Case No. 08-35902

United States Court of Appeals

for the Ninth Circuit

Brian P. Carr

Plaintiff-Appellant

versus

The State of Oregon through
Hardy Myers in his official capacity as Attorney General of the State of Oregon and
The City of Portland through
Linda Meng in her official capacity as City Attorney of the City of Portland

Defendants-Respondents

Appeal from an Order of the United States District Court

for the District of Oregon, Case No. 3:08-CV-398-HA

The Honorable Ancer L. Haggerty, Judge Presiding

Brief of Plaintiff-Appellant

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Table of Contents

Table of Cases and References

Table of Statutes and References

Table of Record and References

Preliminary Statement

Mr. Carr's ability to seek employment (property interest) was restricted without due process and Mr. Carr was not provided equal protection under the law as required by the Fourteenth Amendment of the U.S. Constitution in proceedings where the state courts cited a lack of jurisdiction to consider these constitutional issues. Along a similar vein, the state courts established a bail amount based on the representations of the prosecution while preventing Mr. Carr from 'appearing' or presenting evidence (due process). The federal District Court demonstrated prejudice against *pro se* parties by preventing the *pro se* plaintiff-appellant from submitting electronic documents without any justification and to the detriment of Mr. Carr (due process).

Jurisdiction

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367, as a case arising under 42 U.S.C. § 1981, 42 U.S.C.§ 1982, 42 U.S.C. § 1983, 42 U.S.C. § 1985 (3), and 42 U.S.C. § 1986 as a case seeking to enforce rights and privileges secured by the laws of the United States as authorized by 28 U.S.C. § 2201 (a) and 28 U.S.C. § 2202 as well as under the Fourteenth Amendment of the U.S. Constitution guarantees of Due Process and Equal Protection under the law. The damages sought are not precluded by the Eleventh Amendment as the State of Oregon has authorized tort claims against public bodies under ORS 30.265. Venue was proper pursuant to 28 U.S.C. § 1391 (b) because a substantial part of the events or omissions giving rise to the claim had occurred or will occur in this district and all of the Defendants in this matter reside in the Oregon District.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292 as the trial court issued a final decision on October 20, 2008[1] and a Notice

1 Record 41 Order Dismissing Complaint, October 20, 2008.

of Appeal was filed on October 28, 2008.[2]

Issues

1 Are U.S. courts restricted by Rooker-Feldman, *res judicata*, or any other doctrine based on a finding of state courts that the state courts do not have jurisdiction to consider those issues under the Fourteenth Amendment of the U.S. Constitution?

2 Can U.S. District Courts restrict *pro se* parties ability to include electronic documents into the record without cause or justification and while permitting the opposing parties unrestricted access?

3 Can U.S. District Court require *pro se* parties to file papers sooner (with less preparation time) than opposing parties without cause or justification?

4 Are the due process requirements of the Fourteenth Amendment of the U.S. Constitution met if the U.S. District Court simply ignores the primary issues presented to it and instead addresses only ancillary issues?

5 Can the state and city knowingly publish false criminal records with respect to employment decisions and without regard to the due process and equal protection requirements of the Fourteenth Amendment of the U.S. Constitution? In particular,

5.1 Can the state give preferential treatment to convicted criminals over law abiding citizens without some underlying rational justification?

5.2 Can the state publish records of arrests with respect to employment decisions when the underlying enforcement procedures are know to have an extreme sexual bias?

5.3 Can the state publish false criminal records with respect to employment decisions and without providing any due process mechanism to correct those errors?

5.4 Can the state determine if a violation of an order is criminal or civil in nature without considering the statutes of the state where the order is issued?

2 Record 43 Notice of Appeal, October 28, 2008.

5.5 Can the state publish the results of an order which is known to be void *ab inito* with respect to employment decisions?

6 Can Oregon state courts set a bail amount based solely on the evidence provided by the prosecution and without permitting the defendant any opportunity to review the evidence considered or to be heard on the bail amount or any other matter related to the prosecution of the matter.

