in character, and the often vast gulf between a politician's words and his deeds. As he correctly noted, our Founding Fathers held that each individual has certain rights so basic and fundamental to his dignity as a human being that no government may violate them, and that we as citizens have a right to expect our courts to enforce them. "They proclaim the belief -- and represent a specific means of enforcing the belief -- that the individual comes first, [and] that the Government is the servant of the people, and not the other way around." *Ronald Reagan, Speech (to the National Strategy Forum), May 4, 1988.* But Reagan also observed that in the real world, many people do not enjoy these rights: Some governments "make elaborate claims that citizens under their rule enjoy human rights," ... but "[e]ven if words look good on paper, the absence of structural safeguards against abuse of power means they can be taken away as easily as they are allowed." *Ronald Reagan, Speech (Proclamation of Human Rights Day), Dec. 10, 1987.* It would be shocking indeed if Colorado was to join the list of Third World banana republics where this state of affairs exists.

Applied scrupulously, Colorado law is more than sufficient to provide an effective deterrent to crimes committed by public officials. But law is only as good as its enforcement, and if partisan prosecutors like Mitchell Morrissey are free to discard their oaths like cheap suits, and judges can violate their oaths as easily as breathing, there is no rule of law left to enforce.

If we are to remain as a free people, we cannot settle for anything less than first-class justice for all. This necessarily demands that courts and prosecutors must faithfully follow the law, even when it becomes politically inexpedient. Justice Brandeis minced no words:

Decency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself.³³

Accordingly, Movant asks that District Attorney Mitchell Morrissey be directed to prosecute the crime alleged to the fullest extent of the law, and that he be further directed to seek the maximum criminal penalty allowed by law, and to reject any plea bargain agreement that does not call for a minimum of six months' imprisonment. Denver's culture of corruption and comity must be broken, once and for all.

Respectfully submitted this 20th day of March, 2007,

Kenneth L. Smith, in propria persona
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2007, I served a copy of the foregoing upon all parties herein by hand-delivery to the following address:

Mr. Mitchell Morrissey, District Attorney
Mr. Henry R. Reeve, Deputy District Attorney
Second Judicial District
201 W. Colfax Ave.
Denver, Colorado 80202

³³ *Olmstead v. United States*, [277 U.S. 438, 485](#) (1928) (Brandeis, J., dissenting).