

COUNTY COURT, CITY AND COUNTY OF DENVER, COLORADO

The People of the State of Colorado,
ex rel. Kenneth L. Smith,

v.

MICHAEL L. BENDER, et al.,
Defendants.

Kenneth L. Smith, *in propria persona*
23636 Genesee Village Rd.
Golden, CO 80401

↑COURT USE ONLY↑

Phone: (303) 526-5451

Case No:

AFFIDAVIT OF VICTIM

Comes now Affiant Kenneth L. Smith (hereinafter, "Smith") who is a natural person of lawful age and competent to testify, possessing first-hand knowledge of pertinent facts, who believes that he has been the victim of a crime as defined under Colorado statutory law, and who states as follows under penalty of perjury:

IDENTITY AND LOCATION OF ALLEGED PERPETRATORS

1. On information and belief, HONS. MICHAEL L. BENDER, NATHAN B. COATS, GREGORY J. HOBBS, JR, REBECCA LOVE KOURLIS, ALEX J. MARTINEZ, MARY J. MULLARKEY, and NANCY E. RICE were, for all times pertinent to this Affidavit, Justices of the COLORADO SUPREME COURT.

2. On information and belief, the COLORADO SUPREME COURT regularly conducts its business at 2 East 14th Ave., in Denver, Colorado.

3. On information and belief, HONS. JOHN/JANE DOE 1-3 were, for times pertinent to this Affidavit, Judges of the COLORADO COURT OF APPEALS.

4. On information and belief, HON. JANICE B. DAVIDSON is and was, for all times pertinent to this Affidavit, the Chief Judge of the COLORADO COURT OF APPEALS.

5. On information and belief, the COLORADO COURT OF APPEALS regularly conducts its business at 2 East 14th Ave., in Denver, Colorado.

6. On information and belief, HON. H. JEFFREY BAYLESS is and was, for all times pertinent to this Affidavit, the Chief Judge of the DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO.

7. On information and belief, the DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO, regularly conducts its affairs at 1437 Bannock Street, in Denver, Colorado.

8. On information and belief, HON. JOHN W. SUTHERS is, and has been for all times pertinent to this Affidavit, Attorney General of the State of Colorado.

9. On information and belief, FRIEDRICK C. HAINES is, and has been for all times pertinent to this Affidavit, an Assistant Attorney General of the State of Colorado.

10. On information and belief, Attorney General Suthers has the right and/or duty under law to exercise supervisory authority and responsibility over Mr. Haines, by virtue of his position.

11. On information and belief, the various parties enjoy supervisory authority over others, including attorneys licensed by the State of Colorado identified only as JOHN/JANE DOES #4-99.

12. On information, all named parties are attorneys licensed by the State of Colorado and/or are authorized to practice law in the Tenth Circuit Court of Appeals and as such, are obliged to abide by standards of personal and professional conduct established by those courts.

13. On information and belief, all natural persons named in this Complaint currently reside within the boundaries of the State of Colorado.

14. On information and belief, all natural persons named in this Complaint as defendants are “public servants,” as defined by C.R.S. § 18-8-901(3)(o).

PERTINENT STATUTORY PROVISIONS

15. As all statements of pertinent federal and/or state statutory law are taken from secondary reporters via the Internet (the United States Code, from the collection made available by Cornell Law School at <http://www.law.cornell.edu/statutes.html> and all other provisions, from the cache provided by the Office of Legislative Legal Services of the Colorado General Assembly via contract (at http://www.state.co.us/gov_dir/leg_dir/olls/HTML/colorado_revised_statutes.htm) with

Lexis, these statements of statutory law are presented only on information and belief as accurate, and will not be individually sourced.

16. Article VI, cl. 2 of the United States Constitution (the “Supremacy Clause”) states:

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.

17. Any state statute in conflict with the Supremacy Clause is null and void. *Sager v. District Court*, 698 P.2d 250 (Colo. 1985).

17. The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18. Section 1 of the Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

19. 18 U.S.C. § 4 states:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

20. 18 U.S.C. § 241 states, in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same [...] They shall be fined under this title or imprisoned not more than ten years, or both [...];

21. 18 U.S.C. § 242 states, in pertinent part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District 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 [...]

