

March 4, 2007

*Extremism in the defense of liberty is no vice;  
moderation in the pursuit of justice is no virtue.*  
-- Sen. Barry Goldwater

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

Complaint under C.R.S. § 18-8-404

Dear Mr. Reeve:

I am in receipt of your letter of the 28<sup>th</sup>, and was genuinely mystified by your response. Allow me to directly address your stated objection.

**Canon 3F is Legally Irrelevant**

Even if, *arguendo*, the Justices could have heard my appeal, their actions still result in criminal liability under C.R.S. § 18-8-404. First and foremost, the statute criminalizes acts “constituting an unauthorized exercise” of an official’s function. As it is axiomatic that no Colorado court is legally authorized to defy United States Supreme Court decisions interpreting the scope of First Amendment protections,<sup>1</sup> it logically follows that any act by a court abridging those protections -- such as an act denying a citizen’s right to have his federal civil rights claims heard in a state court of general jurisdiction<sup>2</sup> -- is by definition “an unauthorized exercise of [that judge’s] official function.”

Second, the statute criminalizes acts taken with the intent to benefit the official taking action. This almost never occurs in a judicial context, as judges are affirmatively required by statute to recuse themselves in situations where conflicts of interest might occur. However, as the Justices themselves freely acknowledged, a conflict of interest clearly existed in this case. Thus, even if they absolutely had to have decided the case under the Rule of Necessity, they could not decide it in a manner repugnant to the Constitution. As no group of seven judges with their education and experience would reasonably be expected to make such an unfathomable error by simple mistake, the only logical conclusion is that they acted to benefit themselves, by extinguishing tort claims large enough to have bankrupted them personally.

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<sup>1</sup> 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, (Colo. 1974).

<sup>2</sup> *Claflin v. Houseman*, 93 U.S. 130 (1876); see also, e.g., *Boulder Valley Sch. Dist. R-02 v. Price*, 805 P.2d 1085 (Colo. 1991) (adjudicating federal rights claim).

Both elements of the crime -- the intent to benefit themselves, and an unauthorized exercise of their official function -- are thus established and more importantly, would have been established irrespective of whether they could or could not have heard my appeal under Canon 3.F., as you erroneously asserted in your letter.

### **The Rule of Necessity Doesn't Apply, in Any Event**

As you well know, the United States Constitution, as authoritatively interpreted by the United States Supreme Court, is "the supreme Law of the Land." *U.S. Const. art. VI, § 2*; see, *Marbury v. Madison*, 5 U.S. 137 (1803). Similarly, the Colorado constitution and laws promulgated thereunder are the supreme law of the State, subject only to strictures lawfully imposed under the federal constitution. See, e.g., *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990) ("the Supremacy Clause maintains a hierarchy of laws that must be respected by all adjudicators sworn to uphold the Constitution"). Canons of judicial ethics are for the most part hortatory and most certainly, do not override United States Supreme Court opinions defining the contours of our portfolio of rights.

If you had read what I wrote with care, you would have noticed that I not only acknowledged the existence of the Rule of Necessity but also, established conclusively that it could not possibly apply in this case. At the price of quoting myself, I wrote as follows:

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*, 273 U.S. at 523. 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.<sup>3</sup>

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<sup>3</sup> *Will*, 449 U.S. at 214 (quotation omitted).

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.”<sup>4</sup> As all of the sixteen (or nineteen) Court of Appeals judges were independent with respect to this case, 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.<sup>5 6</sup>

It would be an odd inversion of our hierarchy of laws if a mere judicial canon could be read as to give a judge the authority to extinguish my First and Fourteenth Amendment right of access to the courts and to have my valid grievances heard by a fair and independent tribunal. Thus, as the suspects’ compliance with the Colorado Canons of Judicial Conduct is the excuse you have given for refusing to vindicate my rights under Colorado law (the last excuse was a lack of jurisdiction, which is equally risible) via the criminal prosecution of those who have violated those rights, and I have shown that it could not possibly apply here (the essential predicate to invoking the “Rule of Necessity” is that there be an actual “necessity,” and *C.R.S. § 13-4-101* plainly precludes it), you have no credible excuse for failing to file the information as requested.

