IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-02455-REB-BNB

CHARLES H. CLEMENTS,

Plaintiff

v.

THOMAS C. MILLER.
JANIS E. CHAPMAN,
and KATHERINE
GRIER.

Defendants.

PLAINTIFF'S EXCEPTION TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE and PRAYER

Comes now Charles H. Clements, the Proper Party Injured Plaintiff in Pro Se by Doctrine of Necessity to very respectfully submit this PLAINTIFF'S EXCEPTION TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, Filed June 17, 2005: For the following reasons, I very respectfully PRAY that the RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE be REVIEWED and DECLINED, that Defendant Chapman's Motion to Dismiss (24 January, 2005) be DENIED and in support of that PRAYER state as follows;

I. BACKGROUND

Plaintiff filed his Original Complaint with Jury Demand (the "Complaint") on November 26, 2004.

Plaintiffs claims arise out of two separate Adams County cases wherein Magistrate Judge

David Juarez presided as Trial Judge in Case No. 03C5606, and defendant Chapman was the magistrate judge in Case No. 03DR1773; defendant Miller was the Attorney for Plaintiff in other matters including; a '1983' action for Vindictive Prosecution against the Colorado State Attorney General's Office, their Clients, and such other Defendants, as well as the domestic case; defendant Grier was the opposing counsel in 03DR1773. Plaintiff seeks monetary judgment against the defendants for damages.

II. STANDARD OF REVIEW

The Plaintiff respectfully submits that the liberal standard set for any submission by a pro per plaintiff in pro se, particularly by Doctrine of Necessity, and more particularly as regards a '1983' complaint for abuse by Officers of the Court as is the case here, must be very generously interpreted insofar as Dismissal With Prejudice for reasons of forma, or some failure to cite the appropriate statutory description of the crimes committed, and particularly without leave to amend the Original Complaint.

> Coverage of §1983 must be broadly construed. Dennis v. Higgins, U.S.Neb.1991, 111 S.Ct. 865, 498 U.S. 439, 112 L.Ed.2d 969.
>
> This section should be interpreted with sufficient liberality to fulfill its purpose of providing federal remedy in federal court in protection of federal right. Birnbaum v. Trussell, C.A.2 (N.Y.) 1966, 371 F.2d 672. See, also, Schorle v. City of Greenhills, D.C.Ohio 1981, 524 F.Supp. 821; Courtney v. School Dist. No. 1, Lincoln County, Wyoming, D.C.Wyo.1974, 371 F.Supp. 401; Nanez v. Ritger, E.D.Wis.1969, 304 F.Supp. 354.
>
> As pro se litigants, plaintiffs are entitled to invoke the familiar principle of liberal pleading construction. See *Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996).*
>
> Plaintiff's pro se pleadings must be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *See Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).*
>
> A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).*

We conclude, therefore, that, if a complaint is filed within the time required by any controlling statute or rule and contains substantive allegations sufficient to invoke the court's jurisdiction on some basis, the fact that the pleader mistakenly relies upon an inapplicable statute or rule is not fatal to his cause. If the court would otherwise have authority to adjudicate the claim, it is not deprived of its jurisdiction simply because the plaintiff designates an inapplicable statute or rule. See Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961) (fact that complaint alleged that plaintiff was proceeding under a particular statute not controlling). See also People v. District Court, 200 Colo. 65, 612 P.2d 87 (1980).

The plaintiff's civil rights pleading was 150 pages and described by a federal judge as "inept". Nevertheless, it was held "Where a plaintiff pleads pro se in a suit for protection of civil rights, the Court should endeavor to construe Plaintiff's Pleadings without regard to technicalities." Picking v. Pennsylvania Railway, 151 F.2d. 240, Third Circuit Court of Appeals

The Honorable Court has twice Denied the pro se plaintiff an opportunity to Amend the Complaint both for clarity, as in the First Proposed Amended Complaint, and because of New Evidence, in the Second Proposed Amended Complaint, and seems to rely on the self-serving restatement of the circumstances of the case by Defendants' Counsel in her first reply.

The Court must make all reasonable inferences in favor of plaintiffs, and the pleadings must be construed liberally. Id.; see also *Fed. R. Civ. P. 8(a); Lafoy v. HMO Colorado, 988 F.2d 97, 98 [*1449] (10th Cir. 1993).*

In ruling on a motion to dismiss, the Court must assume the truth of all well-pleaded facts in plaintiffs' complaint and view them in a light most favorable to plaintiffs. *Zinermon v. Burch, 494 U.S. 113, 118, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972);* see also *Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984)*(all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true).

