

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (DME-KMT)

KENNETH L. SMITH,

Plaintiff,

v.

HON. MICHAEL L. BENDER, et al.,

Defendants.

MOTION FOR INJUNCTIVE AND/OR DECLARATORY RELIEF

Comes now plaintiff Kenneth L. Smith (“Smith”), *in propria persona*, who states as follows:

INTRODUCTION

If a cop gave your wife a traffic ticket because she refused to perform oral sex on him when he “requested” it, you would be understandably upset. And at the most abstract level, that’s what this entire controversy is all about: Smith’s refusal to acquiesce to a plainly illegal “request” that he submit to an act of mental rape. The law is clear: The government may not punish anyone for refusing to accede to an illegal demand made by an agent of the State. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Smith seeks fair compensation for injuries inflicted by the Defendants in retaliation for his decision to stand up for his rights under law.

This case is unusual, in the sense that every fact pertinent to the question of tort liability is an indelible part of the public record, and amenable to judicial notice. The motions submitted to the Court are intended to resolve these issues quickly, as a prelude to the reaching of a just and amicable settlement.

SUMMARY OF THE ARGUMENT

On or about August 16, 2005, the Colorado Court of Appeals referred Smith's appeal in the case styled *Smith v. Mullarkey*, 04-CA-0949 (Colo. Ct. App. filed May 14, 2004), to resolve an ostensible jurisdictional question. Justices of the Colorado Supreme Court, Defendants in this case, purported to decide that question, despite the fact that they were expressly precluded from so doing by Colorado statute. Colo. Rev. Stat. (hereinafter, "C.R.S.") § 16-6-201. Despite the fact that the 'decision' was void as a matter of law, *Davidson Chevrolet, Inc. v. City and County of Denver*, 330 P.2d 1116, 1118 (Colo. 1958), it has had the practical effect of 'shutting Smith out of court,' as the Colorado Court of Appeals' jurisdiction to decide the appeal has been suspended pending resolution of the jurisdictional question, and the power to resolve this difficulty lies solely with Chief Justice Mary Mullarkey. C.R.S. § 13-4-101.

The ubiquitous Section 1983 was enacted to combat a situation very much like the one now confronting this Court, wherein corrupt public officials ran roughshod over the rights of emancipated Negroes and their Republican allies, while law-enforcement officials turned a blind eye to their crimes. *See Pierson v. Ray*, 386 U.S. 547, 559-67 (1967) (Douglas, J., dissenting) (extensive discussion of the historical background and legislative history of Section 1983). Injunctive relief under 42 U.S.C. § 1983 is available upon a plaintiff's showing that he has been deprived of a federal right. *Olson v. Hart*, 965 F.2d 940, 942 (10th Cir. 1992). Smith has an indisputable right under the First and Fourteenth Amendments to have his valid grievances heard by a fair and impartial tribunal, *E.g., Tumey v. Ohio*, 273 U.S. 510, 523 (1927), to have federal claims decided in a state court of general jurisdiction, *Claflin v. Houseman*, 93 U.S. 130 (1876), and to due process of law and equal protection of the law. U.S. Const. amend. XIV § 1. Every fact pertinent to this Motion is judicially noticeable; this Court has been asked (in a separate motion) to do so.

Smith therefore asks for this Court to issue an order to Chief Justice Mullarkey¹ commanding that she submit the attached opinion for publication acknowledging that *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) is void, and that she convene a panel of judges chosen from the Colorado Court of Appeals to decide the jurisdictional question within ten days of the date of its issuance.

ARGUMENT

A party seeking injunctive relief must show: 1) a substantial likelihood that the movant eventually will prevail on the merits; 2) that the movant will suffer irreparable injury unless an injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and 4) that said injunction would not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). Because injunctive relief is an extraordinary remedy, “the right to relief must be clear and unequivocal.” *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1065-66 (10th Cir. 2001) (quotation omitted). A heightened burden applies to preliminary injunctions that would disturb the status quo, are mandatory as opposed to prohibitory, or provide the moving party with substantially all the relief the party may recover after a full trial on the merits. *See SCLC IFC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991).

