

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.

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**REPLY IN SUPPORT OF MOTION FOR DECLARATORY RELIEF  
UNDER 28 U.S.C. § 2201(a)**

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

**SUMMARY OF THE ARGUMENT**

Either Defendant United States of America (United States) is in material compliance with the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992) (hereinafter, “the Covenant”), or it is not. As an intended beneficiary whose rights have vested through the filing of this suit, Smith has a right to have this Court declare his rights thereunder. U.S. Const. art III, § 2, cl. 1; *Head Money Cases*, 112 U.S. 580, 598-99 (1884). **Opposing counsel does not dispute this.**

As the only object and purpose of the Covenant was to serve as an enforceable human rights treaty, *Mot. at 13-14*, and the “non-self-execution” declaration referred to by Defendant, *Def.’s Resp. at 3*, renders it unenforceable, the only question is whether the declaration is void. Under international law, the declaration cannot be a part of the treaty by definition, Vienna Convention

on the Law of Treaties, art. 19, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (specifying conditions under which signatory States can submit reservations<sup>1</sup>); thus, it is void under domestic law, as the President and Senate (either alone, or in tandem) have no statutory authority under the Constitution to promulgate legislation with purely domestic effect. *Cf.* U.S. Const. art. I, § 7; art. II, § 2, cl. 2. **Again, opposing counsel does not dispute this.**

Rather, Defendant United States asserts that Smith's argument is somehow mooted because, in its solemn estimation, he has "exercised the right he claims to have been denied." *Def.'s Resp. at 1*. As Smith seeks declaratory relief -- which is forward-looking, by definition -- the question of whether he may or may not have suffered a legally cognizable harm in the past is irrelevant to this specific motion. Smith's future enjoyment of his portfolio of inalienable human rights is at stake, and a formal declaration from this Court that Defendant United States is in material breach of the Covenant is likely to have the intended salutary effect.

In addition, Defendant United States contends that the Covenant is not binding on the federal courts, and this somehow divests this Court of jurisdiction. *Def.'s Resp. at 3*. Defendant fails to explain the mechanism by which this should occur; moreover, Defendant relies on a 2002 Tenth Circuit case which was effectively overruled by the United States Supreme Court.

## **I. DEFENDANT UNITED STATES HAS CONFESSED TO THE MOTION.**

As was explained in the Motion, a reservation incompatible with the object and purpose of a treaty is severed from the treaty. *Mot. at 9-11*. As Defendant United States is therefore obliged to perform the treaty without the effect of the declaration, it is in material breach if, in its domes-

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<sup>1</sup> Under international law, the 'declaration' is construed as a reservation. Vienna Convention, art. 1, sec. 1(b).

tic courts, the declaration has but a spark of incipience.

For this reason, Smith doesn't *need* to care whether *Hain v. Gibson*, 287 F.3d 1224 (10<sup>th</sup> Cir. 2002), is controlling. The object and purpose of the Covenant is to provide enforceable rights to citizens of signatory States, and the United States failed to furnish a mechanism for enforcement on account of the fact that our courts have deemed it to be a legal nullity, then we are in material breach of the Covenant, and Smith is entitled to the relief he seeks. Conversely, if the courts are still at liberty to rule that the self-execution declaration is void and do so, Smith is entitled to the *other* relief he seeks.

#### **A. Heads, I Win; Tails, You Lose**

While no one disputes this Court's obligation to follow precedent, this Circuit's 'precedent on precedent' requires that it take a more nuanced tack. Specifically, precedent "includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." *United States v. Meyers*, 200 F.3d 715, 720 (10<sup>th</sup> Cir. 2000). And this is where things get murky.

Indeed, it is difficult to ascertain the extent to which *Hain*, relied on Defendant United States, even survives as a viable precedent in light of the subsequent contrary decision by the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). The Court relied heavily on the Covenant and its near-universal acceptance in reaching its conclusion that the juvenile death penalty constituted "cruel and unusual punishment." *Id.*, *slip op.* at 22-23. While it might be true that the Covenant does not 'create new causes of action,' it doesn't have to; all it would need to do to serve Smith's needs -- and, prevent the United States from being in material breach -- is eradicate the common-law concept of official immunities from damage awards for human rights violations.