The issue in reviewing the sufficiency of plaintiffs' complaint is not whether they will prevail, but whether they are entitled to offer evidence to support their claims. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).*

The Court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that plaintiffs can prove no set of facts in support [**4] of their theory of recovery that would entitle them to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir. 1991).*

Although plaintiffs need not precisely state each element of their claims, they must plead minimal factual allegations on those material elements that must be proved. *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).*

Plaintiff has refuted Defense Counsel's fantasy re-statement in numerous submissions to the Honorable Court, and has presented New Evidence come to light after the filing of the Original Complaint which directly supports Plaintiff's claims and assertions.

> This broad reading of a pro se plaintiff's complaint does not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See *Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992)* (citing *Fed. R. Civ. P. 15(a)*, "leave [to amend pleading] shall be freely given when justice so requires).

Particularly in the nature of a '1983' action, as considered in the light of R.S. §1979, and its means to exercise Plaintiff's First Amendment Right to Petition the government for redress of grievance by the individual who has been harmed by the abuse by State Actors, a wide latitude for forma should append to the submissions by the Proper Party Injured pro se Plaintiff.

> (a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp. 172-187. [365 U.S. 168]
>
> **(b)** One of the purposes of this legislation was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp. 174-180.
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> **(c)** The federal remedy is supplementary to the state remedy, and the state remedy need not be sought and refused before the federal remedy is invoked. P. 183.
>
> **(d)** Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law within the meaning of § 1979. United States v. Classic, 313 U.S. 299; Screws v. United States, 325 U.S. 91. Pp. 183-187.
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> 3. Since § 1979 does not contain the word "willfully," as does 18 U.S.C. § 242, and §1979 imposes civil liability, rather than criminal sanctions, actions under §1979 can dispense with the requirement of showing a "specific intent to deprive a person of a federal right." P. 187. Monroe v. Pape, 365 U.S. 167 (1961) (embolding added)
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> Pro se pleadings are to be considered without regard to technicality; pro se litigants'

pleadings are not to be held to the same high standards of perfection as lawyers. Jenkins v. McKeithen, 395 U.S. 411, 421 (1959); Picking v. Pennsylvania R. Co., 151 Fed 2nd 240; Pucket v. Cox, 456 2nd 233

Plaintiff's pro se pleadings must be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *See Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).* This means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal theories or unfamiliarity with pleading requirements. *See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).*

"Following the simple guide of rule 8(f) that all pleadings shall be so construed as to do substantial justice"... "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The court also cited Rule 8(f) FRCP, which holds that all pleadings shall be construed to do substantial justice. *Conley v. Gibson, 355 U.S. 41 at 48 (1957)*

"Allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient"... "which we hold to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner, 404 U.S. 519 (1972)*

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment." *Maty v. Grasselli Chemical Co., 303 U.S. 197 (1938)*

Defendant Chapman asserts that the Original Complaint must be dismissed for lack of subject matter jurisdiction under the Rooker-Feldman doctrine, but the Rooker-Feldman doctrine would not seem apply to this set of circumstances nor to answer Plaintiffs Complaint of Defendant’s denial of the due process of the Law.

Rooker-Feldman does not directly confer valid jurisdiction to ex parte hearings, ex parte judgments, any failure to notify parties of a hearing, or of the true nature of a hearing, or to give testimony or present evidence.

Defendants have failed to make a defense to the fact that Plaintiff was excluded from meaningful participation in hearings in both cases, both by the failure to notify Parties and by concealing the true nature of the hearing from Plaintiff.

Defendant Chapman fails to make a defense to Plaintiff's assertion that judgments were entered sans jurisdiction resulting from those ex parte hearings conspired between Defendants Chapman and Grier and that those judgments caused Plaintiff injury and damage.

Neither has Plaintiff been allowed to Amend the Original Complaint to more specifically describe the Frauds, Denials, and Abuses by Defendants, nor to present New Evidence as has revealed subsequent to the writing of the Original Complaint or indeed of the first submitted Plaintiff's Amended Complaint.

III. ANALYSIS

The Rooker-Feldman Doctrine would not seem to the eye to apply to judgments made sans jurisdiction and void of due process. Defendant Chapman had no jurisdiction to go forward without all Parties duly notified of the hearings, or notified of the true nature of the hearings.

