

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS

8TH CIRCUIT COURT
DISTRICT DIVISION - KEENE

The State of New Hampshire

v.

Ian Bernard a/k/a Ian Freeman

Docket #: 449-2012-CR-00535

MEMORANDUM IN SUPPORT OF **MOTION TO DISMISS**

NOW COMES the Defendant by and through his attorneys, Backus, Meyer and Branch, LLP, and files this Memorandum In Support of his Motion To Dismiss the charge of criminal trespass against him stating the following:

FACTS

The facts in this case are not in significant dispute. Defendant is a political activist and host of a web radio program. Defendant's political activism includes monitoring of court proceedings to guard against governmental abuse. His political expression has also included articulating questions and opinions in and around the Cheshire County Superior Court House pertaining to judicial matters. Defendant's political concerns and activism are shared by other individuals who also participate in court monitoring.

On December 30, 2011 the Cheshire County Sheriff addressed to the Defendant a "no trespass order, per RSA 635:2". That order prohibited the Defendant from "entering or remaining on the county property at 12 Winter Street, Keene, New Hampshire (the Cheshire County Superior Courthouse building)". It further stated, "if you have any legitimate county business that requires you to enter and remain in the Cheshire County Superior Court House, you are to contact me to make an appointment to conduct your county business."

No type of adjudicative or rule making proceeding was held prior to the issuance of this order, nor was Defendant given any opportunity to object to the order prior to its issuance. The only reason given in the order was "due to your persistent harassment of court personnel". The order does not state the nature of the harassment, the identity of the persons allegedly harassed, or the date of the incident or incidents in question. No claim was made that Defendant has disrupted court proceedings or breached any rule adopted by the court. No time limit was set for the order which would appear to operate in perpetuity. By the terms of the order, the Sheriff retains to himself exclusive authority to determine whether and when the Defendant can enter the courthouse. It appears to distinguish between entering the courthouse for the purpose of conducting "county business" which is permitted with the authorization of the Sheriff, and entering the courthouse for the purpose of monitoring judicial proceedings which is flatly prohibited. Other political activists who have monitored judicial proceedings in Cheshire County have received identically phrased orders.

ARGUMENT

INTRODUCTION

"The right to open courtrooms and access to court records related to court proceedings is firmly supported by New Hampshire practice and common law principles, Part 1, Articles 8 and 22 of our State Constitution and our guidelines for public access. Such access is critical to ensure that court proceedings are conducted fairly and impartially and that judicial process is open and accountable." Associated Press v. State of New Hampshire, 153 NH 120, 129 (2005) (citations omitted). "New Hampshire is one of only a handful of States with a constitutional provision that explicitly protects the public's right of access to governmental proceedings and documents." Id. at 128. Restriction on access to court proceedings also implicates fundamental rights under the First Amendment. Huminski v. Corsones, 396 F3d 53 (2nd Cir. 2004).

An individual can be removed from a courtroom or courthouse for disruptive behavior. However, because such removal implicates fundamental constitutional interests, it can only occur if such an exclusion is narrowly tailored for the protection of a compelling governmental interest, and through a process which gives the excluded individual an opportunity to be heard. Banning orders cannot be used as a weapon against political activists engaged in the monitoring of court proceedings even when that monitoring may cause irritation and discomfort on the part of judicial branch employees.

I. THE RIGHT TO MONITOR JUDICIAL PROCEEDINGS IS FUNDAMENTAL UNDER THE NEW HAMPSHIRE CONSTITUTION, PART 1, ARTICLE 8.

Part 1, Article 8 explicitly links governmental accountability with access to governmental proceedings based upon the principle that the peoples' right to self government as set forth in Part 1, Article 7 cannot be effectuated unless "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." "These provisions express the American theory of government that the government is ultimately accountable to the people." State v. Decato, 156 NH 570, 574 (2007).

The leading case on access to court proceedings under Part 1, Article 8 as well as the free speech clause in Part 1, Article 22 is the Associated Press v. State of New Hampshire, 153 NH 120 (2005). Although the Associated Press case involved the access to court records, in particular marital affidavits, the Supreme Court has applied the same principles to access to judicial proceedings, most recently in the case of State of New Hampshire v. William Decato, where the court upheld the right of access to proceedings and records of probable cause hearings initiated by the State against defendants under the Involuntary Civil Commitment of Sexually Violent Predator's Act.

The constitutional importance of open access is based upon the principle that "the trial of [civil] causes should take place under the public eye, . . . not because of the controversies of one citizen or another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." Associated Press, supra, at

127. Among the reasons that the Sheriff's order in this proceeding is constitutionally deficient is that 1) it fails to recognize the Defendant's right to monitor judicial proceedings in which he has no personal interest is at least as important from a constitutional perspective as his attendance at proceedings in which he is a party, 2) his order vests himself with unlimited discretion to decide when the Defendant can enjoy his constitutional right of access, 3) it does not cite a compelling government interest, and 4) it is not narrowly tailored to a compelling interest. The very fact that the order contemplates the Defendant's entry into the courthouse under limited circumstances establishes that the Sheriff himself does not believe that the Defendant being in the courthouse would threaten public safety or disrupt court proceedings.