It has been black-letter law for two centuries that this court must interpret domestic law in a way that harmonizes it with our international obligations, if at all possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Accordingly, this Court can interpret Defendant United States' obligations to Smith under the Constitution by invoking the reasoning of *Roper*: Even if the Covenant is not "binding," it is bound by precedent to interpret domestic law in conformance with the dictates of international law. To wit, just as evolving international standards altered our domestic definition of "cruel and unusual punishment" in *Roper*, evolving international standards of the sovereign's duty to the citizen alter our domestic definitions of sovereign immunity and/or judicial immunity. And, as these immunities are common-law doctrines, nowhere to be found in the Constitution, this change is a predictable and expected consequence of the common law.

On the other hand, if we assume, *arguendo*, that *Hain* were to be read as Defendant asserts, it engenders an array of embarrassing diplomatic difficulties, which the "Rule of Charming Betsy" was intended to avert. In effect, Defendant United States is asking this Court to bless its confession of the commission of a diplomatic fraud worthy of the erstwhile Soviet Union. The United Nations Human Rights Committee explains:

Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

Hum. Rts. Comm. General Comment No. 24 (52), para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

If *Hain* is binding law, then Defendant United States has pulled off the trifecta. The non-self-execution declaration has essentially rendered all Covenant-based rights ineffective and prohibits

Americans from suing to enforce them in domestic courts. And as Defendant United States has failed to adopt the first Optional Protocol, all essential elements of the Covenant guarantees have been removed. Given the public statements of both Congress and our diplomatic corps, as were brought to this Court's attention in the Motion, the suggestion that Congress intended our ratification of the Covenant to be a cynical and transparent fraud is risible.

As has been said, for Smith's purposes, it is a matter of six-of-one, a-half-dozen-of-the-other: If this Court follows the Supreme Court's cues in *Roper*, Smith is entitled to the other relief he seeks in this case. If this Court follows *Hain* in response to Defendant United States' urging, he is entitled to an immediate declaration that it is in material breach.

Unfortunately, none of the other courts offer an abundance of bankable guidance as to what the answer ought to be. Since *Roper*, *Hain* has become a complete legal nullity on this subject (search parameters of "287 F.3d 1224 and Covenant" and date after Mar. 1, 2005 on Versuslaw turned up no decisions, either in the Tenth Circuit district courts' database or the Circuits). The Covenant is used reliably as a source of norms of international law, e.g., *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), which would suggest that this Court should follow *Roper*. Further, the Defendant offers no post-*Roper* guidance to speak of.

## **II. THE RIGHT OF ACCESS TO THE COURTS MEANS MORE THAN THE RIGHT TO WALK IN THE DOOR AND PAY \$350.**

Counsel asserts, and Smith would not dispute, that mere "dissatisfaction with legal rulings is not a denial of access to the courts." *Def.'s Resp. at 2*. However, as Judge Alex Kozinski of the Ninth Circuit observes, some "legal rulings" can be egregious enough to constitute sanctionable misconduct:

Judicial action taken without any arguable legal basis ... is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." See 28 U.S.C. § 351 (a); *Shaman, Lubet & Alfini, supra*. § 2.02, at 37 ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); *In re Quirk*, 705 So. 2d 172, 178 (La. 1997) ("**A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct.**"(citing *Jeffrey M. Shaman, Judicial Ethics*. 2 *Geo. J. Legal Ethics* 1, 9 (1988))).

*In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting; emphasis added).

Everyone would agree with Judge Kozinski that there is a palpable difference between a close ruling that could have gone either way and a ruling so bizarre that no one could rationally defend it. Moreover, even a debatable decision made under cloud of suspicion is indefensible. We need only turn to one of the Defendants, Justice Michael Bender, for an explanation:

Avoiding even the appearance of bias also serves to assure parties to particular cases that they are, indeed, receiving a fair trial. "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. "[T]he Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, `justice must satisfy the appearance of justice."

*People v. Julien*, 47 P.3d 1194, 2002.CO.0000179 ¶¶ 78, 80 (Colo. 2002) (Bender, J., dissenting; citations omitted). "Justice must satisfy the appearance of justice." Lord Chief Justice Goddard adds: "Time and again this court has said that justice must not only be done but must manifestly be seen to be done. . . ." *Rex v. Justices of Bodmin*, 1 K. B. 321, 325 (1947).

### A. Mere Access In the Theoretical Sense Is Not Enough.

Recognizing this, the framers of the Covenant understood that a mere right to appear before an agent of the State is insufficient to protect inalienable human rights. The Covenant proclaims that everyone has the right to have grievances decided in “a fair and public hearing by a competent, independent and impartial tribunal established by law,” Covenant, art. 14(1), and that all persons “are equal before the law and are entitled without any discrimination to the equal protection of the law.” *Id.*, art. 26. As former American Bar Association president Robert Grey, speaking in a publication of the United States Department of State, “it is *the results* that flow from the decisions made by the courts that give [“access to the courts”] meaning.” Robert J. Grey, Access To the Courts: Equal Justice For All, *eJournalUSA* (United States Dept. of State), Aug. 2004, available at <http://usinfo.state.gov/journals/itdhr/0804/ijde/ijde0804.htm> (emphasis added).

