IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WESLEY C. SMITH Plaintiff	)	
v.	)	CASE NO: 1:07-CV-1002
Gaylord L. Finch Jr. Individually and in his official capacity as Fairfax Circuit Court Judge; Dawn Butorac, Individually and as an attorney for the Office of the Public Defender Office of the Public Defender	)	
Jointly and Severally Defendants	)	

#2 - REPLY

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"Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstad v. United States, (1928) 277 U.S. 438

INTRODUCTION

1. This is a civil rights action, seeking equitable relief, declaratory relief, nominal damages and other relief to prevent and/or redress the deprivation under color of Virginia law of Plaintiff's rights, privileges and immunities under the United States and Virginia Constitutions. Defendants have actually deprived the Plaintiff of his constitutional rights.

Facts

2. Mr. Ingold claims that I did not present sufficient facts, however he is being intentionally misleading.

3. It is well established that defendants in criminal cases are entitled to effective counsel and that the state must provide effective counsel if the defendant is unable to afford one. Ms. Butorac was appointed to represent me and had an obligation to make a good faith effort to defend me.

4. As a professional attorney, one who had graduated from law school and one who passed the bar exam it is reasonable to conclude that Ms. Butorac should have been aware of her responsibility to the people she represents as well as basic legal concepts and case law applicable to my case.

5. On July 1st 2005, I wrote to Ms. Butorac and referenced facts that demonstrated I had a right to attend my son's class party and even cited Reed v. Commonwealth which indicates as long as I thought I had a right to be there I was not guilty of criminal trespass. Ms. Butorac should have known this defense for herself, but certainly was aware of it after I pointed it out. A copy of my letter is attached.

> "Moreover, a good faith claim of right to be on the premises negates the requisite intent to engage in a criminal trespass." Id. Criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent, and **if the act prohibited is committed in good faith under claim of right . . . although the accused is mistaken as to his right, unless it is committed with force . . . no conviction will lie**. Reed v. Commonwealth, 6 Va. App. 65, 71, 366 S.E.2d 274, 278

6. It is simply inexcusable for Ms. Butorac to not present this valid legal defense which would have the charge dismissed without a trial - especially when specifically requested to do so. Ms. Butorac's refusal to present this denied me effective counsel and thus violated my right to counsel. Such a right was clearly established at the time. She does not have any immunity for such an act:

> That being said, the Court reviewed its immunity decisions and the history of the Civil Rights Act of 1871 [also known as the Klu Klux Klan Act]. Quoting from Imbler v Pachtman, 424 US 409 at 421 (1976), the Court noted that § 1983 immunities are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court offered that it next considers whether Civil Rights Act history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. In Tower, the Court concluded: "Using this framework we conclude **that public defenders have no immunity f**rom § 1983 liability for intentional misconduct of the type alleged here."Tower v Glover, 104 S. Ct. 2820, 2825 (1984).

7. In my complaint I also stated other facts that show that it is common for Public Defenders to fail to provide effective counsel. See paragraph #82 of the complaint:

> In August 2005 the executive director of Virginia's Indigent Defense Commission was asked to, and did resign, due to complaints, also Joanmarie I. Davoli, **Fairfax County's** top public defender, resigned in frustration in **July 2005** saying she did not have adequate resources to defend the poor in Virginia's wealthiest county.

8. Note that Ms. Davoli's resignation occurred **the month before my district court hearing** and that she resigned due to the state not providing sufficient recourses for her to defend the poor **in the county I was tried in**. Ms. Davoli will be able to provide testimony at trial to support the case that the state is not fulfilling its obligation to provide effective counsel. The level of funding provided by the state is a joke, paying only enough for a partial hour of attorney time, severely limiting representation. The situation is make even worse in that the state doesn't fully fund even the meager rates set by law.

