COPY

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS
OCT. TERM

8TH CIRCUIT COURT
DISTRICT DIV. – KEENE

The State of New Hampshire
v.
Ian Bernard
Docket # 449-2012-CR-00535

STATE'S ANSWER AND OBJECTION TO DEFENDANT'S MOTION TO DISMISS

NOW COMES the State of New Hampshire, by and through Assistant Cheshire County Attorney David Lauren, and files the Answer and Objection to Defendant's Motion to Dismiss, and in response states as follows:

FACTS

1.) Defendant, Ian Bernard, is a Cheshire County resident who relocated to Keene, NH as part of the "Free-State Project" (hereinafter FSP).

2.) Defendant and other members of the FSP have engaged in various forms of civil-disobedience and self-styled "political activism."

3.) Said actions include, but are not necessarily limited to handing out leaflets at court; refusing to acknowledge the authority of a presiding judge by failing to stand upon his or her entrance into the court and standing in court parking lots while videotaping court employees and their vehicles and license plates as they arrive for, and leave after work while attempting to ask them questions, singing Christmas carols with made-up words attacking bailiffs for doing their job, and picketing the homes of Judges and police officers. Tapes made by the members of the FSP during these activities were subsequently placed on the FSP website, Freekeene.com. In at least one instance, a member of the Cheshire County Superior Court Clerk's Office was subjected to

harassing behavior when a member of the FSP came to the window in the aftermath of a man setting himself on fire outside the Superior Court.

4.) Court employees were concerned for their family's safety should their license plate be publically disclosed on the internet and experienced emotions ranging from fear to frustration. The employees felt compelled to leave the Court together at closing time so as to not have to contend with the FSP members with cameras who were waiting in a semi-circle for them outside the door leading to the parking lot and upon arrival in the morning they were accosted by FSP members with cameras who photographed them leaving their vehicles and further photographed their license plates. The employees were harassed with questions that demeaned their employer, the Court.

5.) In response to these actions and the concerns expressed by the court employees, Cheshire County Sheriff Richard Foote issued a "No Trespass Order" (see attached) prohibiting a limited number of FSP members from being on Superior Court property or inside the Court without prior permission from Sheriff Foote.

6.) While not specifically noted in the Order, Sheriff Foote authorized members of his command staff to grant said permission should the Sheriff not be available. Whenever anyone would call the Sheriff's Department and ask to speak to the sheriff, they were asked what it was in regard to. If it was a person subject to the No Trespass Order, he or she was transferred to a member of the Department authorized to grant access.

7.) Following service of the no trespass order, the Defendant entered the Cheshire County Superior Court without having first notifying the Sheriff and receiving permission.

8.) The defendant was charged with criminal trespass and the defendant's Motion to Dismiss subsequently followed.

ARGUMENT

9.) At the outset, the State would argue that in the context of the instant case, the validity of the No-Trespass Order is irrelevant and essentially a red herring.

10.) The way to challenge such an order that one feels is invalid is to not violate it and bring a civil action to challenge the order, as was done in *Gessner v. Plummer,* 2011 U.S. Dist. LEXIS 75538 (2011).

11.) In the instant case, all this Honorable Court need do is, pursuant to RSA 635:2, determine if the order was served on the defendant; if, after service, the defendant subsequently entered the Court in defiance of said order that was personally communicated to him and served on him by the Cheshire County Sheriff or his designee, an authorized person.

12.) If this Honorable Court is unconvinced by the initial argument and determines that it needs to proceed to rule on the validity of the Order, the State offers the following as argument as to the validity of the Order.

13.) Assuming but without conceding that Defendant's contention regarding the right to monitor judicial proceedings is part of the New Hampshire Constitution, and under the First Amendment to the United States Constitution, the State would argue that the No Trespass Order does not violate those rights.

14.) Counsel for the Defendant cites to the case of *Huminski v. Corsones,* 396 F.3d 53 (2d Cir. 2004) as persuasive authority for challenging the validity of the Order.

15.) Under *Huminski*, one has an individual First Amendment right, both as a citizen and as a "citizen reporter," "to access court proceedings even though he was not a party to and had no other official connection with them." *Huminski,* at 58.

16.) *Huminski* stated that said right of access – a presumptive right – "could be overcome if court officials reasonably decided that he might pose a threat to persons, property, or proceeding and if the restrictions on his access were reasonably tailored to meet the legitimate goals of the exclusion." *Huminski* at 59.

17.) The *Huminski* court cited a four-step inquiry that needed to be made in order to determine if the State could overcome the presumptive right.

18.) The first step involves determining the reasons for the ban. As Cheshire County Sheriff Richard Foote indicated in his affidavit (see attached), the ban was needed as a result of the defendant's continued harassment of court employees, harassment that resulted in court employees fearing for their safety and the safety of their family. Based on conversations with employees of the Cheshire County Superior Court's Clerk's Office, their reluctance even now to have their last names disclosed to the defense either as witnesses or through affidavits demonstrates their great level of fear and concern for both their and their families safety. Said concerns were very clearly stated in the statements made to the State during its inquiries into the instant case.