With that in mind, let us examine the judicial conduct Smith is ‘dissatisfied’ with. The facts are all judicially noticeable. In both *Smith v. Mullarkey*, No. 00-N-2225 (D.Colo. filed Nov. 7, 2000) and its materially identical twin, *Smith v. Mullarkey*, No. 02-cv-127 (Denver Dist. Ct. filed Jan. 12, 2002), Smith alleged that he was wrongfully deprived of his constitutional right to procedural due process during his bar admission proceeding, and that a bar admission rule that affected him was unconstitutional. Moreover, this Court can take judicial notice of the fact that the Tenth Circuit was aware of this legally dispositive fact:

...[Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff’s constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**

*Smith v. Mullarkey*, 67 Fed.Appx. 535, slip op. at 4 (10<sup>th</sup> Cir. Jun. 11, 2003) (emphasis added).

Despite the fact that Smith's right to have his claims heard in federal court was recognized by United States Supreme Court, *Carey v. Phipus*, 435 U.S. 247 (1978), *District of Columbia Court of Appeals v. Feldman*; 460 U.S. 462, 482-83 (1983) (bar applicant's right to challenge constitutionality of a state bar admission statute), and published Tenth Circuit decisions, *Roe v. Ogden*, 253 F.3d 1225 (10<sup>th</sup> Cir. 2001) (prospective bar applicants also have standing), the judges of the Tenth Circuit refused to hear his claims on the grounds of a putative lack of jurisdiction, *Smith v. Mullarkey*, 67 Fed.Appx, slip op. at 7, in an "unpublished" decision. Despite the fact that Smith had a right to have federal civil rights claims heard in a state court of general jurisdiction, *Clafin v. Houseman*, 93 U.S. 130 (1876) (re: availability of state courts to vindicate federal claims), in front of a fair and independent tribunal, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), justices of the Colorado Supreme Court who were defendants in the case decided the matter without jurisdiction to do so. See *Pl.'s Resp. to State Defs.' Mot. To Dismiss at 1-2*. The bottom-line question here is whether Smith received the minimum access to the courts -- the right to be heard by a fair and independent tribunal, and the right to the same law that the plaintiffs in *Carey*, *Feldman*, *Clafin*, *Tumey*, and *Roe v. Ogden* enjoyed -- and the only conceivable answer is no. As Mr. Grey put it, **while speaking on behalf of the Defendant**, it's "the results" that count.

As his rights under the Covenant have thus been violated, counsel's almost incomprehensible psycho-babble about Smith's "argument being moot because he has exercised the right he claims to have been denied" is as irrelevant as it is pointless.

## **B. Bad Law 101**

At this point, it makes sense to point out a couple of stray errors in Defendant's responsive brief, to prevent this Court from being misled.

## 1. Judicial Notice

Defendant United States' opening salvo proclaimed:

As noted by the Colorado Supreme Court in one of Plaintiff's recent cases, *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005), as to which the Court may take judicial notice pursuant to Federal Rule of Evidence 201(b)(2), rather than comply with the procedures of the Bar to assess Plaintiff's fitness to practice law, "he filed a series of lawsuits, first in federal district court and then in Denver District Court."

*Def.'s Resp. at 2.* This is just bad law. By taking judicial notice of the fact that a document was published by another court, that court does not accept the other court's findings of fact as true.

*Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003). Besides, in light of judicially noticeable facts this Court is *required* to accept as true pursuant to Fed. R. Evid. 201(d), it cannot place any weight on the Colorado Supreme Court's assertions in that case, as the justices had absolutely no jurisdiction over the matter in the first place. *See Mot. for Taking Of Judicial Notice.*

## 2. The Citation Of *Harrington v. Wilson*

In context, counsel's citation of an unpublished District Court decision, *Harrington v. Wilson*, *Def.'s Resp. at 2* --which, in substance, isn't even the opinion of an Article III judge -- borders on the surreal. A short excerpt from Smith's amicus brief in the *Harrington* appeal reveals the tale of the tape:

Justice Douglas wrote, "[i]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). This axiom is an indispensable feature of Anglo-American jurisprudence, as Lord Chief Justice Goddard adds: "Time and again this court has said that justice must not only be done but must manifestly be seen to be done. . . ." *Rex v. Justices of Bodmin*, (1947) 1 K. B. 321, 325.