9. I have also specified sufficient facts as to how Mr. Finch violated my Constitutional Rights. In #68 I pointed out his personal animosity against me due to my website. Due Process requires not only an impartial judge but one that appears impartial. Due to his personal issues with my website he should have recused himself and let one of the other 12 judges hear the case. (see #71)

> The due process clause of the Fifth Amendment entitles a person to an **impartial and disinterested** tribunal in both civil and criminal cases, and such **requirement of neutrality** in adjudicative proceedings safeguards the two central concerns of procedural due process - **the prevention of unjustified or mistaken deprivations** and the promotion of participation and dialogue by affected individuals in the decision-making process; the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law, while at the same time preserving **both the appearance and reality of fairness**, generating the feelings, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that t**he arbiter is not predisposed to find against him**. Marshall v Jerrico, Inc. (1980, US) 64 L Ed 182, 100 S Ct 1610
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> In proceedings where a person's property or liberty interest is at stake due process entitles him to notice and an opportunity to be heard as a matter of right. The person whose interest is at stake must be fully apprised of the nature of the charges against him, the evidence to be considered and the witnesses against him who must testify under oath and be subject to cross-examination. He has a right to a hearing before an unprejudiced and impartial official and to findings supported by some competent evidence having probative value. Ronayne v Lombard (1977) 92 Misc 2d 538, 400 NYS2d 693

10. Mr. Finch denied my written and verbal motions for an attorney. I had been ruled indigent. Thus by denying me an attorney he violated my Right to Counsel under the Sixth Amendment, thus he no longer has jurisdiction to proceed.

11. Mr. Finch made further violations of my Right to Due process by refusing to let me present evidence (see #69). Specifically Judge Finch refused to let me play the audio recording of the incident

for the jury, or to present transcripts of the recording, or to use the audio or transcripts to impeach the testimony of the state's witnesses (see #73).

> Decisional precedents in defining the due process elements at which liberty is at stake, in civil as well as criminal, proceedings, have established that the **right of confrontation, the right of cross-examination** and the right to present a defense are fundamental to fair procedure and hence constitute due process. Re B. (1978) 94 Misc 2d 919, 405 NYS2d 977.

12. Mr. Finch also violated my Right to Due Process by refusing to let me call a witness in my defense (See #72) I had subpoenaed Jack Dale, school superintendent, who had made written statements as to why I was arrested, and his statements directly contradicted the testimony of the state's witnesses. Mr. Finch improperly quashed the subpoena, denying me the right to present witnesses in my defense.

13. Refusing to let me present evidence in my defense, and refusing to let me properly cross-examine witnesses, and refusing to let me call a witness, is a GROSS violation of Due Process, that certainly no judge with his experience would have done accidentally. It is not a judicial act to intentionally deny a defendant a fair trial. Just as it is not a judicial act to use a criminal case to enact punishment for proper expression for First Amendment Right to freedom of speech.

14. Mr. Finch also violated my Right to Due Process, by refusing to rule on my Motion To Dismiss (see #69). The motion was timely filed, and in the proper format. It was a violation to hold the trial without first ruling on the motion to dismiss. Indeed Mr. Ingold cites a nice case for this. Given that I filed a motion to dismissed, based on the well-settled defense that I thought I had a right to be there, thus not guilty of trespassing, Mr. Finch should have dismissed the case according to the citation provided by Mr. Ingold - "Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense" Brooks v Winston-Salem.

15. Mr. Finch also denied me the right to appeal the case by denying my motion for a court reporter and my motion to allow me to make an audio recording of the hearing. By doing so he denied me a

record needed to appeal his ruling, in doing so he violated my 14th amendment right to equal protection, as a rich person could have afforded a court reporter and thus appealed the case. (see #86)

Misleading statements by Mr. Ingold

16. On Page 3 Mr. Ingold claims "Nowhere in his complaint does plaintiff inform this court how defendant's alleged acts…are a violation of his constitutional rights." Not only did I do so, but I even stated the specific facts under headings listing the specific Right and the Amendments that guarantee that right. For example under the heading "Violation Of Plaintiff's Right To Confront Witnesses (6th Amendment)" I pointed out that Mr. Finch refused to let me call Mr. Dale as a witness, or impeach witnesses (such as when Mr. Vanderhye testified he told me to leave, but the audio recording & transcripts prove that he made no such statement, Mr. Finch's refusal to let me use that in my cross-examination was a violation of my 6th amendment right).