22. Article II, section 6 of the Colorado Constitution states:

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

23. Article II, section 10 of the Colorado Constitution states:

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

24. Article II, section 25 of the Colorado Constitution states: “No person shall be deprived of life, liberty or property, without due process of law.”

24. Article III of the Colorado Constitution states:

The powers of the government of this state are divided into three distinct departments,-- the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

25. Article VI, section 1 of the Colorado Constitution states, in pertinent part:

The judicial power of the state shall be vested in a supreme court, district courts, a probate court in the city and county of Denver, a juvenile court in the city and county of Denver, county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court, as the general assembly may, from time to time establish;

26. Article VI, section 2 of the Colorado Constitution states, in pertinent part:

(1) The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general

superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law.

(2) Appellate review by the supreme court of every final judgment of the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver shall be allowed, and the supreme court shall have such other appellate review as may be provided by law.

27. Article VI, section 3 of the Colorado Constitution states, in pertinent part:

The supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority as to writs of habeas corpus.

28. Article VI, section 9(1) of the Colorado Constitution states:

The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

29. Article VI, section 23(3)(d) of the Colorado Constitution states:

A justice or judge of any court of record of this state, in accordance with the procedure set forth in this subsection (3), may be removed or disciplined for willful misconduct in office, willful or persistent failure to perform his duties, intemperance, or violation of any canon of the Colorado code of judicial conduct, or he may be retired for disability interfering with the performance of his duties which is, or is likely to become, of a permanent character.

30. C.R.S. § 13-4-101 states:

There is hereby created the court of appeals, pursuant to section 1 of article VI of the state constitution. The court of appeals shall be a court of record. Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court.

31. C.R.S. § 13-4-102(1) states:

(1) Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver, except in:

- (a) Repealed.
- (b) Cases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional;
- (c) Cases concerned with decisions or actions of the public utilities commission;
- (d) Water cases involving priorities or adjudications;
- (e) Writs of habeas corpus;
- (f) Cases appealed from the county court to the district court, as provided in section 13-6-310;
- (g) Summary proceedings initiated under articles 1 to 13 of title 1 and article 10 of title 31, C.R.S.;
- (h) Cases appealed from the district court granting or denying postconviction relief in a case in which a sentence of death has been imposed.

31. C.R.S. § 13-4-110(1)(a) states:

When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

32. C.R.S. § 18-8-404 states:

(1) A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly:

- (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or
- (b) Refrains from performing a duty imposed upon him by law; or
- (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) First degree official misconduct is a class 2 misdemeanor.

33-40. [Reserved.]

GENERAL ALLEGATIONS

41. All facts asserted in this section of the Affidavit are asserted as matters of public record, amenable to judicial notice upon an appropriate demonstration of proof, and are offered on information and belief, subject to verification from official records; as it is ultimately the province of the District Attorney to offer such proof at trial, no effort is made to do so herein.

42. On January 13, 2002, Smith filed a complaint in Denver District Court, styled *Smith v. Mullarkey, Case No. 02-CV-127*, alleging violations of his federal rights committed by persons

acting under color of state law pursuant to 42 U.S.C. §§ 1983-86, and an array of facial challenges to the constitutionality of Colo. R. Civ. P. 201.

43. In the aforementioned complaint, Smith purports to assert at least one claim grounded in federal law.

44. On or about April 9, 2004, in deciding a contested motion to dismiss, Denver District Judge H. Jeffrey Bayless entered an order dismissing Smith's complaint.

45. On or about May 14, 2004, Smith filed a timely appeal of the aforementioned order in the Colorado Court of Appeals.

46. The issue presented to the Colorado Court of Appeals in that appeal is as follows:

Whether the trial court erred in declining jurisdiction over damage claims brought pursuant to 42 U.S.C. § 1983, facial constitutional challenges to a statutory regulation promulgated by an instrumentality of the state, and/or claims brought pursuant to article II, section 6 of the Colorado constitution because the Colorado Supreme Court "has exclusive jurisdiction over matters involving the licensing of persons to practice law."