> We have considered the effect of a void judgment on numerous occasions and have consistently held that a judgement entered where a jurisdictional defects exist is a nullity. See, e.g., People v. Dillon, 655 P.2d 841 (Colo. 1982)
>
> ("It is axiomatic that any action taken by a court when it lacked jurisdiction is a nullity." (citations omitted)); Davidson Chevrolet, Inc. v. City and County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958) [**24] (same), cert. denied 359 U.S. 926, 3 L. Ed. 2d 629, 79 S. Ct. 609 (1959); see also In re Marriage of Pierce, 720 P.2d 591 (Colo. App. 1985) (same).

> We were emphatic about the effect of a void judgment in Davidson:
> A judgment entered where such a defect exists [lack of subject matter jurisdiction] has neither life nor incipience, and a court is impuissant to invest the judgment with even a fleeting spark of vitality, but can only determine it to be what it is -- a nothing, a nullity.
> Being naught, it may be attacked directly or collaterally at any time. Davidson Chevrolet, Inc. v. City and County of Denver, 138 Colo. 171, 175, 330 P.2d 1116, 1118-19. [*229] Further, we have explained that a trial court has no discretion in setting aside a judgment that is void. Stroud, 631 P.2d 168 at 170 n.5 (A "judgment either is void or it isn't and relief must be afforded accordingly.").

Plaintiffs allegations against Defendant Chapman are that she conducted ex parte hearings unknown to Plaintiff; that she issued judgments ex parte to Plaintiff's participation in an open hearing; that the true nature of other hearings were concealed from Plaintiff denying Plaintiff a reasonable time to prepare; that Defendant Chapman conspired with Defendant Grier to deny Plaintiff his rights to Due Process of the Law, to the Equal Protection of the Law, and to the Equal Application of the Law; that Defendant Chapman failed to notify Plaintiff of any opportunity to appeal such rulings, or to demand an Evidentiary Hearing as appropriate.

> (magistrates must "inform a pro se litigant not only of the time period for filing objections [to magistrate's findings and recommendations], but also of the consequences of a failure to object"). *United States v. Gutierrez, 839 F.2d 648, 651 (10th Cir. 1988)* [**9] (citing *Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454 (10th Cir. 1978),* and *Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986)); cf., Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)*

It would then seem clear, as the Honorable Magistrate Judge observes 'from the allegations against defendant Chapman that the state court judgment caused, actually and proximately, the injury for which the plaintiff seeks redress', that said judgments were rendered void of jurisdiction, and denied Plaintiff the due process of the Law to Plaintiff's damage, and constitute a Federal controversy appropriate to the jurisdiction of the Honorable Court.

Rooker-Feldman doctrine would seem to speak to some other set of circumstances than those of Plaintiff's Complaint as Plaintiff asks for relief from the denial of the due process of the Law, and Defendant Chapman would seem to have no immunity as the judgments were rendered sans jurisdiction.

Plaintiff was injured by ex parte judgments rendered from ex parte hearings held by Defendant Chapman, in conspiracy with, and to the benefit of, Defendant Grier and to the damage of Plaintiff.

The denial of due process by judgments made sans jurisdiction are further exacerbated by the constant theme of discriminatory animus against the pro se litigant, particularly those identified as some sorts of civil rights advocates, as was Plaintiff so identified on numerous occasions. It was an ongoing theme between Defendant Chapman, Defendant Grier and Defendant Miller; the genesis of the threat of criminal action used to extort Plaintiff, and soas to intimidate Plaintiff to refrain from suing the Colorado State Attorney General's Office.

The denial of due process is further exacerbated by the abuse of the process to intimidate a Witness, Plaintiff, against the Colorado State Attorney General's Office staff members complained in RICO case 01 ES 1145, and their co-defendants.

Defendant Miller, on 07 June, 2005, admitted under oath that he had deceived his client, the Plaintiff in 01ES1145 of about 31 October 2001, on behalf of the Colorado State Attorney General's Office.

Implicitly, Defendant Miller deceived Plaintiff, also his client and Witness in the associated action deriving from Jefferson County Case 00CR3372, as well.

"If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, ..." Wright v. No Skiter, Inc., 774 F.2d 422, 425 (10th Cir. 1985) (quoting Kimble v. D.J. McDuffy, 623 F.2d 1060, 1064 (5th Cir. 1980), modified on other grounds, Kimble v. D.J. McDuffy, Inc., 648 F.2d 340 **[**7]** (5th Cir. 1981) (en banc)), cert. denied, 454 U.S. 1110, 70 L. Ed. 2d 651, 102 S. Ct. 687 (1981).