¹ This could also be construed as a motion for relief in the nature of mandamus, insofar as it can be argued that the act to be done is a ministerial one for which there is no substantive discretion. *See In re Winn*, 213 U.S. 458 (1909). As this Court has jurisdiction to issue injunctive relief in any event, *Olson, supra*, the distinction is purely academic.

I. SMITH IS LIKELY TO PREVAIL ON THE MERITS.

A moving party demonstrates a substantial likelihood of prevailing on the merits of a claim by presenting “a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought.” *Autoskill, Inc. v. National Educational Support Systems, Inc.*, 994 F.2d 1476, 1487 (10th Cir. 1993). Here, every fact of legal consequence must be judicially noticed as a matter of law, *see Mot. For the Taking of Judicial Notice*, and accordingly, Smith is entitled as a matter of law to prevail.

While the Colorado Supreme Court had jurisdiction over the question of which court was to decide Smith’s appeal, C.R.S. § 13-4-102(1), Colorado statutory law also requires judges with a personal interest in a matter before their courts to recuse themselves. C.R.S. § 16-6-201. As the Justices’ decision was void as a matter of law, *Davidson Chevrolet, supra*, the matter in question has never been decided in accordance with law. In this case, the only way it can be decided is for this Court to issue an Order compelling Defendant Mary Mullarkey to do her sworn duty under C.R.S. § 13-4-101 to appoint a panel of substitute justices to decide the question. As Smith must eventually prevail as a matter of law, he is entitled to prevail in this Motion.

II. SMITH WILL SUFFER IRREPARABLE INJURY UNLESS AN INJUNCTION ISSUES.

Time is of the essence here. As this is written on the day we celebrate his life, it is particularly apropos to point out that Dr. Martin Luther King once famously observed, “justice too long delayed is justice denied.” *Martin L. King, Letter (to Bishop C.C.J. Carpenter, et al.)*, Apr. 16, 1963. When Smith passed the Colorado bar examination, he was the tender age of 38; last year, he celebrated his fiftieth birthday. How long can a man be expected to wait for justice?

Every day is an irreparable injury.

III. THE BALANCE OF HARMS FAVORS ISSUANCE OF AN INJUNCTION.

State officials are obliged to follow the law. “No 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). Indeed, there could be no offense more pernicious than that 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.”

United States v. Janotti, 673 F.2d 578, 614 (3d Cir. 1982) (Aldisert, J., dissenting; quoting Montesquieu, *De l'Esprit des Loix* (1748)). Justice Brandeis adds:

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.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting; emphasis added).

Injunction is an equitable remedy. *See, e.g., Reich v. Continental Casualty Co.*, 33 F. 3d 754, 756 (7th Cir. 1994). Accordingly, this Court must balance the harm Smith suffers due to a continuing denial of his right of access to the courts against the embarrassment a judge will suffer as a result of this Court recognizing that she has committed a federal crime.

A. Denying a Citizen Access To the Courts Is a Federal Crime

A century ago, Justice Moody described the right of access to the courts as “the right conservative of all other rights.” *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907). His reasoning is self-evident: if our courts have legal authority to refuse to hear your grievances, you

don't have any "rights" at all. As such, it is not without cause that the great Chief Justice Marshall described a judge's willful refusal to take jurisdiction over a case which he had a duty to hear as "treason to the constitution." *Cohens v. Virginia*, 16 U.S. 264, 404 (1821). But more to the point, it is a federal crime, as the Department of Justice methodically informs us:

DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States.

For the purpose of Section 242, acts under "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include ... judges, ...and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.

The offense is punishable by a range of imprisonment up to a life term, or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any.

TITLE 18, U.S.C., SECTION 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both...

