

The People of the State of Colorado,

DRAFT

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: (to be determined)

MOTION FOR RELIEF PURSUANT TO C.R.S. § 16-5-209

COMES NOW Kenneth L. Smith (hereinafter, “Smith”), *in propria persona*, who states as follows in this Motion for Relief Pursuant to C.R.S. § 16-5-209:

1. C.R.S. § 16-5-209 states, in pertinent part:

The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding, based on the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties, the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so.

2. C.R.S. § 18-8-404(1) states:

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.

3. On information and belief, this Court possesses jurisdiction over misdemeanor violations of Colorado law committed within the City and County of Denver.

4. On information and belief, all acts and/or omissions complained of herein, as duly attested to in the attached Affidavit of Victim, were done within the boundaries of the City and County of Denver.

5. Pursuant to C.R.S. § 16-5-209, this Court may order the district attorney to explain, in an open hearing attended by the victim and in which s/he is permitted to participate, to show cause as to why criminal charges have not been brought.

6. According to the Instructions for Complaint provided by the District Attorney's office for the City and County of Denver, the complainant is normally "notified of the decision [of whether to prosecute] within two weeks of when [his/her] complaint is received." Exhibit A.

7. The aforementioned complaint, including an affidavit substantially similar to the one that is attached hereto as Exhibit B, was filed with the District Attorney's office on or about January 30, 2007 via e-mailed PDF files.

8. Time is of the essence in this matter, as the statute of limitation with respect to the alleged crime expires on or about April 17, 2007.

Respectfully submitted this ____ day of February, 2007.

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AFFIDAVIT OF VICTIM

[obligatory opening comments elided]

IDENTITY AND LOCATION OF PARTIES

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 (hereinafter, “the Justices”) were, for all times pertinent to this Complaint, 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 Complaint, 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 Complaint, 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 Complaint, 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 Complaint, 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 Complaint, 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. All natural persons named in this Complaint as putative defendants are “public servants,” as defined by C.R.S. § 18-8-901(3)(o).

15. Affiant Kenneth L. Smith is a citizen of the United States who, for all times pertinent to this Complaint, has resided in the state of Colorado.

16-20. [Reserved.]

FACTS ESTABLISHED BY JUDICIAL NOTICE

21. Judicial notice may be taken of matters of public record and of common knowledge to an interested public. *See In Re Interrogatory by Governor Romer, 814 P.2d 875 (Colo. 1991)*. Also, rules and regulations promulgated by a governmental agency pursuant to the agency's statutory authority and published in an official state publication, such as Code of Colorado Regulations, may be judicially noticed. *Westfall v. Town of Hugo, 851 P.2d 299 (Colo. App. 1993)*.

22. On or about January 10, 2002, Affiant 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 (other allegations are not material for purposes of this analysis).

23. On or about November 7, 2003, Affiant filed his First Amended Complaint in Denver District Court (adding a request for declaratory relief on state grounds, in the wake of the Colorado Supreme Court's decision in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002)). [A copy of this document (will have to be) attached hereto as Exhibit A; the original is, of course, in the possession of the courts.]

24. In the aforementioned complaint, Affiant presents at least one claim grounded in federal law.

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

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

27. The issue presented to the Colorado Court of Appeals by Affiant 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."

28. 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.

29. 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).

30. 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....”

31. In C.R.S. § 13-2-102(1), the Colorado legislature clearly stated its intention to have the Colorado Court of Appeals consider all initial appeals from the state’s district courts, except in those circumstances specifically enumerated by statute. Affiant’s appeal was not among them.

32. In the complaint from which the dismissal was being appealed, six of the seven Justices were named as party defendants in their individual capacities for wrongful acts committed in a non-judicial capacity.

33. On or about October 17, 2005, the Justices issued a *per curiam* opinion affirming the District Court 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, 191 P.3d 890, slip op. at 2 & fn. 1 (Colo. 2005) (per curiam).

34. The correct statement of the “Rule of Necessity,” according to the United States Supreme Court, is as follows:

The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- where no provision is made for calling another in, or where no one else can take his place -- it is his duty to hear and decide, however disagreeable it may be.

Philadelphia v. Fox, 64 Pa. 169, 185 (Pa. 1870), quoted with approval in *United States v. Will, 449 U.S. 200, 214 (1980) (emphasis added).*

35. Colorado law contains a provision for ‘calling other judges in’ to avoid invocation of the Rule of Necessity: judges of the Colorado Court of Appeals are specifically authorized to “serve in any state court with full authority as provided by law.” *C.R.S. § 13-4-101.*

36. As independent judges could have heard the appeal pursuant to law, the involvement of the Justices in that appeal clearly violated C.R.S. § 16-6-201(2), which states: "Any judge who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself."

37. In said opinion, the Justices stated: “The inquiry panel conducted proceedings and ultimately concluded that probable cause existed to believe that Mr. Smith lacked mental stability, and hence recommended that his admission to the Bar be denied,” *Id.* at 2, a statement that is defamatory on its face.

38. The aforementioned defamatory statement is demonstrably false, insofar as there is no such conclusion to that effect in the record. (See, First Amended Complaint at ¶¶ 51-60).

39. Affiant appealed the decision to the United States Supreme Court. *Smith v. Mullarkey*, Case No. 05-1055.

40. Friedrich C. Haines was counsel of record for the Justices in that matter.

OTHER ALLEGATIONS OF FACT

41. It “most certainly violates the Fourteenth Amendment ... to subject [a man’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.” *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

42. The Justices either knew or reasonably should have known that every one of the judges of the Colorado Court of Appeals was facially independent with respect to the matter, and that they could have lawfully decided the appeal as substitute justices, by operation of C.R.S. § 13-4-101.

43. The Justices either knew or reasonably should have known that their affirmance of the dismissal would deprive Affiant of any forum in which to pursue claims grounded in federal law, in clear and indisputable contravention of the First and Fourteenth Amendments.

44. Both Friedrich C. Haines and John W. Suthers either knew or reasonably should have known that affirmance of the dismissal deprived Affiant of any forum in which to pursue claims grounded in federal law, in clear and indisputable contravention of both the First and Fourteenth Amendments.

45. On or about February 10, 2006, Mr. Suthers was personally apprised of the situation by Affiant at a Republican Party committee meeting in Jefferson County.

46. On or about March 9, 2006, Mr. Suthers was further apprised of the situation via correspondence. [A copy of the letter will be provided upon request.]

I hereby certify that the information contained on this document is true to the best of my knowledge. I consent to the use of this information in any manner the District Attorney deems proper, including release of this information to other interested parties, law enforcement agencies and the media. I understand this complaint may, under certain circumstances, be examined by members of the public

Signature



Date

29 JAN 2007