Statement of Facts

Sealing of Arrest Records

On October 27, 2004, Washington Clark County District Court Judge Melnick signed a Clark County Superior Court Order for Protection[3] which, amongst other things, prohibited Mr. Carr from *knowingly* remaining within 300 feet of his wife.[4]

On November 5, 2004, Mr. Carr was arrested by the Portland Police Bureau and incarcerated for over three days.[5] Mr. Sewell, Multnomah County Deputy District Attorney, said the arrest was for a violation of a civil restraining order but explained that no charges were filed as there was a lack of evidence that Mr. Carr was aware of the presence of his wife outside the restaurant.[6] The City of Portland and the State of Oregon have continued to publish the record of Mr. Carr's arrest because, oddly enough, he was not arrested for some crime.[7] Had Mr. Carr been arrested for some crime, he could have had the record sealed under ORS 137.225[8] and restored his otherwise blemish free criminal record.[9] However, Mr. Carr's criminal record lists the arrest as being for what appears to be two crimes and a cryptic code, i.e. '*1: TRESPASS 2: DOMESTIC VIOLENCE 3: CIVIL CMPLNT-VIOL OF R/O*'.[10] There was no evidence whatsoever to

3 Record 21-2 Order from Western Washington District Court, November 5, 2007, page 4 line 2
4 Record 29-4 Order for Protection, October 27, 2004, page 2 ¶5.
5 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 1 ¶1 and page 3 ¶12.
6 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 line 1.
7 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 line 11.
8 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 line 11.
9 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 4 ¶18.
10 Record 29-2 Arrest Record, February 21, 2006.

support any of the offenses listed in the criminal record.[11]

On November 28, 2005, Mr. Carr applied to the Multnomah County Circuit Court to have his arrest record sealed, but on April 17, 2006 his request was denied without any trial[12] based on the court's conclusion that it did not have jurisdiction to go beyond the limits ORS 137.225 and set aside arrests in the absence of any crime.[13] The state court did not make any findings of facts[14] and relied exclusively on the unsupported allegations of the state in reaching its conclusion, ignoring all the evidence and arguments Mr. Carr submitted.[15] The state court said *'this court ... is not legally entitled to ... address the other points that you raised*' referring to numerous Fourteenth Amendment issues.[16] This summary decision was upheld by the Oregon Court of Appeals in case A132012 on November 7, 2007 with 'AFFIRMED WITHOUT OPINION'.[17] Mr. Carr's Petition for Review by the Oregon Supreme Court in case S055534 was denied on March 5, 2008.[18]

The inaccurate Oregon criminal record has restricted Mr. Carr's ability to seek employment. In 1975, Mr. Carr graduated with honors with a B.E. from U.S.M.A., West Point, NY. In 1977, Mr. Carr received a M.A. in Computer Science (Applied Mathematics) from M.I.T., Cambridge, MA. Mr. Carr served in the Signal Corps with a Top Secret security clearance until 1982 when Mr. Carr left the U.S. Army as a Captain. Mr. Carr has an otherwise spotless record and the inaccurate Oregon criminal record has had a significant detriment in his ability to seek employment.[19]

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11 While Mr. Carr was in a restaurant that he did not own, it was open for business with other parties present. There is no evidence that: 1) Mr. Carr knew of his wife's presence outside the restaurant, 2) the proprietors had asked Mr. Carr to leave, or 3) that there was any form of altercation with any party. There is a total absence of evidence for at least one required element of each of the listed offenses. Record 29-1, page 3 ¶9-10.
12 Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
13 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 lines 5-14.
14 Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
15 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 lines 5-14.
16 Record 29-8 Transcript of Hearing of April 13, 2006, page 6 lines 5-14.
17 This was the entirety of their opinion. Record 21-5 Oregon Court of Appeals Order, November 7, 2007.
18 Record 21-6 Oregon Supreme Court Order, March 5, 2008.
19 Record 29-1 Declaration of Plaintiff, June 25, 2008, ¶17-19,31.

Jurisdiction of Underlying Order

While the Clark County District Court processes all of the domestic violence complaints in Clark County, they do it under the auspices of the Superior Court. However, a review of several hundred cases demonstrated that the individual deciding each case was never included in the record making it difficult to challenge their jurisdiction.[20] Judge Bryan of the Western Washington Federal District Court in his decision in Case 3:07-cv-05260-RJB on November 7, 2007 determined that it was District Court Judge Eiesland who signed the Temporary Order for Protection and District Court Judge Melnick who signed the Order for Protection from the record in this matter.[21] Judge Bryan established the jurisdiction of these judges but only with respect to judicial immunity and as District Court judges. Judge Bryan noted that these District Court judges had been appointed as constitutional Superior Court Commissioners but did not comment on their jurisdiction as Superior Court Commissioners.[22] This jurisdiction is problematic as the appointment orders on which Judge Bryan relied appointed four commissioners[23] while there is a restriction on constitutional Superior Court Commissioners '*not exceeding three in number*' in any given county (Washington State Constitution, Article 4, Section 23). This issue is separately before this court in Case 07-35962.