Sovereign Immunity

17. Mr. Ingold also claims the Defendant's have Sovereign Immunity. While I agree in practice Virginia and its employee's act as if they are sovereigns that rule over us serfs, nothing is farther from the truth legally. After the revolutionary war, the people hold the sovereign power, not the federal government and not the states. The U.S. Constitution grants certain limited powers to the federal and state governments, prohibits both from certain powers (which Mr. Ingold is trying to exempt Virginia from in this case) and reserves all else to the States AND the people (see Amendment 10). In no way does the Constitution make the states sovereign and the people serfs and establish a system whereby 'the king (or state) can do no wrong'.

> "There is no such thing as a power of inherent sovereignty in the government of the United States... **In this country, sovereignty resides in the people,** and Congress can exercise power, which they have, by their Constitution, entrusted to it. All else is withheld." Juliard v. Greeman, 110 U.S. 421 (1884)
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> "**Government immunity violates the common law maxim that everyone shall have remedy for an injury done to his person or property**." FIREMAN'S INS/ CO. OF NEWARK, N.J. V. WASHBURN COUNTY, 2 Wis.2d 214, 85 N.W.2d 840 (1957)

18. According U.S. Constitution, the Constitution is the “supreme law of the land” and that the judges in every state are to be bound by it. Mr. Ingold’s arguments are nothing less than attempt violate the mandate that the Constitution is the supreme law of the land, and a bald face attempt to free Virginia Judges from the restriction of complying with the Constitution. As such his arguments as to “Sovereign Immunity” or “judicial immunity” are without merit no matter what law or case rulings he wishes to cite. No law, no case ruling can change the restriction that state judges are to be bound by the Constitution, which enforcing that idea is the goal of this case.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the **supreme Law of the Land**; and the **Judges in every State shall be bound thereby**, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Constitution, Article VI

Absolute Judicial Immunity

19. There is only one absolute about Judicial Immunity: "**Power tends to corrupt, and absolute power corrupts absolutely**." - Lord Acton, in a letter to Bishop Mandell Creighton, 1887. No matter how Mr. Ingold attempts to dress up his arguments, they all boil down to advocating for giving Virginia judges absolute power and freeing them from their oath to uphold the constitution.

> "**Government immunity violates the common law maxim that everyone shall have remedy for an injury done to his person or property**." FIREMAN'S INS/ CO. OF NEWARK, N.J. V. WASHBURN COUNTY, 2 Wis.2d 214, 85 N.W.2d 840 (1957)
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> **Immunity fosters neglect and breeds irresponsibility**, while liability promotes care and caution, which caution and care is owed by the government to its people." RABON V. ROWEN MEMORIAL HOSP., INC, 269 NSI. 13, 152 S.E.2d 485, 493 (1967)
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> "Judges are not absolutely immune from liability to damages under Civil Rights Act. 42 U.S.C.A. Section 1983 & 1985 PETERSON V. STANCZAK, 48 F.R.D. 426

20. While Mr. Ingold cites a case or two to support his argument there are many or more citations against judicial immunity. Not that case citations would matter as any ruling the supports judicial immunity for constitutional violations are them themselves unconstitutional and without merit. Any

ruling supporting must comply with Article VI of the Constitution, and still force state judges to follow the constitution.

> "We conclude that judicial immunity is not a bar to relief against a judicial officer acting in her [his] judicial capacity." Pulliam v. Allen, 466 U.S. 522 (1984); 104 S. Ct. 1781, 1980, 1981, and 1985
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> **State immunity defenses may not be asserted** in response to federal civil rights claims. Wilson v Jackson (1986) 66 Md App 744, 505 A2d 913
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> "**The language and purpose of the civil rights acts, are inconsistent with the application of common law notions of official immunity**. . . " JACOBSEN V. HENNE, 335 F.2d 129, 133 (U.S. Ct. App. 2nd Circ. - 1966) Also see" ANDERSON V. NOSSER, 428 F.2d 183 (U.S. Ct. App. 5th Circ. - 1971)
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> 'The doctrine of judicial immunity from federal civil rights suits dates only from the 1967 Supreme Court decision in Pierson v. Ray, 386 U.S. 547 (1967), which found a Mississippi justice of the peace immune from a civil rights suit when he tried to enforce illegal segregation laws. Until this time, several courts had concluded that Congress never intended to immunize state-court judges from federal civil rights suits. See, for example, McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949). 2435 U.S. 349 (1978)