Defendant Miller was the Defense Attorney, paid by the Alternate Defense Counsel, in collusion with the Prosecutor, Marleen M. Langfield, to represent the Colorado State Attorney General's Office interests contrary to the interests of his Client, and so admitted on 7 June, 2005.

Public defenders charged with conspiring with state officials in violation of 42 USCS § 1983 do not enjoy any immunity, qualified or absolute, from suit under § 1983. Glover v Tower (1983, CA9 Or) 700 F2d 556, affd, remanded (1984) 467 US 914, 81 L Ed 2d 758, 104 S Ct 2820.

Immunity of prosecutor does not extend to those persons who conspire with him to violate civil rights of others. Goldschmidt v Patchett (1982, CA7 Ill) 686 F2d 582, 1982-2 CCH Trade Cases P 64893.

IV. CONCLUSION

Plaintiff respectfully submits that even the self-serving restatement of the case proffered by Defendant Chapman's counsel is fatally flawed as it never asserts Immunity for Defendant Chapman that is based on a judgment founded in valid jurisdiction as would be required under the Rooker-Feldman doctrine.

A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. Forrester v. White, 484 U.S. at 227-229, 108 S. Ct. at 544-545 (1987); Westfall v.Erwin, 108 S. Ct. 580 (1987); United States v. Lanier (March 1997)

Elements of procedural due process. The elements of the constitutional guaranty of due process in its procedural aspect are *notice and an opportunity to be heard or defend* before a competent tribunal in an orderly proceeding adapted to the nature of the case; also, to have the assistance of counsel, if desired, and a reasonable time for preparation for trial. Colorado State Bd. of Medical Exmrs. v. Palmer, 157 Colo. 40, 400 P.2d 914 (1965) (emphasis added)

> Jurisdiction is "The right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, *the proper parties must be present*; and third, the point decided upon must be in substance and effect within the issue." Reynolds v. Stockton, 140 U.S. 254, 268 (emphasis added)

Defendant Chapman acted in clear absence of all jurisdiction in ex parte hearings, rendering ex parte judgments, or failing to correct ex parte judgments when notified by Plaintiff, or failing to report ex parte actions for sanctions, or failing to correct ex parte applications by Defendant Grier without notice to Plaintiff when notified, and as admitted to by Defendant Grier.

> Generally, judges are immune from suit for judicial acts within or in excess of their jurisdiction even if those acts have been done maliciously or corruptly; *the only exception being for acts done in the clear absence of all jurisdiction*. Hoffsomer v. Hayes, 92 Okla 32, 227 F. 417 (emphasis added)

> Judicial immunity is overcome only where (1) the actions in question were not taken in the judge's judicial capacity, and (2) *where the actions in question were taken in the clear absence of all jurisdiction*. Mireles v. Waco, 502 U.S. 9, 11-12 (1991). (emphasis added)

> A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).*

> This broad reading of a pro se plaintiff's complaint does not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, [HN2] a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See *Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992)* (citing *Fed. R. Civ. P. 15(a)*, "leave [*4] [to amend pleading] shall be freely given when justice so requires).

> It can be argued that to dismiss a civil rights action or other lawsuit in which a serious factual pattern or allegation of a cause of action has been made would itself be violating of procedural due process as it would deprive a pro se litigant of equal protection of the law vis a vis a party who is represented by counsel.
>
> Even so, a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See *Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992)* (citing *Fed. R. Civ. P. 15(a)*, "leave [to amend pleading] shall be freely given when justice so requires). We review a district court's denial of a motion to amend for abuse of discretion. *Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992).*

Wherefore, Charles H. Clements Proper Party Plaintiff in Pro Se humbly and respectfully PRAYS the Honorable Court to review RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, Filed June 17, 2005, and to DECLINE the recommendations, and to DENY Defendant Chapman's Motion to Dismiss, and so order

Respectfully Submitted this 23rd day of June, 2005

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CERTIFICATE OF SERVICE
Civil Action No. 04-RB-2455 (BNB)

I, Charles H. Clements, undersigned hereby certify that a true and correct copy of the foregoing PLAINTIFF'S EXCEPTION TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE of 17 June, 2005 and PRAYER was served by depositing the same in the United States mail, first class postage prepaid, this 23rd day of JUNE, 2005, to the following:

CLERK OF THE FEDERAL DISTRICT COURT
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DENVER, COLORADO 80294-3589

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