Submitting Electronic Documents

On April 7, 2008 Mr. Carr submitted a motion to in this matter seeking access to the court's CM/ECF system[24] which was denied on April 9, 2008 with no justification or

20 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 8 ¶32.
21 Surprisingly enough, no previous court had made a determination of who signed these orders even though the issue of individual jurisdiction was contested previously in the state courts.
22 Record 21-2 page 4, lines 22-24. It is worthy of note that the two listed appointments as constitutional commissioners were in 2004 while the family law court commissioners were in 2006. Two other constitutional commissioner appointments in 2004 were District Court Judges Anders and Schreiber. All four appointment orders in 2004 were included in the record in all matters cited.
23 Record 29-5 Superior Court Commissioner Appointment Orders, 2004.
24 Record 3 Motion for Access to CM/ECF, April 7, 2008.

document associated.[25] Motions to Reconsider were submitted on April 21, 2008[26] and May 15, 2008.[27] On April 29, 2008, the court ordered that Mr. Carr be provided a copy of all documents filed in the court's CM/ECF but did not allow Mr. Carr to file documents in the court's CM/ECF or for the clerk to file electronic documents which Mr. Carr provided on digital media.[28] No justification was ever given for the denial of these requests.[29] These decisions were prejudicial against Mr. Carr as the other parties in the matter were able to submit electronic documents directly into the record which are substantially easier to search and read (paper documents are scanned into the record) and which can be submitted later than paper documents and at less expense.[30]

Bail Set Without Hearing

On April 7, 2008 Mr Carr's vehicle was stolen in Portland, OR and Mr. Carr reported the theft to the Portland Police Bureau in case #08-032989. On April 24, 2008, Mr. Carr was notified by the Portland Police Bureau that his car had been recovered and was at Sergeant's Towing Lot in Portland, OR. There was a parking violation citation U019204 from the City of Portland attached to the vehicle for an abandoned auto violation and listing a fee of $280.[31]

On or about April 25, 2008, Mr. Carr called the number on said notice, 503-988-3776, and learned that the court parking unit had no record of the parking violation but that these notices occasionally take a few days to be processed and that he should call back in a week or so. On or about May 9, 2008, Mr. Carr again called the court parking unit and learned that the citation was pending and that if the vehicle was stolen the matter could be dismissed.[32] On May 23, 2008, Mr. Carr filed an Answer, Affirmative Defense, and

25 Record 4 Order Denying Access to CM/ECF, April 9, 2008.
26 Record 5 Motion to Reconsider Access to CM/ECF, April 21, 2008.
27 Record 11, 12, and 14.
28 Record 10 Order Denying Access to CM/ECF, April 29, 2008.
29 Record 4, 10, and 14.
30 Record 12 Memorandum of Law, May 15, 2008, ¶4-7.
31 Record 45 Plaintiff's Declaration, August 11, 2008, ¶1-4. This is a corrected version of Record 36 which had a missing page, scanning error by the clerk.
32 Record 45, ¶13-14, and Multnomah County Circuit Court Supplementary Local Rules SLR 17.025.

Complaint with the Multnomah County Circuit Court, Parking Unit as well as a Declaration and Interrogatories seeking amongst other things a copy of the police report of the stolen vehicle.[33]

On July 27, 2008, Mr. Carr received a letter from the Multnomah County Circuit Court, Parking Unit, which stated that the court does not have access to the police records and asking that Mr. Carr instead provide these documents to the court. The letter also stated that Mr. Carr must either provide a copy of the stolen vehicle police report[34] or that Mr. Carr post the bail amount ($560) by August 22, 2008.[35]

If Mr. Carr did not meet the deadline the court could issue a warrant for the seizure of Mr. Carr's vehicle.[36] However, when Mr. Carr sought to get the required police report from the Portland Police Bureau Records Division he learned that he could not meet the deadline.[37] Instead Mr. Carr sought to amend his complaint and get an injunction from the federal court to prevent the siezure of his vehicle until he was provided an opportunity to heard as required by due process under the Fourteenth Amendment of the U.S. Constitution.[38] The lower court again ignored the issues presented to it and denied the request to amend the complaint as the issues were '*frivolous*'.[39]