21. The goal of judicial immunity is to 'aid in the effective functioning of government', absolute immunity for intentional violations of Constitutional rights, has exactly the opposite effect, promoting negligence, corruption, and abuse of power. Judicial immunity can be beneficial if applied in a limited fashion but broadly applied causes more harm than help to the judicial system.

> "The Supreme Court has made it clear that the doctrine of **immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose.** Gregory v. Thompson, 500 F.2d 59, 63-64 (9th Cir. 1974)
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> **Official immunity, after all, 'is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.'** Barr v. Matteo. 360 U.S. 564, 572-573, 79 S.Ct. 1335, 1340, 3 L.Ed.2d 1434 (1959) " Gregory v. Thompson, 500 F.2d 59, 61 (9th Cir. 1974
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> "Absolute immunity, however, is 'strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.'[40] (Posner, J., dissenting). 792 F2d, at 660

22. Immunity does not apply to either Mr. Finch or Ms. Butorac as a state has no authority to violate the constitution, or authorize or protect any of its officers that do so. When Mr. Finch acted to violate my constitutional rights he voluntarily gave up any immunity he otherwise may have had.

"**immunity does not extend to a person who acts for the state, but [who] acts unconstitutionally**, because the state is powerless to authorize the person to act in violation of the Constitution." Althouse, Tapping the State Court Resource, 44 Vand. L. Rev. 953, 973 (1991).

The U.S. Supreme Court, in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case **stripped of his official or representative character** and is subjected in his person to the consequences of his individual conduct. **The State has no power to impart to him any immunity** from responsibility to the supreme authority of the United States."

If a judge does not fully comply with the Constitution, then his orders are void, In re Sawyer, 124 U.S. 200 (1888), he/she **is without jurisdiction, and he/she has engaged in an act or acts of treason.**

23. Judicial immunity requires jurisdiction. When Mr. Finch proceeded with the hearing without approving my request for an attorney, after having been found indigent, he lost jurisdiction to proceed with the case. Without jurisdiction, he can't have any judicial immunity.

24. Mr. Ingold make the bold claim that Mr. Finch's actions were 'judicial in nature'. Nothing could be further from the truth. The only judicial authority Mr. Finch has comes from Virginia which itself has no authority to authorize him to violate constitutional rights. Indeed in order to take his position as a judge Mr. Finch was required by Virginia to swear an oath to uphold the Constitution. Denying a Defendant the right to call a witness, the right to cross-examine witnesses, the right to present evidence, are all acts that are not judicial in nature, and which Virginia had no authority to authorize Mr. Finch to take. In doing so Mr. Finch acted individually and as such is individually responsible, without any claim of immunity from the state. Indeed its grossly improper and unconstitutional for the Virginia Attorney General's office to be spending tax dollars to defend Mr. Finch's unconstitutional actions.

> "We should, of course, not protect a member of the judiciary "who is in fact **guilty of using his powers to vent his spleen upon others**, or for any other personal motive not connected with the public good." at 564 ". . .the judge who knowingly turns a trial into a "Kangaroo" court? Or one who intentionally flouts the Constitution in order to obtain conviction? **Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far out weighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights**." at 567 SANTIAGO V. CITY OF PHILADELPHIA, 435 F.Supp. 136

Eleventh Amendment vs Fourteenth Amendment

25. The Eleventh Amendment argument is just more of the same: attempting to protect theunconstitutional actions of Mr. Finch and again has no constitutional merit. No matter what words he wants to use, any argument that results in Virginia judges not being bound to follow the constitution as required by Article VI is unconstitutional, and nothing less than advocating treason by Virginia judges. Courts have even ruled that its improper to make this argument in Civil Rights cases.