<http://www.usdoj.gov/crt/crim/242fin.htm> (last visited Jan. 21, 2008; emphasis in original). The

Department of Justice was even gracious enough to furnish us with pattern jury instructions:

UNITED STATES' PROPOSED INSTRUCTION NO.

Elements

Four essential elements are required to be proved in order to establish the offense charged in these counts of the Indictment:

First: The person upon whom the alleged acts were committed must have been an inhabitant of a state, here, the State of [...].

Second: The defendant must have been acting under color of law, that is, while using or misusing power possessed by reason of his official position.

Third: The conduct of the defendant must have deprived the victim of some right secured or protected by the Constitution of the United States.

Fourth: The defendant must have intended to willfully deprive the named victim of the specified Constitutional right.

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00137.htm (last visited Jan. 21, 2008; copy on file).

B. The Criminal Case Against the Justices

Compared to the Lewis “Scooter” Libby perjury case, which cost \$1.4 million just to investigate, Josh Gerstein, ‘All Star Game’ Taking Shape in Libby’s Trial, *New York Sun*, Jan. 16, 2007, available at <http://www.nysun.com/article/46741>, prosecuting a crime like this is like shooting fish in a barrel. Smith was obviously an inhabitant of Colorado, and the defendant Justices were as obviously acting under color of law, as evidenced by their opinion, as published in the *Pacific Register*. For purposes of the criminal law, it doesn’t matter whether they had legal authority to decide Smith’s appeal or not -- acting “under color of law” also means using power possessed by reason of one’s official position, according to the pattern instructions. All that matters is that the Justices deprived Smith of a right “secured or protected by the Constitution or laws of the United States,” 18 U.S.C. § 242, and did so willfully.

That Smith has been deprived of a right secured and protected by the Constitution is a matter of black-letter law. In the year that Colorado became a state, the United States Supreme Court established that federal civil rights claims must be heard in a state court of general jurisdiction.

Clafin v. Houseman, 93 U.S. 130 (1876); *see also, Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912); *Howlett v. Rose*, 496 U.S. 356, 371 (1990). The Colorado Constitution “confers general jurisdiction upon [its] district courts, with original jurisdiction in all civil, probate, and criminal cases. This jurisdiction extends to cases involving federal rights, even when there is no governing Colorado authority.” *Telluride Co. v. Varley*, 934 P.2d 888, 890 (Colo. App. 1997) (citing *United States v. District Court*, 169 Colo. 555, 458 P.2d 760 (1969), *aff'd*, 401 U.S. 520 (1971)). Colorado courts have been hearing federal civil rights claims forever. *E.g., Boulder Valley Sch. Dist. R-02 v. Price*, 805 P.2d 1085 (Colo. 1991). To declare that Smith did not have a right to have federal civil rights claims heard in a Colorado district court is to create an entirely new legal doctrine: ‘*stare deceased*’.

Finally, under Section 242, the State does not have to prove that the Justices had intended to break the law but rather, that they committed the act upon which criminal liability is predicated. A ‘willful’ act is one done intentionally, knowingly, and purposely, without justifiable excuse -- and ignorance of the law is no excuse. Justice Rutledge explains:

Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it.

Screws v. United States, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring). Justice Douglas further elaborates:

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.

Screws, 325 U.S. at 105 (plurality opinion).

As the Sixth Circuit later explains, the decision in *Screws* established "that once a due process right has been defined and made specific by court decisions, the right is encompassed by § 242." *United States v. Lanier*, 33 F.3d 639, 1994 C06 40712, ¶ 69 (6th Cir. 1994) (Versuslaw). Hence, if all they intended to do is 'do the deed,' they have earned a vacation in 'Club Fed.'

In light of this analysis, the calculus leans strongly toward granting an injunction, as the only harm that would be suffered by the Defendants is in their suffering the embarrassment of having a court admit that there is probable cause that they committed a crime. Smith, on the other hand, would enjoy restoration of his most important of constitutional rights if an injunction issues.