47. On or about August 16, 2005, the Colorado Court of Appeals issued an order referring the jurisdictional issue to the Colorado Supreme Court, ostensibly pursuant to § 13-4-110(1)(a), C.R.S. 2004, which states:

When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

48. On or about August 18, 2005, the Colorado Supreme Court accepted jurisdiction over the jurisdictional question, pursuant to the ostensible authority of § 13-4-110(1)(a).

49. Section 13-2-102(1), C.R.S. 2004 states, in pertinent part, that "[a]ny provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts...."

50. On or about October 17, 2005, the Justices issued a *per curiam* opinion affirming the District Court's decision denying jurisdiction over Smith's federal claims, wherein they admitted:

The court is the defendant in this action. By operation of the Rule of Necessity, Canon 3 F., if all or a majority of the court has a conflict, the court must nonetheless hear the case.

Smith v. Mullarkey, slip op. at 2 & fn. 1.

51. First Assistant Attorney General Friedrich C. Haines has been, for all times relevant to this matter, counsel of record in *Smith v. Mullarkey*, *supra*.

52. On information and belief, on or about March 2, 2006, Mr. Haines submitted a document to the United States Supreme Court entering his appearance as counsel of record in *Smith v. Mullarkey*, No. 05-1055 (U.S. 2006), formally indicating that he did not intend to file a response to Smith's petition for a writ of certiorari unless requested by the Court. *Exhibit AA*.

53. On information and belief, based primarily on the United States Supreme Court decision in *Salinas v. United States*, 547 U.S. ___, 126 S.Ct. 1675 (2006), submitted as *Exhibit AB*, had Mr. Haines alerted the Court to the felonious misconduct of his clients and urged a reversal, the Supreme Court would have remanded the case to the Colorado Supreme Court.

54. On information and belief, but for Mr. Haines' willful and notorious dereliction of duty, the crime itself would not have been committed.

55. For all times relevant to this matter, Affiant has been a precinct committeeperson for the Republican Party in Jefferson County, Colorado.

56. On or about February 15, 2006 (the precise date is uncertain, but can be ascertained from appropriate records), during a Central Committee meeting of the Jefferson County Republican Party, Affiant personally apprised Attorney General John Suthers of the facts of this case and his agency's knowing participation in the crime as alleged.

57. On or about October 24, 2005, Affiant transmitted a letter to Attorney General Suthers regarding the matter, stating in the very first paragraph of the letter:

I write today concerning the recent disposition of *Smith v. Mullarkey* [citation] and arguably, the most stunning act of misconduct ever committed by an American appellate court. **Specifically, the Justices decided a case in which they were defendants in their individual capacities.**

Exhibit AC at 1 (emphasis in original).

58. On or about March 9, 2006, Affiant transmitted a second letter to Attorney General Suthers regarding the matter, a copy of which is submitted as *Exhibit AD*.

59. On information and belief, the letters submitted as *Exhibits AC* and *AD* are accurate renditions of the letters as sent.

60. [Reserved.]

ALLEGATIONS REQUIRED PURSUANT TO C.R.S. § 16-5-209

61. Smith herein alleges that the crime of first degree official misconduct, as defined under Colorado law, has been committed against him, for the reasons stated in his Motion for Relief and his Brief in Support of Criminal Prosecution of Named Defendants, as submitted with this Affidavit.

62. Smith further alleges that he has expended every reasonable effort to induce the District Attorney for the City and County of Denver to prosecute the alleged perpetrators, as documented in his Motion for Relief Pursuant to C.R.S. § 16-5-209, and evidenced by the Exhibits attached thereto.

63. Smith further alleges that said District Attorney has refused to prosecute this crime, and said refusal to prosecute is objectively unreasonable, for the reasons more fully stated in the Brief and documentation submitted with this Affidavit.

Further Affiant sayeth not.

Signed this ____th day of March, 2007

Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2007, I served a copy of the foregoing upon all parties herein by hand-delivery to the following address:

Mr. Mitchell Morrissey, District Attorney
Mr. Henry R. Reeve, Deputy District Attorney
Second Judicial District
201 W. Colfax Ave.
Denver, Colorado 80202