> **State immunity defenses may not be asserted** in response to federal civil rights claims. Wilson v Jackson (1986) 66 Md App 744, 505 A2d 913
>
> "**The language and purpose of the civil rights acts, are inconsistent with the application of common law notions of official immunity**. . . " JACOBSEN V. HENNE, 335 F.2d 129, 133 (U.S. Ct. App. 2nd Circ. - 1966) Also see" ANDERSON V. NOSSER, 428 F.2d 183 (U.S. Ct. App. 5th Circ. - 1971)
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> **11th Amendment does not bar suit against state officials in their individual capacities, even if arising from their official acts**, Hafer v. Melo, 502 U.S. 21, 30-31 (1991), unless the claim will "run to the state treasury" under state law. Reyes v. Sazan, 168 F.3d 158, 162-163

26. The Fourteenth Amendment clearly was intended to force the states to provide Equal Protection. Allowing the states to have 11th Amendment immunity in a case of 14th Amendment violations pretty much nullifies the Fourteenth Amendment. This is incorrect, given that the Fourteen Amendment was passed later. **Under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one, the 14th amendment should prevail over the 11th amendment**.

> If there is any conflict between the provisions of the Constitution and an amendment, the amendment must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one. Schick v United States, 195 US 65, 49 L Ed 99, 24 S Ct 826

27. The Fourteenth Amendment grants congress the authority to pass laws to enforce it. Since the 14th is controlling over the 11th and Civil Rights legislation was enacted to enforce the 14th amendment, the Civil Rights Statutes must also take precedence over the 11th Amendment. Thus the 11th Amendment should have no application to a 1983, 1985, 1986 suit against the state.

> Under the Fourteenth Amendment, [congress] has the power to counteract and **render nugatory all state laws and proceedings** which have the effect of abridging any of the privileges or immunities of citizens of the United States, to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Anderson v St Paul, 226 Minn 186, 32 NW2d 538 In a fairly early case, the Supreme Court stated that the Thirteenth and **Fourteenth Amendments were intended to be what they really are, limitations of the power of the states and enlargements of the power of Congress**. They are, to some extent, declaratory of rights, and although in the form of prohibitions, they imply immunities, such as may be protected by congressional legislation. Strauder v West Virginia, 100 US 303, 25 L Ed 664.

28. The U.S. Supreme Court has recognized the 14th Amendment as limiting every state power. Which would include its power to be immune from lawsuit.

> **Every** state power is limited by the inhibitions of the Fourteenth Amendment - Southern R. Co. v Virginia, 290 US 190, 78 L Ed 260, 54 S Ct 148
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> Suits against counties and municipal corporations of state were maintainable in district court, without state's consent, where other requisite jurisdictional elements existed. United States v **Prince William County** (1934, DC Va) 9 F Supp 219, affd (CA4 Va) 79 F2d 1007, cert den 297 US 714, 80 L Ed 1000, 56 S Ct 590

Rooker-Feldman Doctrine

29. Mr. Ingold would have this court believe that this court is without authority to declare the conviction null and void. He is grossly in error. He might have a point if I had asked this court to make a ruling of not-guilty, but I have not asked this court to review the facts of the case and overrule the state kangaroo court. Instead I have asked this court to only rule that the conviction was null and void due to Due Process violations, something this court is entitled to do, and which Mr. Ingold is well aware that I have case citations to support it. [Not that is a big deal, a misdemeanor with a $100 fine is NOT the focus of this case but rather to honor my oath to defend the Constitution, even if Mr. Ingold and Mr. Finch choose not to honor their own oaths to do the same].

30. To put it another way, I have only asked this court to review the Due Process violations and rule if they are sufficient that the order by the state court is ALREADY null and void. I've not asked this court to take any action to change the status of that order. There are many rulings that agree this is a proper function of federal courts.