IV. THE INJUNCTION WOULD NOT BE AVERSE TO THE PUBLIC INTEREST.

A. If This Court Won't Enforce the Law, Who Will?

The inexplicable refusal of federal and state law enforcement agencies to prosecute what can only be described as an 'open-and-shut case' is reminiscent of the appalling state of affairs in the Reconstruction South. As Justice Douglas reminds us:

A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that "[i]mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong., 1st Sess., 374. Mr. Rainey of South Carolina noted that "[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." *Id.*, at 394. Congressman Beatty of Ohio claimed that it was the duty of Congress to listen to the appeals of those who "by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, [cannot] obtain the rights and privileges due an American citizen" *Id.*, at 429. The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied.

Pierson v. Ray, 386 U.S. at 359-60 (Douglas, J., dissenting).

“Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.” This was the state of affairs in the South in 1868, and it *is* the state of affairs in Colorado in 2008. Certainly, we are entitled to expect better from law enforcement:

The United States Attorney is the representative not of an ordinary party to a controversy, but of **a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all**; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

Smith has exhausted every other avenue for remedy short of Smith and Wesson -- the United States Attorney, the Denver District Attorney, the Commission on Judicial Discipline, *Exhibit A*, and even the Inter-American Commission on Human Rights, *Smith v. United States*, Petition No. P-1096-06 (filed Oct. 13, 2006) -- to no avail. In effect, all Smith seeks is an order compelling Chief Justice Mullarkey to do what she swore an oath to do in the first place: to rationally apply existing law to an established set of facts, thereby doing equal justice to rich and poor. If Smith is not at least entitled to this, the highest and best use of our Bill of Rights is as toilet paper.

Surely, it would not be adverse to the public interest for Smith to receive this token measure of redress. To even suggest otherwise is absurd.

V. HEIGHTENED BURDEN ANALYSIS

As the four factors considered in a grant of an injunction thus weigh heavily in Smith’s favor, the injunction should be granted in any event. Accordingly, Smith will not burden the Court with unnecessary analysis.

VI. EQUITABLE CONSIDERATIONS PERTINENT TO THE SCOPE OF A REMEDY

Smith seeks a remedy designed to mitigate damages, to the extent possible. First, by requiring Chief Justice Mullarkey to appoint judges of the Colorado Court of Appeals to the Court for purposes of deciding the matter of jurisdiction over his appeal pursuant to C.R.S. § 13-4-110, he expects to breathe life into his underlying civil suit. Second, by requiring Ms. Mullarkey to issue an opinion retracting the original opinion issued in *Smith v. Mullarkey, supra.*, and explain why it is being retracted, the grievous injuries to his personal and professional reputation caused by that opinion -- one clearly issued in bad faith -- can to some extent be ameliorated.

A. A Judge's Personal Interest In a Case Often Translates into Fabricated Facts.

It's no great secret: "Many sins in the law have been at times swept under a jurisprudential rug in the guise of fact finding." *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1177 (3d Cir. 1979). Whenever a judge has a personal interest in a case, or even a strong opinion about what the outcome should be, the facts are often his first victims. Professor Karl Llewellyn observes that judges often

manhandl[e] ... 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.

Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133. And quite often, the dissenting judge lets us in on their nefarious little plot:

I have read, and re-read, and re-re-read, the majority's opinion. I don't know what was in the Kool-Aid they were drinking, but I believe that the opinion is one of the most factually misleading and legally pernicious cases to be produced by this Court . . . **If there is any light to be found in the majority's opinion, it is in the fact that it did not actually address the parties' legal arguments. I suspect it was because the majority opinion could not do so without either issuing an opinion unfavorable to the hospital, or issuing an opinion that was more factually and legally wrong.**

Riggs v. West Virginia University Hospitals, Inc., No. 33335 (W.Va. 2007) (Starcher, J., dissenting), *slip op.* (issued Dec. 26, 2007) at 1, 18 (emphasis added). And while it may be a joke to the judges, it is dead serious to those whose rights depend upon a fair and just decision.