Argument

1. State's Lack Of Jurisdiction Not Preclusive

33 Record 45 Plaintiff's Declaration, August 11, 2008, ¶5-8. On June 12, 2008, Mr. Carr served the papers of May 23, 2008 on the City of Portland and filed the Acceptance of Service document with the Multnomah County Circuit Court, Parking Unit.
34 This is not stated in the local court rules. Indeed there are no indications how the Defendant is permitted to submit anything without first paying the bail amount specified exclusively by the prosecution.
35 Record 45 Plaintiff's Declaration, August 11, 2008, ¶10, Exhibit 4. This is a corrected version of Record 36 which had a missing page, scanning error by the clerk.
36 ORS 153.820, ORS 153.992, Record 45, ¶13-14, and Multnomah County Circuit Court Supplementary Local Rules SLR 17.015 and 17.035.
37 Record 45 Plaintiff's Declaration, August 11, 2008, ¶10-11. This is a corrected version of Record 36 which had a missing page, scanning error by the clerk.
38 Record 33 Motion to Amend Complaint, August 7, 2008.
39 Record 40 Order Denying Motion to Amend Complaint, September 29, 2008, page 3.

In the lower court's decision of October 20, 2008:

> This court notes that plaintiff's Fourteenth Amendment arguments were raised in state court, and in relying on ORS § 137.225, it appears the court dismissed those claims as meritless. That said, even if plaintiff's constitutional claims were not considered by the state court, they would still be barred by the *Rooker-Feldman* doctrine.[40]

However, this misconstrues both the decision of the state court as well as the basis for the relief sought. In its decision of April 17, 2006, the Multnomah County Circuit Court stated in its entirety:

> On April 13, 2006, this matter came before the court on defendant's motion for expungement of the record pursuant to ORS 137.225, the State of Oregon appearing by Travis T. Sewell, Deputy District Attorney, and the defendant appearing pro se, and being fully advised in the premises, the court finds that:
>
> Defendant's Motion to Set Aside record of arrest, under ORS 137.225, is denied.
>
> IT IS ORDERED that defendant's motion to set aside conviction/arrest is hereby DENIED.[41]

The federal district court was not asked to abrogate this decision in any way as the basis for the request to have the arrest record sealed by federal courts was not ORS 137.225, but rather the Fourteenth Amendment.[42] While Mr. Carr had asked the state court to consider Fourteenth Amendment issues, the state courts did not consider those issues[43], not because they were '*meritless*'[44], but because the state courts did not have jurisdiction to consider those issues.[45]

The decision of the state court deals exclusively with ORS 137.225. The entirety of the state court's decision from the transcript of the hearing on April 13, 2006 is:

> Mr. Carr this court is confined to the statutory requirements under 137.225 and is

40 Record 41 Order Dismissing Complaint, October 20, 2008, page 6.
41 Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
42 Record 1 Complaint, March 31, 2008, ¶ 8.
43 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.
44 Record 41 Order Dismissing Complaint, October 20, 2008, page 6.
45 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.

> not legally entitled to look behind the arrest to determine whether the arrest had probable cause or address the other points that you raised. The court must adhere to the statutory language and criteria that is set out under ORS 137.225. It can not look to the Washington law or any errors that you allege may have occurred in the process there. The cases have been cited by the state are on point: *State* ex el ..., *ex rel Hathaway versus Hart*, and *State* versus... ex ...*ex rel Dwyer versus Dwyer*. The violation of a restraining order simply does not fall under ORS 137.225 as an action whether it be an arrest or otherwise that can be expunged. Contempt of Court is not a criminal conviction. So an arrest for VRO can not be considered an arrest for a crime so the court denies your motion to set aside.[46]

The Multnomah County Circuit Court claimed that it did not have jurisdiction to consider any issues beyond ORS 137.225. As the Oregon Circuit Courts are creations of the Oregon legislature (they are not in the current state constitution), statutory restrictions on the jurisdiction of those courts can be considered binding even though the Oregon Circuit Courts are the only courts of general jurisdiction of the State of Oregon. However, a decision of a state court that it does not have jurisdiction to consider matters such as Fourteenth Amendment issues does not in any way preclude other courts from having jurisdiction over those matters. Clearly the federal District Courts have jurisdiction over Fourteenth Amendment issues and the decision of the state courts that the state courts can not consider such issues does not invoke Rooker-Feldman, *res judicata*, or any other preclusion to restrict that jurisdiction with respect to federal courts.

2. Inclusion of Electronic Documents

It is beyond question that 'Every court has supervisory power over its own records and files' *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). However, this power is constrained by the sound discretion of the court. As an impartial authority, the court can not arbitrarily give preferential treatment to one party or another.