19. The second step asks what interests the no-trespass order seeks to protect. As indicated in Sheriff Foote's affidavit, the activities of the defendant's was interfering with the normal operations of the Court and negatively impacting the orderly administration of justice. Actions that were disruptive were being directed at court staff and judges.

20.) The third step asks whether there were alternatives available to protect the interests that the no-trespass order sought to guard. In the instant case, the defendant's were met by members of the Cheshire County Sheriff's Department on numerous occasions and asked to cease the behavior that was considered disturbing and threatening by the Court employees. Prior to the issuance of the no-trespass order, even with Sheriff's deputies present, the defendant's and their supporters engaged in actions such as forming a horseshoe around the exit door, waited for the employees to leave, and as they were leaving, asked questions that demeaned their employer, the Court, while recording them on camera. Even though the defendant's and their supporters parted to let the employees through, their actions were disruptive to the employees. Said behavior continued despite repeated efforts on the part of the Sheriff's office to discourage such behavior. The State would note that at no time was any request for admission to the Court denied. The State would argue that while prior permission to come onto the Court property was required, there was a procedure in place for granting of said permission when the Sheriff was not personally available, and, when requested in advance, permission was always granted.

21.) The fourth inquiry asks what the scope and duration of the ban was and whether it was narrowly tailored to meet the reasons for the ban and protect the endangered interest. In the instant case, Sheriff Foote reported that the reason for no trespass order was not to deprive the defendant's and their supporters of the right to come to the Cheshire County Superior Court, but to allow the Court to be prepared if they did come. The requirement of advanced notice served to allow the Sheriff's Office and the Court bailiffs to be prepared and have additional staff available should any type of altercation, civil disobedience, or other issue arise.

The scope of the ban was limited to the areas that the behavior engaged in would result in causing the previously noted disruptions to the Court employees. While the language of the no-trespass order was silent in regard to its duration, Sheriff Foote's intention was always to review the behaviors in the future and, based on how those subject to it acted, rescind the order when appropriate.

22.) The State would argue that the reasoning applied by the United States District Court for the Southern District of Ohio in the case of *Gessner v. Plumber,* 2011 U.S. Dist. LEXIS 75538; 2011 WL 271259 (See Attached) more closely follows the reasoning that is applicable in the instant case.

23.) In *Gessner,* the plaintiff, a pro se litigant, would appear in court and seek advice as to how to proceed with his case. On occasion, his behavior was found to be "threatening and harassing." *Gessner,* LEXIS 75538 at 8-9. A no-trespass order was served on Gessner, said order providing "that in the event he had court proceeding to attend, or any other legitimate business in the Courthouse, the he would need to check in with the [Sheriff's] Court Detail and that we would escort him while he conducted his business." *Gessner, at 10.*

24.) The *Gessner* Court subsequently found no violation of Gessner's right of access to the courts. The Court initially noted that since 1995 and the bombing of the Murrah Federal Building in Oklahoma, "courthouse[s] [are] much more restricted than [they] used to be. ... The general public does not enjoy the same unrestricted entry into courthouses which was common before 1995." *Id* at 22, 23.

25.) The Court noted that "[c]alm and orderly courthouses are essential to the administration of justice. ... [C]ourts must have relative order to do justice. ... The Supreme Court has upheld

the authority of the States to prohibit by criminal sanctions demonstrations so near courthouses as to disrupt the proceeding, even though the demonstration is not on court property." *Id* at 23, 24; *Citing Cox v. Louisiana,* 379 U.S. 559, (1965).

26.) The *Gessner* court further noted that "[p]laintiff does not cite a single instance in which he has been prevented from actually filing in person any document he desired to file in any of his cases in the Courthouse." *Id* at 25. In the instant case, upon proper notice, at no time was the defendant denied access to the Court.

27.) As in the instant case, "[t]he notice [in Gessner] does not address itself in any way to speech by Mr. Gessner and it does not purport to prevent him from entering the Courthouse, but merely requires that he be accompanied. " *Id* at 26, 27.

28.) In the instant case, as in *Gessner,* the no-trespass order was a response to behavior by the defendant that was viewed as being threatening and harassing by the Superior Court Staff. The no trespass order served on the defendant was actually less restrictive than the one served on Gessner, in that it provided only for notice to the Sheriff's office prior to entry, and did not provide for constant monitoring once permission had been granted and the defendant entered the Court.

29.) The Cheshire County Superior Court has also, since 1995, instituted security measures. The semi-circular drive in front of the main entrance has been chained off, preventing any vehicle from driving up close to the door to discharge passengers, and all those entering the Court are subject to search and must proceed through a magnetometer.

