***NOTE*: THIS MOTION REQUIRES IMMEDIATE DISPOSITION (SEE C.R.C.P. 121 § 1-15.4) OR IRREPARABLE HARM WILL RESULT.**

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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Golden, CO 80401

Phone: (303) 526-5451

↑COURT USE ONLY↑

Case No: (to be determined)

MOTION FOR RELIEF PURSUANT TO C.R.S. § 16-5-209

COMES NOW Kenneth L. Smith (hereinafter, "Smith"), *in propria persona*, who states as follows in this Motion for Relief Pursuant to C.R.S. § 16-5-209:

1. There could be no crime more pernicious than those committed by public officials under color of law. As one federal appellate judge observed,

> …those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice."[1]

[1] *United States v. Janotti, 673 F.2d 578, 614 (3d Cir. 1982) (Aldisert, J., dissenting)* (quoting Montesquieu, *De l'Esprit des Lois* (1748)).

2. When a government official acts in willful defiance of his or her obligations under law, it is no mere crime … **it is "<u>treason</u> to the Constitution,"** *Cohens v. Virginia, 16 U.S. 264, 404 (1821) (emphasis added)*, for "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron, 358 U.S. 1, 18 (1958).*

3. It is further established beyond question that it "violates the Fourteenth Amendment … to subject [a person'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).* Similarly, the proposition that a Colorado court must hear a federal civil rights claim brought before it is etched in Constitutional stone. *Claflin v. Houseman, 93 U.S. 130 (1876).*

4. This is, at essence, a human rights case. As Ronald Reagan observed, some governments "make elaborate claims that citizens under their rule enjoy human rights," … but even "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.*

5. The photograph below, taken by Smith last month, is an apt metaphor for this case. In the American police state, our government is ever-attentive to even our most venial sins, crouching behind corners and unmarked cars to catch us in the act -- and indeed, the City and County of Denver was recently caught conducting extensive spying operations on its own law-abiding citizens, *see,* http://www.aclu.org/safefree/general/24287res20060227.html -- but when the government commits even the most heinous of crimes *against* the people, in plain sight, no one ever

seems to be watching….

6. In *Federalist No. 78*, Alexander Hamilton wrote, "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." C.R.S. § 16-5-209 was enacted to secure the public liberty, by forcing prosecutors to prosecute crimes committed by public officials.

7. C.R.S. § 16-5-209 states, in pertinent part:

> The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding, based on the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties, the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so.

8. 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.

9. On information and belief, this Court possesses jurisdiction over misdemeanor violations of Colorado law such as this, committed within the City and County of Denver.

10. On information and belief, based in extensive part upon representations on the agency's own website, "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." *http://www.denverda.org/Office_Overview.htm (visited Mar. 2, 2007), a PDF copy of which is submitted as Exhibit A.*

11. On information and belief, all acts and/or omissions complained of herein, as duly attested to in the Affidavit attached hereto directly relating to the criminal acts alleged, were done within the boundaries of the City and County of Denver.

12. A complaint, including an affidavit substantially similar to the one attached hereto, was filed with the District Attorney's office for the City and County of Denver on or about January 30, 2007 via e-mailed PDF files. Exhibit B.

13. On information and belief, every act of legal significance that would form the basis of the criminal complaint as proposed is not only alleged but amenable to judicial notice.

14. The legal basis for criminal liability was set out in a letter sent to the attention of Denver District Attorney Mitchell Morrissey, submitted as Exhibit C.

15. Despite the fact that every fact of consequence to criminal liability can be established via judicial notice and ostensibly occurred within the confines of the City and County of Denver, one Pat Wegner who is, on information and belief, an agent of the Denver District Attorney, asserted in subsequent correspondence: "The files you sent were received. There is no appropriate unit at

our office for your issues, as we have no regulatory authority over the named principals or the actions in question." *Pat Wegner, E-mail (to Ken Smith), Feb. 14, 2007 (original on file; copy in PDF format submitted as Exhibit D).*

16. On or about February 16, 2007, Smith hand-delivered a packet of information which, on information and belief, included Exhibits E (a letter to Mr. Morrissey) and F (a letter from Smith purporting to be to the Colorado Commission on Judicial Discipline, which was published on the Internet and subsequently modified slightly, so that the ultimate submission would be in compliance with the Colorado Constitution).

17. Public officials are instinctively disinclined to act against the powers and prerogatives of office, frequently dissembling to avoid the performance of their sworn duties, as is evidenced by the correspondence file related to this Motion and their attendant unreasonable delays.