From a procedural standpoint, it is difficult to imagine a more shameful spectacle than *Harrington v. Wilson*. In adopting the magistrate's 41-page recommendations without

independent findings of fact or comment, the Court dismissed Mr. Harrington's complaint sua sponte, not bothering to wait for his response, as was required by law. When Mr. Harrington objected, submitting a competently written, fully-hyperlinked brief -- attaching thousands of pages' worth of opinions, as required by Court electronic filing protocols -- in a timely manner, Judge Nottingham acknowledged that he didn't bother to read it, exclaiming that it "is impossible to follow or make sense of this heap." Doc. #80 at 2. Adding insult to injury, he then struck the objections from the record in an apparent fit of pique, gratuitously berating Mr. Harrington. Id. **It shatters the bounds of credulity to even suggest that Mr. Harrington's objections were granted cursory consideration.**

Br. of Amicus Curiae Kenneth L. Smith, *Harrington v. Wilson*, No. 06-1418 (10<sup>th</sup> Cir. filed Jan. 7, 2007) at 1-2 (emphasis added, footnotes elided). *See also*, Kenneth L. Smith, Letter (accompanying Tenth Circuit ethics complaint), Feb. 6, 2007, Exhibit A, and Smith, Petition for Review By the Judicial Council, Apr. 11, 2007, Exhibit B (more detailed critique).

If counsel's point is that no American is guaranteed the bare minimum of access to the courts required under the Covenant, *Harrington* is an excellent object lesson. Beyond that, it is difficult to imagine what value it has -- as the declarations of a magistrate who has no Article III authority whatsoever certainly cannot be relied on as precedent in this or any other court.

## CONCLUSION

The *Cleveland Plain-Dealer* put this dispute in its proper perspective:

Geneva France walked out of federal prison with \$68 and a bus ticket home. That's all the government had to offer a woman who had served 16 months of a decade-long prison sentence for a crime she didn't commit.

The mother of three returned to her family, but her youngest child -- who was 18 months old when France was sent to prison -- didn't recognize her.

And France, 25, had no home to return to.

Her landlord had evicted her from the rental during her incarceration, and everything she owned had been tossed on the street.

France's case is the nightmare scenario for a system that critics say sometimes dispenses justice differently for rich and poor.

It shows how easy it is for the government to get convictions in cases built on shaky investigations.

Defense attorneys say a street-smart but dishonest informant and a federal agent working without oversight manipulated the system to convict France and dozens of others.

"They stole the truth," France said. "I don't think I'll ever trust people again. It's too hard."

"I don't know how a human being with a heart could stand up there and lie about another person," France said. "They stole part of my life."

John Caniglia, Mansfield Woman Free After Drug Conviction Based On Lies, *Cleveland Plain-Dealer*, Tuesday, January 22, 2008.

If this had happened *in* Geneva *or* France, she would have received fair compensation, Covenant, art. 14, sec. 6, but in America, all Ms. France gets is a bus ticket.

The International Covenant on Civil and Political Rights establishes minimum standards of human decency that every civilized nation owes to its citizens. But as Ronald Reagan reminds us, 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. What would the Gipper -- the man who appointed you, Judge Ebel -- counsel you to do right now?

Defendant United States has failed to mount any opposition to the essential claims advanced in this Motion: that Smith is an intended beneficiary of the Covenant who faces a clear and present danger of being victimized by arbitrary and capricious judicial rulings violative of the Covenant, see, Mot. For Relief Pursuant To 28 U.S.C. § 292; he is thus entitled as a matter of law to a

formal declaration of his rights thereunder. Consequently, this Court has a choice: to declare the Defendant United States in material breach, or declare that no individual defendant is entitled to any form of immunity for the legal wrongs that Smith alleges have been committed against him. It no longer has the luxury of sitting on the fence.

Those of us whose lives have been stolen have a right to an answer.

Respectfully submitted this 28<sup>th</sup> day of January, 2008.

/s/ \_\_\_\_\_  
Kenneth L. Smith, in propria persona  
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### **CERTIFICATE OF SERVICE**

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

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c/o United States Dept. of Justice  
1225 - 17<sup>th</sup> St., Suite 700  
Denver, Colorado 80202

Christine Wilkinson  
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the last known mailing address.

\_\_\_\_\_  
Kenneth L. Smith