30.) As noted by Sheriff Foote, permission to enter the building has always been granted once the formal request has been tendered. In the manner in which it was enforced, the No-Trespass

Order in the instant case did not serve to deprive the defendant of his right of access to the court, but served to assure that the "court[ ] ... have relative order to do justice." *Id.* At 23,24.

WHEREFORE, the State respectfully requests that:

1.) This Honorable Court deny Defendant's Motion to Dismiss, and

2.) For such other relief this Honorable Court deems just and proper.

Respectfully Submitted,

Dated: Oct 17, 2012

David Lauren, Esq. NH Bar # 14214
Assistant Cheshire County Attorney
Cheshire County Attorney's Office
12 Court St.
Keene, NH 03431
603-352-0056
dlauren@co.cheshire.nh.us

I, David Lauren, Assistant Cheshire County Attorney, do hereby swear and/or affirm that all statements attributed to him and others are true and accurate according to his best recollection.

Justice of the Peace/Notary Public

LAURIE E. BURT
Justice of the Peace - New Hampshire
My Commission Expires June 9, 2015

David Lauren, Esq.

10-17-12
Date

CERTIFICATE OF SERVICE

I, David Lauren, Assistant Cheshire County Attorney, do hereby certify that I mailed a copy of this Answer and Objection to Defendant's Motion to Dismiss to Jon Meyer, Esq. counsel for the Defendant, at Backus, Meyer & Branch, LLC, 116 Lowell St., P.O. Box 516, Manchester, NH 03105-0516 on Ocober 17, 2012.

David Lauren, Esq.

RICHARD A. FOOTE
Sheriff

OFFICE OF THE SHERIFF
CHESHIRE COUNTY
12 COURT STREET
KEENE, NEW HAMPSHIRE 03431

TELEPHONE
603/352-4238
FAX
603/355-3020

No Trespass Order, per RSA 635:2

December 30, 2011

Name: Ian Bernard
Address: 73 Leverett St, Keene, NH

Dear Mr. Bernard;

Due to your persistent harassment of court personnel, you are prohibited from entering or remaining on the county property at 12 Winter Street, Keene, NH (the Cheshire County Superior Court Building). This notice is provided to you in accordance with statute governing Criminal Trespass; RSA 635:2.

If you have any legitimate county business that requires you to enter and remain in the Cheshire County Superior Court Building, you are to contact me to make an appointment to conduct your county business.

Sincerely,

Richard Foote,
Cheshire County Sheriff

CC: Keene Police Department
NH State Police, Troop C.

Gessner v. Plummer

United States District Court for the Southern District of Ohio, Western Division
June 1, 2011, Decided; June 1, 2011, Filed
Case No. 3:10-cv-223

Reporter: 2011 U.S. Dist. LEXIS 75538; 2011 WL 2712529

MARK E. GESSNER, Plaintiff, -vs- SHERIFF PHIL PLUMMER, et al., Defendants.

Notice:

Subsequent History: Adopted by, Summary judgment granted by, Complaint dismissed at *Gessner v. Plummer, 2011 U.S. Dist. LEXIS 75585 (S.D. Ohio, July 13, 2011)*

Prior History: *State ex rel. Gessner v. Vore, 123 Ohio St. 3d 96, 2009 Ohio 4150, 914 N.E.2d 376, 2009 Ohio LEXIS 2262 (2009)*

Counsel: [*1] Mark E Gessner, Plaintiff, Pro se, Dayton, OH.

For Sheriff Phil Plummer, Individually and Officially as Sheriff of Montgomery County, Dough Olt, Individually and Officially as Deputy of Montgomery County Sheriff's Office, Defendants: Victoria Ellen Watson, LEAD ATTORNEY, Montgomery County Prosecutor's Office, Dayton, OH.

Judges: Michael R. Merz, United States Magistrate Judge. District Judge Thomas M. Rose.

Opinion by: Michael R. Merz

Opinion

REPORT AND RECOMMENDATIONS

This case is before the Court on Motion for Summary Judgment of Defendants Sheriff Phil Plummer and Deputy Sheriff Doug Olt (Doc. No. 13). Plaintiff filed a Response two days later than the date set by the Court for a response (See Doc. Nos. 17, 19). Because the Plaintiff had only a short time after the Court denied his Motion to Strike to file his response, the Magistrate Judge *sua sponte* extends his time to May 23, 2011. There is no perceptible prejudice to the Defendants from doing so. The Defendants have now filed a Reply (Doc. No. 21) and do not complain of Plaintiff's late filing.

A motion for summary judgment is a dispositive motion on which a magistrate judge to whom such a motion has been referred must file a report and recommendations. *28 U.S.C. § 636(b)*; [*2] *Fed. R. Civ. P. 72(b)*.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56*. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.

Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive [*3] determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. *Fed. R. Civ. P. 50*). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted). "The mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)(quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986). [*4] Therefore a court must make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimi*. *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

The moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also, Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (citation omitted). If the moving party meets this burden, the nonmoving party must go beyond the pleadings to show [*5] that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 587; *Martin v. Ohio Turnpike Comm'n.*, 968 F.2d 606, (6th Cir. 1992).