> Our disagreement with the district court comes down to the question of whether Catz's action is a "core" domestic relations case, seeking a declaration of marital or parental status, or a constitutional claim in which it is incidental that the underlying dispute involves a divorce. We conclude that the case is best described as the latter. True, the remedy Catz seeks -- a declaration that the Pima County divorce decree is void as a violation of due process -- would seem to "directly impact the marriage status and rights between the husband Plaintiff and his wife." On the other hand, **if the divorce judgment were unconstitutionally obtained, it should be regarded as a nullity**, see Phoenix Metals Corp. v. Roth, 284 P.2d 645, 648 (Ariz. 1955), and **any decree so stating would change nothing at all**. Further, the declaration Catz seeks would not itself address the merits, or ultimately dispose, of Chalker's divorce petition; she would be free to relitigate her marital status in state court. Finally, Catz is **not asking the district court to involve itself in the sort of questions attendant to domestic relations** that are assumed to be within the special expertise of the state courts -- for instance, the merits of a divorce action; what custody determination would be in the best interest of a child; what would constitute an equitable division of property; and the like. Instead, Catz **asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts**. *Catz v. Chalker*, 142 F.3d 279, 281 (6th Cir. 1998)

> A judgment **absolutely void upon its face** may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. **It is simply a nullity, and can be neither the basis nor evidence of any right whatever.** … (citations). Nagel v. P&M Distributors Inc. (1969) 273 Cal.App.2d 176, 180; 78 Cal.Rptr 65. [App. J-18; App. M-48].

31. To properly invoke the Rooker Feldman Doctrine the court would first have to make a ruling as to the validity of the state court order. If the order is void, then there is no order and thus no basis to invoke Rooker Feldman. [As a practical matter even a declaration of the order being void only changes the conviction status from guilty and a $100 fine in Circuit court to guilty and suspended sentence from district court -- as I'm not suing the district court judge or attacking its order as, although wrong, that judge made his ruling without the personal motivation or the gross constitutional violations that Mr. Finch used in his courtroom].

> A judgment **absolutely void upon its face** may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. **It is simply a nullity, and can be neither the basis nor evidence of any right whatever.** … (citations). Nagel v. P&M Distributors Inc. (1969) 273 Cal.App.2d 176, 180; 78 Cal.Rptr 65. [App. J-18; App. M-48].

32. Mr. Ingold is also asking this court to abstain when it's clearly inappropriate to do so. There are no overriding state interests at stake here, and the state refused to provide me an adequate opportunity to raise constitutional challenges. I did file for an appeal but the appeals court refused to hear my case

due to the lack of court record, which Mr. Finch went out of his way to prevent me from having a court record.

> Abstention is available in civil cases **only** where state's proceedings implicate overriding state interests and provide **adequate opportunity to raise constitutional challenges**; interest of state in administering its lease laws without federal interference is not of sufficient magnitude to persuade court to invoke abstention. Stewart v Hunt (1984, ED NC) 598 F Supp 1342
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> While federal courts are normally reluctant to interfere with state court proceedings, in special circumstances such action is authorized by 42 USCS 1983 notwithstanding 28 USCS 2283 comity considerations need not dissuade federal court from acting where **state court's proceedings will not afford due process of law.** New Haven Tenants' Representative Council, Inc. v Housing Authority of New Haven (1975, DC Conn) 390 F Supp 831

33. Mr. Ingold has argued for commity but that has been ruled as no justification in cases like this where the state courts will not provide due process:

> While federal courts are normally reluctant to interfere with state court proceedings, in special circumstances such action is authorized by 42 USCS 1983 notwithstanding 28 USCS 2283 **comity considerations need not dissuade federal court from acting** where state court's proceedings will not afford due process of law. New Haven Tenants' Representative Council, Inc. v Housing Authority of New Haven (1975, DC Conn) 390 F Supp 831

Jurisdiction

34. Mr. Ingold claimed this court doesn't have jurisdiction to hear this case. However I have properly stated the jurisdiction for this case (see #5-#7) and the 4th Circuit agrees with me:

> ... **District Court does have jurisdiction under 28 USCS 1331 to review due process claims** and claims of noncompliance with statutory directives or applicable regulations. Virginia ex rel. Commissioner, Virginia Dept. Of Highways & Transp. v Marshall (1979, CA4 Va) 599 F2d 588.