The constitutional provisions of due process guarantees the right of the affected individual to be heard in a meaningful manner[47] which requires an impartial deciding

46 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.

47 The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a

authority. The repeated refusal of the lower court to grant Mr. Carr access to the court's CM/ECF system was never justified leaving no apparent 'sound discretion' for this prejudicial treatment.[48] Indeed, while several documents in both case 3:07-CV-05260-RJB (Western Washington) and 3:08-CV-398-HA (Oregon) were sealed because of violations of local court rules which require certain personal identifying information be redacted, all of these documents were submitted by opposing counsel[49] and no documents which Mr. Carr submitted were sealed.[50] There was no justification for limiting Mr. Carr's access to the court's CM/ECF system indicating a prejudice on the part of the lower court against *pro se* litigants.

The foundation of our adversarial judicial process is that all parties are given an equitable forum where they can present the evidence and arguments supporting their positions. Each party is expected to present their arguments with the greatest possible clarity in both content, style, and presentation. It is prejudicial to prevent one party from clearly presenting their arguments and evidence in the same fashion as the other parties without good cause.

The complaint in this matter references employment eight times (easily and accurately determined in the electronic version) while the deciding decision does not address it at all. Similarly the complaint has a full dozen references to criminal records[51] while the decision has none.[52] This is a clear indication that the lower court simply ignored any issues which were not easily dismissed, paying lip service to giving *pro se* litigants a fair hearing while actually not giving any hearing at all to the primary issues presented to the court. It is possible that the lower court prevented the plaintiff from filing accurate and readable electronic arguments in the record simply to make it easier to ignore those points

meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545 (1965) *Mathews v. Eldridge*, 424 U.S. 319 (1976).

48 Record 4, 10, and 14.

49 Record 24 Order Sealing Documents, June 10, 2008.

50 In no way should this be construed as implying bad intentions on the part of opposing counsel. There is every indication that these violations were simple and harmless mistakes.

51 Record 1 Complaint, March 31, 2008.

52 Record 41 Order Dismissing Complaint, October 20, 2008.

which couldn't be dismissed. It is also possible that the lower courts prejudice against *pro se* parties caused the lower court to ignore the papers filed as they were not considered worthy of a response.

The U.S. court's CM/ECF system is a great step in making litigation open, transparent, and accessible to all parties, but if the court's are permitted to arbitrarily restrict *pro se* parties from including electronic documents which are easily readable and searchable then this openness and transparency is greatly impaired.

On November 11, 2008, Mr. Carr submitted a motion to this court asking that the record be expanded to include electronic versions of the record but this was denied on November 19, 2008 by order of Deputy Clerk Cathie Gottlieb noting that the panel could request the electronic documents from the lower court if needed. However, it is questionable if this can eliminate the prejudice as the excerpts of the record provided by both parties can only include the degraded scanned documents from Mr. Carr rather than the clearer electronic documents he submitted to the lower court. The opposing parties were permitted to and did in fact submit clearer electronics documents in the record which are included in the excerpts of record. This matter should be returned to a different judge in the lower court simply to correct this prejudice by the lower court and to permit an equitable record to be completed.

3. Shortened Filing Time

The denial of access to the court's CM/ECF system to Mr. Carr as described above had other effects as well. CM/ECF accepts documents at any time which means they can be filed as late as midnight on the date when they are due whereas the clerk of the lower court will not accept papers after 5PM and there is the expense of actually producing the additional paper copy which is required when CM/ECF is not used. As Mr. Carr was employed at the time of the filings, papers had to be prepared during the evening and

requiring filing by 5PM effectively required that they be completed and printed the evening before, a one day difference.

While the court did provide a theoretical extension at the end for Mr. Carr to expand the record'[53], this was simply lip service to providing an equitable forum to *pro se* parties as the damage was already done. After degrading the quality of Mr. Carr's filings throughout the process through shortened filing periods, greater expenses, and mandated lower quality filings, this unrequested delay was merely a sop to make it appear as if the court was giving an impartial hearing when in fact the court had already decided that it was going to simply ignore whatever Mr. Carr filed, a conclusion the court seemed to have reached before the parties were even joined in this matter.

If there was some justification for this discriminatory requirement, this would not necessarily be prejudicial. However, as the lower court gave no justification for the discriminatory requirements, they are indicative of prejudice on the part of the lower court.[54] Again, this matter should be returned to a different judge in the lower court simply to correct this prejudice by the lower court and to permit an equitable forum.