B. The Justices Elided Smith's Legal Arguments In *Smith v. Mullarkey*.

As the Wyoming Supreme Court reminds us, "half the truth is often a lie in effect." *Twing v. Schott*, 338 P.2d 839, 841 (Wyo. 1959). In this case, in their effort to save their own skins from the consequences of their own criminal misconduct, the Mullarkey Court managed to elide every fact and argument deleterious to their position. There is *a reason* why judges are never allowed to sit in judgment of their own causes.

1. The Case Of the Missing Fact

By way of example, counsel has made much of the fact that Smith refused to acquiesce to the Defendants' "request" for a psychiatric examination. *State Defs.' Mot To Dismiss at 2*. What she doesn't tell this Court -- and, what the Mullarkey Court forgot to tell the world -- is why.

To understand why damages in this case are easily measured in the tens of millions of dollars, this Court needs to understand the lawsuit the Justices attempted to extinguish, and the facts they so carefully elided. Therein, Smith claimed not that he was denied a law license, but that he was denied a hearing on the matter of his admission to the Bar on account of his refusal to submit to a psychiatric examination to be paid for from his own pocket. Apart from procedural irregularities which were jurisdictional in nature (*e.g.*, the Examiners did not raise the issue of Smith's mental fitness in the manner required by Colo.R.Civ.P. 201.9), their demand plainly violated the federal Americans With Disabilities Act. *See Dare v. California*, 191 F.3d 1167 (9th Cir. 1999) (\$6

charge for handicapped placard violated the ADA). If a de minimis \$6 charge for a handicapped placard is forbidden, a \$6,000 bill for a psychiatric examination² certainly is. As consideration of his admission to the state's bar was conditioned on acquiescence to an illegal demand, Smith was being blackmailed by public officials.

This one fact transforms the entire case. Suddenly, it's not about a disgruntled bar applicant who was 'unhappy' with the Examiners' decision, but about a bar applicant who was denied due process of law and had a legal right to be unhappy. It also precipitates an entirely different legal analysis: Under *Carey v. Piphus*, 435 U.S. 247 (1978), all Smith is required to show was that he was entitled to a certain level of process, and he did not receive it. In short, this one indisputable fact entitles him to relief as a matter of law. Obviously, that is not a fact that you would expect to make its way into the opinion of a judge who could stand to lose her entire fortune if she told the world the truth.

In a sense, Ms. Wilkinson's faux pas underscores the reason why Smith asks for \$30,000,000 in compensatory and punitive damages in this action, and why that figure is so eminently reasonable. Her clients didn't merely deprive Smith of access to a lucrative career; they have destroyed his personal and professional reputation. When the *National Enquirer* accuses presidential candidate John Edwards of having a love child, Update: John Edwards Love Child Scandal!, *National Enquirer*, Dec. 19, 2007, or when the *Weekly World News* warns us that the world will end three weeks from Tuesday, most tend to 'consider the source.' Conversely, when an official statement is made by a state supreme court in West's *Pacific Reporter*, most people accept it as a reliable

² It is further noted here that the ADA's definition of "disabled" includes those who are treated as though they are disabled, irrespective of whether they are in fact disabled. When Smith could still afford it, he was represented by celebrated civil rights attorney David Lane, who brought this fact to the attention of the Colorado Supreme Court to no avail.

statement of fact. Given that being mentally unfit to be a lawyer is akin in most people's minds to being morally unfit to be a prostitute, and an Illinois jury awarded \$7 million in damages to Supreme Court Justice Robert Thomas in his libel suit against a newspaper that had reported in 2003 that Thomas had used his bar disciplinary authority for political purposes and threats, Dan Rozek, Illinois High Court Justice Awarded \$7 Million in Libel Suit, *Chicago Sun-Times*, Nov. 14, 2006, available at <http://www.suntimes.com/news/metro/135698,thomas111406a.article>, an award of \$70 million would not be unreasonable. After all, as their accusations are readily found by anyone who would perform a cursory background check, and given the widely-held prejudice against the mentally ill, this scurrilous accusation has already rendered it impossible for Smith to run for political office, and made it inordinately difficult for him to secure employment commensurate with his education and experience.