Relief

35. Mr. Ingold has misrepresented both the relief requested and the conditions for relief. As previously noted Mr. Finch was not acting in a judicial capacity when acting without authority to deny me Due Process at my trial. Thus the argument about judicial officers is without merit. Not only that but it is irrelevant to the case. The only thing I've asked the court to order Mr. Finch to do is apologize, which is hardly unreasonable - and is certainly nothing that affects his role as a judge.

> Judicial immunity does not prevent plaintiff from obtaining prospective injunctive relief against judicial officer acting in judicial capacity; nor does judicial immunity bar award of attorney's fees. Minne v Indiana (1986 ND Ind) 627 F Supp 1189

36. Asking for the Office Of Public Defender to do their job, and/or that they seek the funds from the state necessary from the state in order to properly represent the poor is also appropriate. It certainly is prospective, does nothing to make up for their lack of representing me, nor will it help me in the future now that I have a career job again. It is specifically allowed:

> The Ex parte Young doctrine holds that the Eleventh Amendment generally does not stand as a bar to suits in which a party seeks only prospective equitable relief against a state official. See id. at 159-60; ANR Pipeline, 150 F.3d at 1188. "The Young doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." Coeur d'Alene, 521 U.S. at 288 (O'Connor, J., concurring).
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> ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); Milliken v. Bradley, 433 U.S. 267, 289 (1977) (recognizing that Ex parte Young "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law"); Burgio and Campofelice, Inc. v. New York Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997)"[T]he best explanation of Ex parte Young and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." (quoting 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3566, at 102 (1984))); Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 512 (9th Cir. 1990) (same). Ex parte Young claims do not implicate the Eleventh Amendment. See, e.g., Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring) ("The Young doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State."). Accordingly, allowing Appellants to proceed with their claims under Ex parte Young does not run afoul of the Eleventh Amendment.

37. Damages are not unreasonable, while the constitutional violations are significant; the monetary impact on me is minimal. $100 fine isn't much, even if we throw in the fee for the Jury, I'm still betting Mr. Ingold spent more money just on his motion to dismiss then one could reasonably come up with in damages. I was quite clear I was not seeking damages from the state or the Office Of public Defender only from Butorac and Finch personally. The real impact on me was not financial but rather the scary thought of what happens to other innocent people who end up before Judge Finch with a

lackluster Public Defender to represent them. The point of the case is to give them a little push to pay attention to the Constitution and make and effort to do their jobs properly.

38. As for fees/costs associated with this lawsuit. The courts have ruled that judges are not immune from paying those. [again as with damages, given no attorney then or now, pretty minimal].

> See Pulliam v. Allen, 466 U.S. 522 (1984), In that case, the Supreme Court upheld the district court's order that Magistrate Gladys Pulliam of Culpepper County, VA., must pay attorney fees and court costs to two men she sent to jail because they could not post bail on "non-jailable" misdemeanor charges. Judge Pulliam appealed the award claiming judicial immunity and the Supreme Court affirmed despite finding that Pulliam had acted in her judicial capacity and within her subject matter jurisdiction.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, the motion to dismiss should be denied and the case set for trial on the merits.

Respectfully Submitted,
Wesley C. Smith

_____
Wesley C. Smith, Plaintiff
5347 Landrum Rd APT 1
Dublin, VA 24084-5603
703-348-7766
liamsdad@liamsdad.org

VERIFICATION

I, Wesley C. Smith, a citizen of the United States, and resident of Virginia, hereby declare under penalty of perjury pursuant to 28 U.S.C 1746 that I have read the foregoing and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 31st day of December, 2007

_____
Wesley C. Smith

CERTIFICATE OF SERVICE

I certify that on Dec 31, 2007 I mailed a complete copy of this Reply and all attachments to Mr. Ingold who is representing all defendants

December 27th, 2007

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Wesley C. Smith, Plaintiff