In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

Analysis

Plaintiff brought this action *pro se* to complain of being barred from the Montgomery County Courthouse and the Dayton Municipal Court, a connected building. He sued both Sheriff Plummer and Deputy Olt in their official and individual capacities (Complaint, Doc. No. 1, ¶ 4). He asserts that on June 11, 2008, he was "seized, detained, and issued a MCSO No-

tice of Criminal Trespass" [*6] (the "Notice") which "trespasses" [1] him from those two buildings. *Id.* ¶ 6. Deputy Olt is alleged to have issued the Notice upon "false and fraudulent allegations of harassment against Montgomery County Common Pleas Judge Mary K. Huffman and her court reporter, Amy Burkett. *Id.* ¶ 7. Sheriff Plummer is alleged to have refused to rescind the Notice or "provide Plaintiff a due process hearing to contest the reasons for issuance of the notice and allow Plaintiff to give evidence of his innocence, call witnesses, and cross-examine his accuser[s]."

Plaintiff alleges these actions were taken against him to prevent him from seeking redress in a civil case in which he is the plaintiff, *Gessner v. Schroeder. Id.* ¶¶ 9, 12. He asserts that the Notice violates his *First Amendment* rights of access to the courthouse as a party to a case and to seek redress of grievances [*7] generally and also "for any other usage of said courts building Plaintiff has had since issuance of the notice." *Id.* ¶ 11. He also claims Defendants' actions deprive him of due process and equal protection of the laws. As relief he seeks $40 million compensatory damages and punitive damages in an unspecified amount, but does not seek injunctive relief.

Shortly after the case was filed, on August 17, 2010, the Magistrate Judge conducted a scheduling conference and set a schedule for the litigation which included a discovery cut-off of March 15, 2011, and a summary judgment motion deadline of April 15, 2011 (Doc. No. 8). The instant Motion was filed on the deadline and does not reflect that any discovery was conducted by either side in the case.

Undisputed Facts

The facts set forth in this Report are admitted or established by evidence competent under *Fed. R. Civ. P. 56(c)(4)* and not controverted by opposing competent evidence. Defendants supported their Motion with Affidavits of Judge Huffman and Deputy Olt. Although Plaintiff moved unsuccessfully to strike Judge Huffman's Affidavit, he has not filed any affidavits in support of his opposition. Instead, he has filed certified copies of [*8] documents and certified transcriptions of three conversations between himself and various Common Pleas court or Sheriff's personnel.

Plaintiff Gessner filed a case in the Montgomery County Common Pleas Court against Dayton Police Officer Alan Schroeder; the case was assigned to Common Pleas Judge Mary Katherine Huffman and tried before her and a jury in September, 2007, resulting in a jury verdict in Schroeder's favor. Plaintiff appealed from that judgment and the appeal received Case No. CA22617 in the Montgomery County Court of Appeals. The appeal was dismissed on April 7, 2010, and the Ohio Supreme Court later declined jurisdiction over a further appeal on August 11, 2010. Thus appellate proceedings from the Common Pleas judgment were pending until two months after this case was filed.

Both before and after trial, Mr. Gessner, who was proceeding *pro se* in that case as he is in this one, would appear in Judge Huffman's courtroom without an appointment to seek advice or direction about how to proceed with the case (Affidavit of Mary Katherine Huffman, Ex. A to Motion, PageID 47-48, ¶ 6). [2] On the occasions when Judge Huffman observed interactions between Mr. Gessner and her staff, she [*9] found his behavior threatening and harassing. *Id.* On June 11, 2008, Amy Burkett, Judge Huffman's judicial assistant who also is responsible for the recording equipment which makes the official court record, told the

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[1] Both parties use the phrase "to trespass" as meaning to bar or exclude as in "to make subject to prosecution for trespass if entering thereafter." While this usage appear to be growing, the Court is unable to find any warrant for it in contemporary dictionaries. See, e.g., the entry for "trespass, v." in the Oxford English Dictionary.

[2] Mr. Gessner objected to this Affidavit and sought to have it struck from the record (Doc. No. 16). The Magistrate Judge denied that Motion and found Judge Huffman's Affidavit to be proper under Fed. R. Civ. P. 56 (Decision and Order, Doc. No. 17; Supplemental Decision and Order, Doc. No. 19). Mr. Gessner has objected to the Magistrate Judge's ruling (Doc. No. 18) and his Objection remains pending for Judge Rose's ruling.

Judge about an encounter she had had with Mr. Gessner that morning in the courtroom. Ms. Burkett told Judge Huffman that Mr. Gessner had "repeatedly suggested that she had somehow altered or failed to maintain the Court's record [of his case]." *Id.* ¶ 7. She said Mr. Gessner had recorded their conversation and she felt both his behavior and demeanor to be threatening. *Id.* As a result, Judge Huffman "asked if the Sheriff's Office could trespass Mr. Gessner from the Courthouse..." *Id.* ¶ 8.

