

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.*
-- Justice Rebecca Love Kourlis

Mr. Mitchell Morrissey, District Attorney
Second Judicial District
201 W. Colfax Avenue
Denver, Colorado 80202

Refusal to prosecute a crime for political reasons?
(Re: My complaint under C.R.S. 18-8-404)

Dear Mr. Morrissey:

I write today in relation to my recent request for criminal prosecution for first-degree official misconduct, submitted to Ms. Pat Wegner of your office. Either Ms. Wegner deliberately lied to me (in violation of Colo. RPC 8.4), or she really doesn't understand the law here, which is why it is imperative that you give this matter both immediate and thorough consideration.

While Justice Stewart spoke of the "aura of deism" on the bench,¹ when a judge is no longer acting ex cathedra, she becomes a mere interloper, indistinguishable from you or I. As I pointed out to Ms. Wegner, 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). Mary Mullarkey is not a demigod ... or even *Demi Moore*. Colorado statutory law vests the right and duty to hear an initial appeal (with certain [inapplicable] statutory exceptions) in the Colorado Court of Appeals -- **NOT** the Colorado Supreme Court. C.R.S. § 13-2-102(1).

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." That is enough on the face of it for a conviction, as it would be difficult to credibly maintain that a pack of Ivy League law school graduates was incapable of competently interpreting a plainly-written statute like C.R.S. § 13-2-102(1).

Your concern, as it should be, is first in ensuring that you have probable cause to convict on the facts to be developed at trial and second, in ascertaining whether there is a reasonable chance

¹*Stump v. Sparkman*, 435 U.S. 349, 369 (1978) (Stewart, J., dissenting).

of conviction. The first is established conclusively, inasmuch as “intent” can readily be inferred from the act, and every fact of consequence is amenable to judicial notice. Given that their only conceivable defense is incompetence so egregious as to warrant immediate impeachment and the defense itself, facially risible, you certainly have a reasonable chance of conviction. A failure to prosecute here would thus send the clear message that our judges are above the law, and no man can count on the protection of the law. Moreover, it would send the message that you have put partisan politics before your elevated duty to the public, evidencing a mental state that is not only knowing but intentional. *See, In re Pautler, 47 P.3d 1175 (Colo. 2002)*

I draw your attention to *Pautler*, as it is a veritable motherlode of high-minded and deliriously hypocritical rhetoric -- coming right from the defendants themselves. For example: “This court has spoken out strongly against misconduct by public officials who are lawyers.” Some of these quotes literally drip with red-hot irony:

“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 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.”

Face it: You can't get this kind of room service at the Ritz-Carlton.

As Ms. Wegner indicated that your office has the documents I sent, I will incorporate them by reference (available at <http://home.earthlink.net/~19ranger57/cosupremes.html>). As your website represents that “The District Attorney is the chief law enforcement officer in the City and County of Denver, and is responsible for prosecuting all of the felonies, misdemeanors and serious traffic offenses committed in the city,” the crime alleged herein is a Class 2 misdemeanor, and every act of consequence occurred within its borders, it is by definition “your problem.” Furthermore, you can rest assured that I will insist upon your attending to this matter. *C.R.S. § 16-5-209*.

I look forward to receiving your firm commitment to prosecute. Thank you for your prompt and diligent attention to this matter.

Kind regards,

Kenneth L. Smith, M.S., J.D.
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cc: as appropriate