I am not so naïve as to think that your reluctance to prosecute this matter is grounded in anything but the fear of retaliation by the judges’ guild and/or your boss’ loyalty to the Democratic Party. But like that noble barrister John Cooke, called upon by fate and duty to prosecute no less a man than Charles Stuart, King of England, the bell tolls for you. Like you, Cooke was called to prosecute an absolute monarch who presided over star chambers -- at enormous risk to himself.

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<sup>4</sup> 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 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).

<sup>5</sup> *People ex rel. Burke v. District Court*, 60 Colo. 1, 4, 152 P. 149 (1915) (internal citation omitted; emphasis added).

<sup>6</sup> Ken Smith, *Letter* (to Mitchell Morrissey), Jan. 26, 2007 at 2-3.

And like you, his first instinct was to run for cover. But he was also a man of sterling character, who understood and internalized the lawyer's higher calling:

He who knows anything about politics may easily foresee there is a great storm gathering in the kingdom against us lawyers. The only way to prevent it is to keep hold of the principles of right reason and dispatch poor men's causes free of charge this hard year. ... Let us contend earnestly for the truth rather than victory. As soon as we discover the cause is unjust let us drop it and advise our clients to make their peace. Let us never utter in court a word we believe untrue. If clients tell us they have no money, let us act for them for their thanks. Then, I warrant you, we shall be Parliament-proof and Kingdom-proof; the people will quickly recognize our usefulness, and an honest lawyer will be a necessary member of the Kingdom and the wisdom of the common law will be admired and honoured. But if we make disquiet and trouble for the poor, then believe me the Kingdom will be as weary of us as they ever were of bishops or arbitrary courts.<sup>7</sup>

While Cooke was but a commoner, his nobility spans the ages. He was the father of our Fifth Amendment right to freedom from self-incrimination. His *Poor Man's Case* was a primogenitor of the modern-day oath of office and the duty of pro bono representation. But his one indefatigable act of courage is the very basis for our modern law: that no man is above the law, and none are beyond its protection. Cooke argued *Rex v. Rex* when Rex was lex; without that innovation, tyrants like Hermann Goering, Augustus Pinochet, Slobodan Milosevic, and Saddam Hussein would have been beyond the reach of law, for "the King can do no wrong."

Many men are too small to muster that level of character within themselves, and many more never have the occasion to search for it. Few would lift a finger for what we swear in the abstract we would die many times over for: the blessings of liberty. But the price of liberty is eternal vigilance, and "the tree of liberty must be watered from time to time with the blood of patriots and tyrants."<sup>8</sup> John Cooke died the noblest death possible, defending the principles that defined his life and livelihood. As he wrote from prison while awaiting execution, "We fought for the public good and would have enfranchised the people and secured the welfare of the whole groaning creation, if the nation had not more delighted in servitude than in freedom."<sup>9</sup>

C.R.S. § 16-5-209 is a fairly robust statute, not only forcing you to defend your decision but also, empowering me to force you to explain yourself under oath in a courtroom under cross-examination. As such, I should not only be able to secure an order from the Court but also, be able to build a record which can be used for disciplinary proceedings in the Tenth Circuit. Please understand that I retain the prerogative to exhaust any and all remedies available to me under our law -- not merely against the Justices themselves, but as against anyone who would knowingly aid and abet them in their attempt to evade criminal responsibility for their unlawful acts.

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<sup>7</sup> Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (New York: Random House, 2005), at 107-08. Queen's Counsellor Robertson, an Australian, is one of the world's pre-eminent experts on international human rights law, having spent a lifetime in its advancement.

<sup>8</sup> Thomas Jefferson, Letter (to William Smith), 1787.

<sup>9</sup> Robertson, *id.* at dedication page.

With all due respect, Sir, I believe you are fresh out of excuses.

Unless I am advised in short order that an information will be filed in this matter, I will file an action in Denver County Court pursuant to that statute, in an attempt to finally put a merciful end to your agency's politically-motivated dissembling (see draft motion attached). Moreover, it will be as widely publicized as my skill and talents allow, so that the people of Colorado may rightly perceive the danger your agency's indolence poses to their most precious of liberties.

Thank you for your immediate attention to this matter.

Kind regards,

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