In his Affidavit, Deputy Olt avers that he was called to Judge Huffman's **[*10]** chambers on June 11, 2008, spoke with Ms. Burkett and Judge Huffman about Mr. Gessner, and received the Judge's request that Mr. Gessner be "trespassed" from the Courthouse. (Affidavit of Douglas Olt, Ex. B to Motion, PageID 49-50, ¶¶ 4-6). Judge Huffman also told him that on a prior occasion Mr. Gessner had cornered her in a stairwell. *Id.* ¶ 5. Deputy Olt obtained permission from his supervisor, Sgt. Roy, to "trespass" Mr. Gessner from the Courthouse. *Id.* ¶ 6. Deputy Olt then contacted Mr. Gessner, who was in the Courthouse at the time, served the trespass order on him, and saw him sign the order and leave the building. *Id.* ¶ 7. Olt explained to Gessner "that in the event he had court proceedings to attend, or any other legitimate business in the Courthouse, that he would need to check in with the [Sheriff's] Court Detail and that we would escort him while he conducted his business." *Id.* ¶ 8.

Plaintiff's exhibits comprise

(1) a copy of the Notice,

(2) a copy of a June 26, 2008, letter from Assistant Prosecuting Attorney John A. Cumming communicating the Sheriff's refusal to rescind the Notice,

(3) a transcript (prepared June 12, 2008, by Michelle Elam) of a recording of the conversation **[*11]** between Mr. Gessner and Ms. Burkett on June 11, 2008,

(4) an Entry in *State of Ohio ex rel Mark Gessner v. Dave Vore*, 123 Ohio St. 3d 96, 2009 Ohio 4150, 914 N.E.2d 376, signed by Chief Justice Moyer dismissing Plaintiff's appeal from denial of a writ of mandamus in the same case in the Montgomery Court of Appeals,

(5) the Ohio Supreme Court opinion which underlies the dismissal entry,

(6) a transcript (prepared May 10, 2011, by Stacey Mortsolf) of a conversation between Mr. Gessner and an unidentified speaker on July 1, 2008,

(7) a transcript (prepared May 10, 2011, by Stacey Mortsolf) of a conversation between Mr. Gessner and a Mr. Nolan on June 12, 2008, and

(8) a copy of what purports to be a draft Sheriff's report regarding the June 11, 2008, incident.

Based on this state of the facts, Defendants assert they are qualifiedly immune from any liability under *42 U.S.C. § 1983* and immune under *Ohio Revised Code Ch. 2744* from Plaintiff's state law claim of intentional infliction of emotional distress.

As to the latter claim, the Court concludes that Plaintiff has not stated or attempted to state an Ohio claim for intentional infliction of emotional distress. The Complaint recites that it arises under *42 U.S.C. § 1983* and **[*12]** that the Court has subject matter jurisdiction under *28 U.S.C. § 1331* (Complaint, Doc. No. 1, ¶¶ 2, 3). Plaintiff pleads a "First Cause of Action" under *§ 1983* but does not purport to state any other claim for relief or make any reference to state law. Finally, in his Response, Plaintiff makes no reference to a state law claim. Therefore, even considering the liberality to which *pro se* pleadings are entitled, this Complaint does not attempt to state a claim under Ohio law, for intentional infliction of emotional distress or otherwise.

The Complaint does purport to state claims under *42 U.S.C. § 1983*.

42 U.S.C. §1983, R.S. §1979, was adopted as part of the Act of April 20, 1871, and reads, as amended:

> Every person who, under color of any statute, ordinance, regulation, cus-

> tom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress , except that in any action **[*13]** brought against a judicial officer, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The statute creates a cause of action sounding essentially in tort on behalf of any person deprived of a constitutional right by someone acting under color of state law. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). The purpose of *§1983* is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). In order to be granted relief, a plaintiff must establish that the defendant deprived him of a right secured by the U.S. Constitution and the laws of the United States and that the deprivation occurred under color of state law. *See West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); **[*14]** *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

There certainly is no question that whatever action Sheriff Plummer or Deputy Olt took towards the Plaintiff was taken in their capacity as law enforcement officials so that they were acting under color of state law.

Government officials performing discretionary functions are afforded a qualified immunity under *42 U.S.C. §1983* as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir., 1994); *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994).

Defendants claim the benefit of the qualified immunity defense at length in their Motion. In the Complaint purports to sue both Defendants in their official and individual capacities. However, in light of the qualified immunity defense, he abandons any individual capacity claim:

> The issues of Qualified immunity has no application where the constitutional claim is that the deprivation occurred as a result of the policy or practice of a local government entity **[*15]** or as a result of a decision of the chief policymaker. The claim, in essence, is against the local government entity, and not the individual.
>
> What happened to Plaintiff, Mark Gessner was not the random unauthorized act of a low level employee who is sued in his individual capacity and for whom the defense of qualified immunity would be available. Plaintiff, Mark Gessner's was subjected to a decided and consistent policy of Defendant, Sheriff Phil Plummer's Office.

