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### Borg v. District Court of Second Judicial Dist.

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

IN THE SUPREME COURT OF THE STATE OF COLORADO

Case No. 83 SA 510

Dec. 23, 1983  
NR

David W. Brezina

MEMORANDUM BRIEF IN SUPPORT OF A WRIT OF PROHIBITION

KAREN BORG,

Petitioner

vs.

THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT,  
for the CITY AND COUNTY OF DENVER, and  
JAMES C. FLANIGAN and PAUL A. MARKSON, JR., DISTRICT JUDGES  
in and for the CITY AND COUNTY OF DENVER in the  
SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, Respondents

ARGUMENT

I. A Writ of Prohibition is a proper remedy.

Relief in the nature of prohibition is a proper remedy to determine whether a District Court has abused its discretion in exercising its functions. Western Food Plan, Inc. vs. District Court, 598 P2d 1038 (1979). People vs. Gallagher, 570 P2d (1977). City of Colorado Springs vs. District Court, 519 P2d 325 (1974).

II. The District Court erred and abused its discretion in permitting filing of direct information after same crime was dismissed by County Court for lack of probable cause.

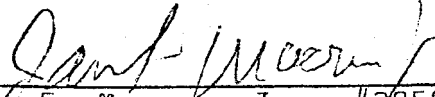
After the Preliminary Hearing on November 4, 1983 wherein the People called numerous witnesses, including two eye witnesses, the County Court found no probable cause. On December 9, 1983 a direct information was filed ex parte in Denver District Court based solely on a Motion filed by the District Attorney, (Attached and made part of the Complaint as Exhibit A). The Motion merely held in County Court, did not offer any new or additional evidence not presented at the Preliminary Hearing,

failed to state any reasons for the requested filing and was filed over one month after the finding of no probable cause in County Court. This Court has recently addressed this very issue in Holmes vs. District Court, 688 P2d 11, August 29, 1983. In the Holmes case this Court ruled that under Rule 7 (c) (2) of the Rules of Criminal Procedure consent of the Court to refile "implies a real application of discretion", citing People vs. Swazo, 553 P2d 782 (1976). The Holmes case states that before the District Court may properly exercise its discretion there must be sufficient evidentiary disclosure by the prosecution to appraise the District Court of the earlier dismissal of identical charges in the County Court and the reasons for the requested refiling. In this case the District Attorney merely restated testimony already presented at the prior Preliminary Hearing. As stated in People vs. Freiman 657 P2d 452 (1983) the duplicative procedure of allowing refiling in District Court after Preliminary Hearing unnecessarily taxes already strained judicial resources and subjects the accused to oppression and discrimination.

#### SUMMARY

As cited in Holmes vs. District Court, supra, there are definite guidelines to the Judge's power to permit a direct filing of an information pursuant to Rule 7 (c) (2) of the Rules of Criminal Procedure. The District Attorney's Motion requesting refiling offered no new or additional evidence, failed to state any reasons, legal or factual, for the refiling and waited over one month to refile. Clearly in this case the Judge abused his discretion and as such is reviewable by a Writ of Prohibition.

Respectfully submitted,



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