18. In a letter dated February 28, 2007, one Henry R. Reeve, who is on information and belief a Deputy District Attorney for the City and County of Denver, asserted that the Rule of Necessity enshrined in Canon 3F of the Colorado Code of Judicial Conduct -- a hortatory proclamation, which does not even rise to the status of substantive law -- empowered the state supreme court to hear an appeal in which they had a material personal financial interest, despite the fact that at least sixteen non-conflicted judges were authorized under law to hear the case, in direct violation of the Due Process Clause of the federal Constitution. Exhibit G.

19. In a letter faxed to Reeve on Mar. 4, 2007, Smith respectfully observed that the Rule of Necessity cannot apply as a matter of law where non-conflicted judges are authorized by law to hear a matter -- quoting material Reeve claimed in his letter to have reviewed -- and importantly, quoting a United States Supreme Court pronouncement to this effect. Exhibit H.

20. In the aforementioned letter, Smith further pointed out that even if the Rule of Necessity could have applied, a crime had nonetheless been committed. Specifically, Smith observed:

> 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,[2] 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[3] -- 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.
>
> 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. [Exhibit H at 1-2.]

21. In that letter, Smith further intoned:

> 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. And like you, his first instinct was to run for

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[2]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).*

[3] *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).

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. Butif 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.[4]

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."[5] 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."[6] [Exhibit H at 3-4.]

22. It is a well-known fact that Colorado agencies routinely use their "discretion" to avoid prosecuting politically powerful people for even the most easily proven crimes, and a matter of

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[4]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. (Counsellor Robertson is a human rights lawyer of considerable international repute.)

[5] Thomas Jefferson, *Letter* (to William Smith), 1787.

[6] Robertson, *id.* at dedication page.

public record that the Colorado Legislature agrees, having passed C.R.S. § 16-5-209 as a remedy for the justly aggrieved citizen.

23. C.R.S. § 16-5-209 implicitly recognizes that many attorneys in public office are too small to muster John Cooke's level of character within themselves. In substance, it grants them cover, in the sense that they can plausibly say that they had 'no choice' under law but to prosecute criminal acts committed by fellow public officials.

24. Pursuant to C.R.S. § 16-5-209, this Court may order the district attorney to explain, in an open hearing attended by the victim and in which s/he is permitted to participate, to show cause as to why criminal charges have not been brought.

25. Time is of the essence in this matter, as on information and belief, the statute of limitation with respect to the alleged crime expires on or about April 17, 2007.

26. The submission of this matter to this Court was substantially delayed on account of foot-dragging and deliberate delay by the District Attorney, as explained in the Brief submitted with this motion.

26. Pertinent exhibits for this Motion, the required Affidavit, and the accompanying brief are submitted in a consolidated volume.

CONCLUSION

As our own Attorney General has stated on the campaign trail, his mission is to ensure that "no man is above the law, and no man is beyond its protection." But if the King and his courtiers are above the law, there can *be* no law, and every man is beyond its protection. Indeed, we citizens would thus be reduced to a base state of vassalage. *See, Anti-Federalist #84.* This state of affairs -- where the people are accountable to the government, but not vice versa -- surely cannot be.

Accordingly, it is just and proper that high and mighty public officials like Chief Justice Mary Mullarkey and Attorney General John Suthers should be called to the strictest account for willful misconduct committed in their role of public service; in a nation and state purporting to be governed by the rule of law, *Rex v. Rex* is not an absurdity, for Rex is not lex. Nothing short of imposition of substantial jail time will serve the public interest in ensuring that public officials will respect and follow the law.

WHEREFORE, Movant Smith requests the following relief:

- That this Court issue an order to Denver District Attorney Mitchell Morrissey and/or Deputy District Attorney Henry Reeve to attend a timely open hearing pursuant to C.R.S. 16-5-209, wherein good cause must be shown as to why criminal charges have not been brought, and where Smith may cross-examine them under oath;
- That this Court shall issue such orders as appropriate to remand the files in the cases of *Smith v. Mullarkey,* No. 02-cv-0127 (Denver Dist. Ct.), No. 04-CA-949 (Colo. Ct. App.), and No. 05-SA-238 (Colo.) to its custody, to facilitate said cross-examination;
- That this Court issue a non-delegable personal order to Denver District Attorney Mitchell Morrissey to prosecute this matter in this or any other appropriate Court to the fullest extent of the law, and
- In light of the indisputable nature of the salient facts and the irreparable injury inflicted by the defendants as alleged, that District Attorney Morrissey not be permitted to accept any plea-bargain that would allow for less than six months' imprisonment.

Respectfully submitted this 20th day of March, 2007.

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Phone: (303) 526-5451

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

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