(Response, Doc. No. 20, PageID 133.)

Based on Plaintiff's concession, the Defendants are entitled to qualified immunity and the claims against them in their individual capacities should be dismissed with prejudice.

Defendants also claim entitlement to dismissal in their official capacities because they argue that Plaintiff has not demonstrated "that an unconstitutional policy caused his alleged injuries ..." (Motion, Doc. No. 13, PageID 44). Defendants recognize that suit against them in their official capacities is in effect a suit against "the entity" itself, in this case the Montgomery County Sheriff. *Id.* Defendants in their official capacity are not entitled to qualified immunity. *Owen v. City of Independence, Missouri*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

While **[*16]** Plaintiff has not produced any official policy statement of the Sheriff on barring people from the Courthouse, he has produced sufficient evidence from which a reasonable jury could infer the existence of a policy.

Municipalities and other bodies of local government are "persons" within the meaning of *§1983* and may therefore be sued directly if they are alleged to have caused a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Powers v.Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 606-07 (6th Cir. 2007); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

An unconstitutional governmental policy can be inferred from a single decision by the highest officials responsible for setting policy in a particular area of the government's business. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). On the other hand, official policy cannot be inferred from the single unauthorized act of a subordinate government agent, e.g., an unauthorized shooting by a police officer. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005)("By **[*17]** itself, 'the wrongful conduct of a single officer without any policy-making authority did not establish municipal policy.'" *quoting Collins v. City of Harker Heights*, 503 U.S. 115, 121, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

Identification of the official whose decisions represent the official policy of a particular local governmental unit is a question of law to be decided by the judge. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 784-85, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997), *citing Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).

In this case there is sufficient evidence to infer the existence of a policy made by the Sheriff [3] and a decision to apply that policy to Plaintiff, also made on authority delegated by the Sheriff. First of all, it appears Judge Huffman treated the Sheriff as the official with authority to decide if Plaintiff should be barred. The evidence is that Judge Huffman did not issue an order to bar Plaintiff, but rather requested that he be barred. Deputy Olt did not act on his own or even on Judge Huffman's request. Rather, he received authorization from his supervisor, Sergeant Roy. Since the Sergeant is unlikely to have acted on his own authority in barring a litigant/member of the public from the Courthouse, **[*18]** it is likely he was acting on delegated authority from the Sheriff. Add to this the fact that the Notice appears to be an official form of the Montgomery County Sheriff [4], pre-printed with blanks for use on different occasions. The form purports to be delivered by Deputy Olt "as agent for various property own-

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[3] Dave Vore was the Sheriff when the Notice was issued. Shortly thereafter he was succeeded by Phil Plummer, the current incumbent of the office.

[4] Note the revision date of June 20, 2003, in the lower right-hand corner.

ers." Taken together and construed most favorably to the Plaintiff, these facts support an inference that the Sheriff has a policy of excluding persons from the Courthouse on request of a judge, at least if the judge's concern is facially about security or even interference with court functions.

To recover, a *§ 1983* plaintiff must identify the policy, connect the policy to the political subdivision itself, and show that the particular injury was incurred because of the execution of that policy. *Board of County Comm'r of Bryan County, Okl., v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993). There must be a direct causal **[*19]** link between the policy and the alleged constitutional violation such that the governmental entity's deliberate conduct can be deemed the moving force behind the constitutional violation. *Graham v. County of Washtenaw*, 358 F.3d 377 (6th Cir. 2004), *citing Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001)(citing *Board of County Comm'r of Bryan County, Okl., v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)). There is no doubt that Plaintiff is being excluded from the Courthouse or admitted with restrictions pursuant to the policy identified above.

The critical questions on the instant Motion is whether the Sheriff's policy as applied to Mr. Gessner violates any of his constitutional rights and if those rights were clearly established when the Notice was issued.

As the Court understands Plaintiff's position, it is that the order barring him from the Courthouse except when escorted violates his *First Amendment* rights to enter the Courthouse, both as a party litigant and as a member of the general public. He identifies this as a right of access to the courts or to petition for redress of grievances; he may also be asserting a right to enter the Courthouse for other purposes which he does **[*20]** not identify. He also asserts denial of due process in the failure of the Sheriff to provide him with a post-deprivation hearing before refusing to rescind the order. He claims a violation of his right to equal protection of the laws. Finally, at several places in his response, he asserts he has not been afforded the right to confront his accusers. These four claimed rights will be examined separately.