4. Ignoring Issues Presented

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, ... (1965), *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, it is clear that the lower court did not address the issues presented to it, but instead simply addressed a fictitious

53 Record 40 Order Denying Motion to Amend Complaint, September 29, 2008, page 4.

54 It is possible that the lower court felt that *pro se* parties can not be trusted to abide by local court rules as all filings seem to have been reviewed by Judge Haggerty before filing. However, the correct remedy is to allow the parties to file whatever documents they choose and then seal them as necessary. In cases 07-35962 (Western Washington) and 08-35902 (Oregon) several documents were, in fact, sealed, but they were all submitted by opposing counsel (see Record 24). In this case, Judge Haggerty's concerns seem to have been misplaced, but his discrimination before Mr. Carr had violated any rules indicates a prejudice on the part of Judge Haggerty and a failing of due process.

case which was easy to dismiss. For example, addressing the due process and equal opportunity portions of the complaint, the lower court declared '*it appears the [state] court dismissed those claims as meritless*'[55] while the verbal decision[56] of the state court was actually '*Mr. Carr this court is confined to the statutory requirements under 137.225 and is not legally entitled to ... address the other points that you raised. The court must adhere to the statutory language and criteria that is set out under ORS 137.225.*'[57] '*not legally entitled*' clearly indicates that the state court concluded it did not have jurisdiction to address the due process and equal protection issues which were before it. This is a far cry from a determination that the constitutional issues were '*meritless*'[58]. Of course it was necessary for the lower court to create the fictitious finding of '*meritless*'[59] in order to meet the requirements of Rooker-Feldman and dismiss the Complaint.

Similarly, while the Complaint clearly addressed Mr. Carr's livelihood (property interest) and the publishing of a false criminal record by the city and state with respect to employment decisions, the lower court simply ignored these claims and invented a fictitious basis for the Complaint of warrantless arrest and detention[60] This fiction was necessary so that the lower court could conclude *'count V of plaintiffs Complaint is barred by the statute of limitations*'[61] and was thereby dismissed. Had the damages been from the continuing actions of the city and state then the lower court could not have simply dismissed the Complaint.

Of course it is obvious that if the lower court does not address the actual case presented

55 Record 41 Order Dismissing Complaint, October 20, 2008, page 6.
56 The written decision had no findings of facts or justification for the decision. Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
57 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.
58 Record 41 Order Dismissing Complaint, October 20, 2008, page 6.
59 Record 41 Order Dismissing Complaint, October 20, 2008, page 6.
60 Record 41 Order Dismissing Complaint, October 20, 2008, pages 6-7.
61 Record 41 Order Dismissing Complaint, October 20, 2008, page 7.

to it but instead some fictitious case, then there is no opportunity to be heard "*at a meaningful time and in a meaningful manner*" as required for due process.[62] The foundation of our government of law is a judiciary which conscientiously follows the rule of law. There is little doubt that this case is highly inconvenient, raising issues which are controversial, disruptive, and politically unpopular. The individual judges of the federal District Courts gain nothing by taking a stand on these issues and have much to lose. However, when the courts decide that it is OK to ignore the rule of law when it is inconvenient, we are well on our way to an end to our government of law; all laws are inconvenient to some party at some time or another and there are numerous organizations in our government who have much more real power than the judiciary. When the judiciary sets an example of ignoring inconvenient laws, other parts of the government are sure to follow suit and our government of law will soon be history.

5. Constitutional Issues of Publishing False Criminal Records

5.1 Equal Protection, Discrimination Against Law Abiding Citizens

The entire history of ORS 137.225 demonstrates the belief by the Oregon legislature that a person's criminal record has a significant impact on their livelihood and the sealing of the record of convictions and, later, arrests was justified to allow them to to "bury the past."[63] Mr. Carr is not arguing that the state can not publish criminal records with respect to employment decisions or that the state can not selectively seal records with respect to employment decisions for the purpose of allowing people to resume a more normal life. Mr. Carr is arguing that the state must put in place due process procedures to insure that published criminal records are accurate and that if the state selectively seals records it must do so in such a way to provide equal protection under the law with a rationale basis for the selection, not discriminating based on sex or irrational criteria such as against those who are innocent of any crime. The state court's found that ' *an arrest for VRO*

62 *Armstrong v. Manzo*, 380 U. S. 545 (1965), *Mathews v. Eldridge*, 424 U.S. 319 (1976)
63 *Springer v. Oregon*, 50 Or App 5 (1981)

can not be considered an arrest for a crime so the court [can not seal the record of the arrest]',[64] but this particular interpretation of ORS 137.225 violates the equal protection requirements of the Fourteenth Amendment as there is no rational basis for allowing convicted criminals to 'bury the past' while not offering the same opportunity to those who have not committed (or even been suspected of) any crime.