2. The Financial Consequences to the Justices

There is a certain divine justice in the fact that Judge Ebel is trying this case, as a decision by Judge Ebel is at the very heart of Smith's claim for relief. Specifically, he asks courts to follow this Circuit's decisions in *Horwitz v. Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir. 1987) and *Devous v. Campbell, No. 92-8063* (10th Cir. Jan. 13, 1994). *Horwitz* outlines three prerequisites for immunity, which the *Devous* panel interpreted:

In *Horwitz*, the Tenth Circuit discussed the three-part formula set forth by the Supreme Court in *Butz* for determining whether absolute immunity has attached to administrative officials performing functions analogous to those of Judges and prosecutors. For immunity to attach: (1) the officials' functions must be similar to those in the judicial process, (2) the officials' actions must be likely to result in civil lawsuits by disappointed litigants, and (3) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct. ... The focus of *Horwitz* is not whether a plaintiff was in fact provided with procedural safeguards required by law; **rather, it is whether sufficient procedural safeguards existed in the applicable regulatory framework so that a plaintiff can seek redress through regular channels if they are not complied with.**

Devous, No. 92-8063 at ___, 1994.C10.41454 at ¶ 12 (*Versuslaw*; *emphasis added*).

In his state district court case, Smith alleged with record support that procedural safeguards in the Colorado bar admission process were so scandalously inadequate that they couldn't even prevent a member of his Inquiry Panel from also sitting on his Hearing Panel, in direct and obvious violation of their own enabling statute. *Complaint, Docket #1 at 20*; *cf. Colo.R.Civ.P. 201.8* ("but in no event shall a member who has conducted a preliminary screening or inquiry of an applicant take any part in the consideration of a formal hearing involving the same applicant."). This, in turn, is dispositive under the rule of law Judge Ebel applied in *Devous*:

It was precisely because Wyoming law required certain procedural steps, and because Defendants failed to interpret the law correctly, that Plaintiff was able to gain redress for Defendants' unconstitutional actions in Wyoming courts prior to filing this suit. Thus, the safeguards set forth by Wyoming law and the Wyoming courts' willingness to enforce those safeguards in a manner consistent with due process were sufficient to control the unconstitutional conduct in this case.

Devous, No. 92-8063 at ___, 1994.C10.41454 at ¶ 12 (*emphasis added*).

The obvious distinction here is that, while Wyoming courts were willing to enforce the safeguards built into its law against its Board of Medical Examiners, there is not even a mechanism by which an independent Colorado court can force the Colorado Supreme Court or its agents on the Board of Law Examiners to comply with federal law. *Smith v. Mullarkey, supra* (Colorado Supreme Court claims "exclusive jurisdiction" over every aspect of bar admission). As such, under the *Horwitz/Devous* rule of law, applied in a situation legally identical to Smith's by the Second Circuit, *Diblasio v. Novello, 344 F.3d 292 (2nd Cir. 2003)*, immunity does not attach, and Smith is entitled to seek a remedy in tort.

The reasoning in *Horwitz* and *Devous* is take-it-to-the-bank rational; one is hardly surprised that an independent court like the one in *Diblasio* would follow it. Conversely, you would expect

a judge who has a personal interest in a case to manhandle the law and facts in an effort to ensure that it could never be applied, which is exactly what we see in *Smith v. Mullarkey*. Indeed, given the state of Tenth Circuit precedent, one would expect the courts of Colorado to do exactly what Judge Ebel did when he was on the *Devous* panel -- as the law is presumably so well-settled that *Devous* didn't even need to be published. (Certainly, *Smith* would have every right to be livid if Judge Ebel didn't do what Judge Ebel did on the *Devous* panel in this case when it comes down to a question of quasi-judicial immunity.) But in Llewellyn's words, the Mullarkey Court wanted the result so badly that they were willing to lie to get it. Llewellyn, at 135.