Right of Confrontation

The *Sixth Amendment to the United States Constitution* provides in pertinent part "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him ..." Mr. Gessner has not been charged by Judge Huffman, Ms. Burkett, Sheriff Vore, Sheriff Plummer, or Deputy Olt with any criminal offense as a result of his interaction with Ms. Burkett on June 11, 2008, or any other interaction with Judge Huffman or her staff out of which the Notice arose. While the facts asserted in the police report which was made as a result of Ms. Burkett's complaint could potentially have been turned into a criminal complaint for menacing [5], that did not happen and the statute of limitations for filing such a complaint has long since passed. There **[*21]** is no right of confrontation until one formally becomes an accused with the filing of criminal charges. The right of confrontation is simply inapplicable to this case.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV, § 1*. The Supreme Court has stated that this language "embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997). The states cannot make distinctions which either burden a funda-

[5] The Magistrate Judge is not concluding that Plaintiff actually committed any act which would qualify as menacing under Ohio law, but merely that if there were going to be any criminal prosecution based on those facts, menacing is the charge a prosecutor most likely would have chosen.

mental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference. *Id.*; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005).

Plaintiff [*22] has alleged very generally a violation of the Equal Protection Clause. He has not suggested that there is any class of people similarly situated to him which has not been subject to similar treatment by the Montgomery County Sheriff. A mere conclusory allegation is insufficient to state a claim for violation of the Equal Protection Clause. *Car-Two, Inc. v. Dayton*, 357 F.2d 921 (6th Cir. 1966). This claim should be dismissed without prejudice for failure to plead a claim under *§ 1983* on which relief can be granted.

First Amendment **Right of Access**

Most importantly, Plaintiff claims his right of access to the courts for redress of grievances has been violated.

Without question Mr. Gessner's ability to enter the Montgomery County Courthouse [6] and move about freely inside it is more restricted as a result of the Notice than it was before. As a matter of context, however, entry to the Courthouse is much more restricted than it used to be. Persons seeking to enter the building are screened through a magnetometer and their possessions are x-rayed. Both of those processes are conducted by uniformed deputy sheriffs. [7] These processes have become common at court facilities across the United States, [*23] particularly since the bombing of the Murrah Federal Building in Oklahoma City in 1995. For example, the same processes are used to screen persons entering the Federal Building in which this Court sits, the Potter Stewart Courthouse where the Sixth Circuit sits, and the Thurgood Marshall Building which houses the Administrative Office of the United States Courts. The general public does not enjoy the same unrestricted entry into courthouses which was common before 1995.

Calm and orderly courthouses are essential to the administration of justice. Entirely apart from any threats of physical violence, courts must [*24] have relative order to do justice. For this reason, American judges have always had the power to punish with contempt sanctions those who disrupt court proceedings. *See Ohio Revised Code § 2705.01*: "A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." *18 U.S.C. § 401(1)* is virtually identical. The Supreme Court has upheld the authority of the States to prohibit by criminal sanctions demonstrations so near courthouses as to disrupt the proceedings, even though the demonstration is not on court property. *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

If courts may screen visitors for weapons and sanction disruptive conduct, why may they not require visitors or litigants who are perceived to be threatening to be accompanied by a court security officer?

Without question, the *First Amendment* protects a litigant's right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). However, the *First Amendment* does not protect a particular method of access. Prisoners, for example, may not dictate the method by which access to the courts will be assured. *Penland v. Warren County Jail*, 759 F.2d 524, 531 n.7 (6th Cir. 1985)(en [*25] banc). So far as this Court is

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[6] Reference is made only to the Montgomery County Courthouse but the Notice applies to both that building and the Dayton Municipal Court which is connected by passageway generally open to the public once they have cleared the security at the entrance. Conversely, the Montgomery County Courthouse is open by the same passageway to those who have cleared security at the entrance to the Dayton Municipal Court.

[7] These aspects of entry into the Courthouse are subject to judicial notice because they are open and notorious in the Dayton legal community. They are added to provide context.

aware, neither the Supreme Court nor the Sixth Circuit has ever held that the right of access to the courts encompasses a right to physically enter a courthouse, so long as other adequate means of access are available. Plaintiff does not cite a single instance in which he has been prevented from actually filing in person any document he desired to file in any of his cases in the Courthouse. [8]

Mr. Gessner complains that he was threatened with being jailed "for not more fully detailing his need for a notary public in room 103 of the courts building." (Response, Doc. No. 20, PageID 131.) A fair reading of the transcript of that encounter shows Mr. Gessner being combative with his interlocutor, Deputy Sheriff Grove, and that Mr. Gessner made as many or more threats than the deputy did. Of course, there is no need to enter a courthouse to obtain notarization of an affidavit.

Mr. Gessner complains that he is humiliated by being escorted to the men's bathroom, but there is no need for anyone to use a public bathroom in a courthouse; **[*26]** it is not a necessary ancillary service to providing access to the courts.

Mr. Gessner argues that individuals such as himself have a presumptive right of access to court proceedings and in this he is correct. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)(*Press-Enterprise I*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1(1986)(*Press-Enterprise II*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). But Mr. Gessner offers no proof — indeed, not even an allegation — that he has ever been barred from any court proceeding, in his own or any other case. The right to be present is not the same as a right to be there unaccompanied.