While the city boldly made the claim that Mr. Carr was never denied employment because of the inaccurate arrest record[65], this is hardly an assertion that can be supported by the facts. It is well understood that a criminal record decreases a persons earning potential and livelihood; it is this tangible interest which invoke the procedural protection of the due process clause as listed in *Paul v. Davis*, 424 U.S. 693 (1976). Indeed, the employment records of both the city and the state could be most revealing as to the impact of a person's criminal record on their livelihood by considering those positions where a criminal history check is made and the relative number of job offers and salary levels made to applicants who have criminal convictions, arrests but no convictions, and clean records.

5.2 Equal Protection, Sexual Bias In Domestic Violence Enforcement

Portland Police Bureau has shown a definite sexual bias in arrests made for violations of 'domestic violence' restraining orders (annotated as 'CIVIL CMPLNT-VIOL OF R/O' in their computer records) with the following total arrests:

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2004: 583 total- 90 females (15%) and 493 males (85%)
2005: 617 total- 84 females (14%) and 533 males (86%)
2006: 614 total- 91 females (15%) and 523 males (85%)
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as determined by the Portland Police Bureau Records Division, Captain Killinger.[66]

64 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.
65 Record 20 City's Memorandum of Law, June 3, 2008, page 15.
66 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 5 ¶20.

These rates are what one would expect if men were about six times more likely to commit domestic violence than women. However, peer reviewed studies have repeatedly shown that men and women are about equally likely to commit acts of violence in domestic relations in this country at this time.[67] When U.S. Census Bureau figures are used to compute the estimated number of eligible victims and assuming a normalized distribution of applicants and violators, the discrepancy between the rates of eligible victims and arrests made clearly demonstrates deeply rooted sexual bias in the entire domestic violence process in Oregon.[68]

From these results it is clear that Mr. Carr was only arrested because he was male; had Mr. Carr been a woman he would not have been arrested under these circumstances. While it is not possible to unring this bell, future damages from this past discriminatory behavior on the part of the city can be corrected by preventing the city and state from publishing the record of this arrest with respect to employment decisions. Sexual bias may well be an innate aspect of humanity, but it is not necessary to extend this discriminatory bias into the realm of property and employment decisions.

5.3 Due Process, False Criminal Record

At the hearing before the state courts, the state contended that the arrest was for a violation of a civil restraining order and the court agreed.[69] However, the criminal record which is maintained by the Portland Police Bureau and distributed by the the state lists two entries which appear to be crimes, i.e. trespass and domestic violence.[70] Clearly the city and state are publishing information which they know is inaccurate to Mr. Carr's detriment, preventing him from fully pursuing his livelihood as he would be able were these inaccurate entries not listed. It is this deliberate indifference to the livelihood of

67 See Change In Spouse Assault Rates From 1975 to 1992: A Comparison of Three National Surveys in the United States, Murray A. Strauss and Glenda Kaufman Kantor. Numerous other studies have found similar results.
68 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 5-8 ¶21-28.
69 Record 29-8 Transcript of Hearing of April 13, 2006, page 5-6.
70 Record 29-2 Arrest Record, February 21, 2006.

law abiding citizens which requires correction. The processes in place to correct inaccurate information in criminal records directed Mr. Carr to the state courts[71], but the state courts claimed to not have jurisdiction to correct the records.[72] In absence of a due process procedure to correct inaccurate records, the state should be ordered to stop publishing inaccurate criminal records.

5.4 Due Process, Determination of Civil or Criminal Order

At the hearing of April 13, 2006, the Multnomah County Circuit Court did not rely on any evidence in denying the motion to seal the arrest record under ORS 137.225 but instead just accepted the state's contested claim that the arrest was for a violation of a civil restraining order (VRO).[73] This conclusion was not stated in the findings of facts[74] (so that it would be subject to preclusion) but instead is an underlying assumption of the decision. Further, the Multnomah County Circuit Court specifically stated it did not consider any questions as to whether the alleged restraining order was civil or criminal in nature or whether the restraining order was valid at all.[75] Mr. Carr asks this court to consider whether the alleged restraining order was criminal or civil in nature and on that basis insist that the city and state accurately describe the nature of the restraining order listed in the arrest record.