In the Associated Press case, the court made clear that "there is a rebuttable presumption of openness that is inherent in the constitutional right of access and the burden is always on the party seeking to rebut that presumption." Id. at 129. Further, the restriction on access must serve a "compelling governmental interest [and] be narrowly tailored to serve that interest." Id. at 130. The Sheriff did not even purport to meet his burden of establishing the existence of a compelling governmental interest, or establish that his banning order was narrowly tailored to serve that interest. Nor was the Defendant accorded any right to contest this prior restraint of his right to engage in judicial monitoring before it was in place. The lack of specificity of the order, both in terms of its rationale and its scope, strongly suggests that it was predicated upon a general flexing of authority against court critics. It utterly fails to meet the test of "demonstrat[ing] with specificity that there is some overriding consideration or special

circumstance, that is a sufficiently compelling interest [to] outweigh the public's right of access " Id. at 121.

It could be argued that notwithstanding the exclusion of the Defendant and others, that the general public still retains access to judicial proceedings. However, this makes the constitutional injury greater not less. It is not the prerogative of government to determine who may and may not monitor its proceedings. Such right of selection or discrimination would give it unlimited authority to favor some points of view or political groups over others. Even if all political activists were treated alike, there is no constitutional basis for denying to them a right accorded the general public. Further, the retention of that right with the public does little to advance the constitutional interest in government accountability since most people have limited opportunity to monitor judicial proceedings, and rely on individuals such as Defendant.

II. THE SHERIFF'S ORDER VIOLATES PART 1, ARTICLE 22 OF THE NEW HAMPSHIRE CONSTITUTION AND THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Associated Press case makes clear that the constitutional right to access is also based on the free speech clause in Part 1, Article 22. Similarly there is a line of cases under the First Amendment of the United States Constitution which hold that restriction on access to judicial proceedings without a compelling basis also violates that provision.

Among the reported cases on the exclusion of individuals from courthouses, this case appears to be unique in the strength of the free speech interest in the sense that the Defendant's primary interest was political not personal grievance. The court system has an affirmative interest in supporting his monitoring because it promotes accountability as well as public confidence in the openness of the system.

The leading First Amendment protestor case is Huminski v. Corsones, 396 F3d 53 (2nd Cir. 2004), involving an individual who became a critic of the Vermont justice system because of his belief that he himself had been mistreated by Vermont judges and prosecutors. The Second Circuit held that he had a First Amendment right of access to court proceedings, and there was a constitutional presumption in favor of access which could only be overcome if there was a reasonable basis for believing that he was a threat to persons, property or proceedings, and that the restrictions on his access were reasonably tailored to meet the legitimate goals of the exclusion. Id. at 58. The court noted that "there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. Id. at 81. It further noted that "to work effectively, it is important that society's [judicial] process satisfy the appearance of justice and the appearance of justice can best be provided by allowing people to observe it." Id. at 82. "A person singled out for exclusion from the courtroom, who is thereby barred from first-hand knowledge of what is happening there, moreover, is placed at an extraordinary disadvantage in his or her attempt to compete in the 'marketplace of ideas' about the

conduct of judges and the judicial system.” Id. at 84. “The system of public justice depends on the willingness and ability of individual persons and entities to police the system by seeking access - - through litigation if necessary - - to courtrooms and court records that have been closed.” Id.

In Huminski, the court ruled that absent an imminent threat or some similar circumstance that “the reasons for an official’s denial of access to a member of the public or press to the courtroom [must] be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered”. Id. at 87 (citations omitted). Notwithstanding the fears of various court personnel that Mr. Huminski might engage in violence, including the concern he had a bomb in his van, the act of excluding him was “wildly disproportionate to the perceived threat.” Id. It ruled that “because the exclusion effected by the trespass notices was plainly overbroad in light of its duration, geographical scope and scope of proceedings covered, we conclude that the exclusion was not tailored to the threat and is therefore unconstitutional.” Id. at 88.

III. PRIOR RULING PERTAINING TO THE BARRING ORDER.

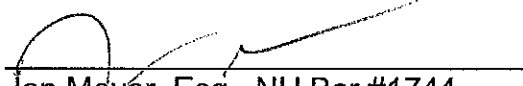
The County relies on an order from Judge McGuire upholding the same banning order addressed to another defendant as within the authority of Sheriff. This decision is not res judicata on Defendant here since he was not a party to that proceeding. Further, there is no evidence from the opinion in that case that the constitutional arguments raised herein were raised there, and Judge McGuire’s order is silent with respect to them. However, for the reasons stated above, if Judge McGuire’s order was

intended to rule against the claim of unconstitutionality, such a decision would have been clearly wrong under state and federal constitutional law.

Respectfully submitted,
IAN BERNARD a/k/a IAN FREEMAN
By his attorneys,
BACKUS, MEYER & BRANCH, LLP

Dated: September 17, 2012

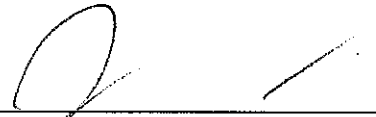
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CERTIFICATE OF SERVICE

I, Jon Meyer, hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS has been delivered in hand this 17th day of September, 2012 to David Lauren, Esq., Assistant Cheshire County Attorney.



Jon Meyer, Esq.