Mr. Gessner relies on *Huminski v. Corsones*, 396 F.3d 53 (2nd Cir. 2004), but the facts in that case are far different from this one. There was an attempt to bar Mr. Huminski from parking his vehicle on or near court property and also an attempt to prevent him from negative speech regarding a particular judge. The Notice does not address itself in any way to speech by Mr. Gessner and it does not purport to prevent him from entering the Courthouse, but merely requires that he **[*27]** be accompanied. It is therefore much more narrowly tailored to the precise problem perceived by Judge Huffman — Mr. Gessner's intimidating manner and his unannounced appearance for *ex parte* communications with court staff.

As a more formal matter, *Huminski* does not clearly establish a constitutional right to enter a state courthouse unaccompanied by security personnel even in the Second Circuit where it was decided, much less in the Sixth Circuit, whose precedent controls here. Ordinarily, "clearly established law" means binding precedent of United States Supreme Court, the Sixth Circuit Court of Appeals, the Ohio Supreme Court, or the deciding court itself. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994); *Wegener v. Covington*, 933 F.2d 390 (6th Cir. 1991); *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988); *Davis v. Holly*, 835 F.2d 1175, 1180 (6th Cir. 1987); *Robinson v. Bibb*, 840 F.2d 349, 352 (6th Cir. 1988); or case law from other circuits which is directly on point. *Barrett v. Harrington*, 130 F.3d 246, 264 (6th Cir. 1997)(*citing* *Cameron v. Seitz*, 38 F.3d 264, 272-73 (6th Cir. 1994). For other decisions to satisfy the test, they must "point unmistakably to the unconstitutionality **[*28]** of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Ass'n. v. Seiter*, 858 F.2d 1171 (6th Cir. 1988). Although the absence of a case on point does not necessarily en-

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[8] The building in question houses the Common Pleas Court, the Court of Appeals, and the Clerk's Office which serves both of those courts.

dow a public official with immunity, "when this court can uncover only some generally applicable principle, its specific application to the relevant controversy must again have been 'clearly foreshadowed by applicable direct authority.'" *Blake v. Wright*, 179 F.3d 1003 (6th Cir. 1999)(*quoting* Summar v. Bennett, 157 F.3d 1054, 1058 (6th Cir. 1998).

In sum, Plaintiff does not have a clearly established constitutional right under the *First Amendment* to unaccompanied access to the Courthouse. His *First Amendment* claim should be dismissed with prejudice.

Fourteenth Amendment Right to Procedural Due Process

Mr. Gessner also asserts that Defendants' actions deprived him of his right to procedural due process under the Fourteenth Amendment. As the Court construes the claim, it is both for lack of a hearing before his right of access **[*29]** to the Courthouse was constricted and also lack of a post-deprivation hearing at which he could contest the evidence allegedly justifying those restrictions.

The Fourteenth Amendment prohibits the States from depriving persons of life, liberty, or property without due process. The Amendment does not itself create the liberty interests it protects, but state law may create protectible liberty interests. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). To create such a liberty interest, the State must use "'explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." Kentucky Dept. of Corrections, supra, *citing* Hewitt v. Helms, 459 U.S. 460, at 471-72, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

Mr. Gessner points to no state law which creates the liberty interest he claims, to wit, the right to enter a courthouse and move about inside unaccompanied by security personnel. *Ohio Revised Code § 311.07(A)* provides in pertinent part that the "sheriff shall have charge of the court house," which suggests at least *prima facie* that the Sheriff is the proper authority **[*30]** to control entry into and movement about the Courthouse. In the absence of state law creating the liberty interest he claims, Mr. Gessner has no procedural due process right, either pre- or post-deprivation, to a hearing. It is just not the case that the United States Constitution gives persons within the jurisdiction of the States a right to a hearing at which any act taken by a public official must be justified by that public official.

Mr. Gessner notes that the Ohio Court of Appeals and Ohio Supreme Court both declined to issue a writ of mandamus at his request, holding that he had an adequate remedy at law by filing an action under *42 U.S.C. § 1983*, either in state or federal court. That ruling, of course, does not mean that he has a right to the remedy he seeks, but merely the right to have this Court or the Common Pleas Court decide whether he has the constitutional rights he claims.

Mr. Gessner has no procedural due process rights with respect to the issuance, maintenance in place, or rescission of the Notice. His Fourteenth Amendment claim should also be dismissed with prejudice.

Conclusion

In accordance with the foregoing analysis, Defendants' Motion for Summary Judgment should **[*31]** be granted and the Complaint herein dismissed with prejudice.

June 1, 2011.

/s/ Michael R. Merz

United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to *Fed. R. Civ. P. 72(b)*, any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to

Fed. R. Civ. P. 6(e), this period is automatically extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within **[*32]** fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See* United States v. Walters, 638 F. 2d 947 (6th Cir., 1981); Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).