The named Defendants have acted in bad faith throughout this saga, and have even been aided and abetted by colleagues sympathetic to their position. Equity demands that they face the consequences of this bad faith, and that the broadest possible remedy be granted.

VII. COMPLIANCE WITH D.C. COLO.LCivR. 7.1:

Opposing counsel have indicated that they will oppose this Motion.

CONCLUSION

The named Defendants may be many things, but they are not stupid. Mary Mullarkey attended Harvard Law School. Mary J. Mullarkey, *Two Harvard Women: 1965 to Today*, 28 Harv. J. of Law & Gender 367 (Spring 2005). Rebecca Love Kourlis attended Stanford. <http://www.courts-state.co.us/supct/justices/kourlis.htm>. AG John Suthers graduated magna cum laude from Notre Dame, and authored a book on white-collar crime. http://www.ago.state.co.us/about_ag.cfm?cpyID=17. These people knew what they were doing. **They knew it was a crime.** And like the most hardened residents of Supermax, they thought they could get away with it.

As the statute of limitations is still open, whether they can remains to be seen.

For everyone involved, this incident has been a test of character. That John Suthers, first and foremost a politician, should fail is almost unremarkable. But the bell tolls for every one of you today. For Christine Wilkinson, it is to honor her statutory obligation not to defend public officials who have willfully and wantonly broken the law.³ For Marc Bonora, it is to honor his oath of office, referring this case to the Criminal Division for prosecution. And for this Court, it is a simple test of fealty to the law.

Every fact of legal consequence to this motion must be judicially noticed by this Court. Fed. R. Evid. 201(d). As the Justices' putative transfer of jurisdiction over Smith's appeal was void as a matter of law, *Davidson Chevrolet, supra.*, their decision in *Smith v. Mullarkey* could never have been lawfully entered. Smith has a right to have his appeal heard by a fair and independent tribunal in accordance with law, and this Court has been invested with the power to ensure that that happens. *Olson, supra.* Accordingly, Smith beseeches this Court to grant the remedy he is entitled to as a matter of law.

Smith therefore requests that this Court issue an order to Defendant Mary Mullarkey requiring her to do her sworn duty, pursuant to C.R.S. § 13-4-101, to appoint a panel of substitute justices from among now-sitting judges of the Colorado Court of Appeals to decide the matter of whether Smith's appeal is to be heard by that body, or the Court of Appeals, and to cause the statement as

³ Specifically, the law provides that a public entity shall be liable for:

- (a) The costs of the defense of any of its public employees, whether such defense is assumed by the public entity or handled by the legal staff of the public entity or by other counsel, in the discretion of the public entity, where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, **except where such act or omission is willful and wanton.**

C.R.S. § 24-10-110(1)(a) (emphasis added).

proposed in the Order to be published as an official record of the Colorado Supreme Court within ten days of the issuance of that Order. Also, if this Order can only be issued if this Court has jurisdiction over Chief Justice Mullarkey in her official capacity, Smith asks further leave to effect appropriate service within a reasonable time pursuant to Fed. R. Evid. 15(a).⁴

Respectfully submitted this 28th day of January, 2008.

/s/ _____
Kenneth L. Smith, in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401-7044
Ph: (303) 526-5451
faster_pussycat@earthlink.net

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2008, I served a copy of the foregoing upon all parties (including all attachments, where appropriate) herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

Marc A. Bonora
c/o United States Dept. of Justice
1225 - 17th St., Suite 700
Denver, Colorado 80202

Christine Wilkinson
c/o Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203,

the last known mailing address.

Kenneth L. Smith

⁴ As Smith would be at liberty to file a separate lawsuit to achieve this end and have the two suits consolidated anyway, the interests of justice and judicial economy strongly favor a grant of relief as requested here.