Oregon is one of the few states which has maintained domestic violence and their resolution as a non criminal procedure. *Bachman v. Bachman*, 171 Or App 665 (2000) . In *Hathaway v. Hart*, 300 Or 231 (1985):

> The essence of [FAPA] is to prevent acts of family violence through restraining orders and, if the court orders are disobeyed, to provide legal sanctions for the violations of the orders because ordinary criminal actions at law were found to be inadequate to achieve this desired legislative result.

71 Record 29-1 Declaration of Plaintiff, June 25, 2008, page 8 ¶29.
72 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.
73 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.
74 Record 29-7 Order Denying Motion to Set Aside, April 18, 2006.
75 Record 29-8 Transcript of Hearing of April 13, 2006, page 6.

The legislature intentionally avoided criminal procedures and the associated stigma to encourage the use of FAPA by abuse victims who might be hesitant to invoke criminal processes against a family member.

The state's conclusion that violating a court order is not a crime neglects those cases where violations of court orders are defined to be crimes as in ORS 163.750:

> ORS 163.750 Violating court's stalking protective order.
> (1) A person commits the crime of violating a court's stalking protective order...
> (2)(a) Violating a court's stalking protective order is a Class A misdemeanor.

which clearly falls within the requirements of ORS 137.225 (5) where misdemeanors are specifically listed as eligible crimes.

In the state of Washington, domestic violence restraining orders are Orders for Protection under RCW 26.50 which are clearly delineated as crimes as in RCW 26.50.110:

> Whenever an order is granted under this chapter ... and the respondent or person to be restrained knows of the order, a violation of the restraint provisions... is a gross misdemeanor ... [or a more serious crime]

which also falls within the requirements of ORS 137.225 (5) where misdemeanors are specifically listed as eligible crimes. While the state may have considered Washington RCW 26.50 restraining orders as most similar to Oregon FAPA restraining orders, they are, in fact, most similar to ORS 163.750 stalking protective orders (SPO), violations of which are clearly delineated as crimes.

Had there been a valid Washington Order for Protection under RCW 26.50 in this case, the arrest should have been listed as a criminal violation of a restraining order. This is of relevance as once the city and state correctly identify the record as being for a criminal violation of a restraining order, then Mr. Carr can reapply to have the arrest record sealed under ORS 137.225.

5.5 Due Process, Effects of Invalid Order Without Jurisdiction

As in the previous argument, the Multnomah County Circuit Court did not consider the validity of the alleged restraining order and made no findings of fact as to its validity so that this issue can be addressed by this court. However, in this case the Washington Court of Appeals, Division II did address aspects of this question but they only confirmed that Family Law / Court Commissioners do not count against the constitutional restriction on constitutional commissioners of the Superior Court '*not exceeding three in number*' (Washington State Constitution, Article 4, Section 23).[76] The orders submitted by the city have only signatures and do not clearly identify the deciding individual[77] as is the norm with Clark County Superior Court decisions concerning domestic violence (RCW 26.50)[78]. While it is clear that the Clark County Superior Court has jurisdiction to issue such orders, it has not been determined whether the signing individual had jurisdiction to issue these orders. The Washington Court Appeals did not identify the individuals responsible for any of the contested decisions.[79] The Western Washington Federal District Court and Judge Bryan also addressed aspects of this issue in his decision of noting that it was District Court Judge Eiesland who signed the Temporary Order for Protection[80] and District Court Judge Melnick who signed the Order for Protection[81] in this matter.[82]

As to the question of how two District Court Judges could sign two orders of the Superior Court, Judge Bryan also noted that they each were appointed as constitutional commissioners for the Superior Court[83] by the orders a copy of which were submitted by Mr. Carr.[84] However, Judge Bryan only confirmed their jurisdiction as District Court judges (granting judicial immunity therefrom), but did not confirm their jurisdiction to

76 Record 21-7 Mandate, Washington Court of Appeals, May 9, 2006, page 8, ¶ III.
77 These documents, 21-3 and 21-4, were sealed (Record 24) as they were not properly redacted, but redacted versions of these documents are available as Record 29-3 and 29-4.
78 Record 29-1 Declaration of Plaintiff, June 25, 2008, ¶ 32.
79 Record 21-7 Mandate, Washington Court of Appeals, May 9, 2006.
80 Record 29-3 Temporary Order for Protection, October 15, 2004.
81 Record 29-4 Order for Protection, October 27, 2004.
82 Record 21-2 Order from Western Washington District Court, November 5, 2007, pages 3-4.
83 Record 21-2 Order from Western Washington District Court, November 5, 2007, page 4 line 2
84 Record 29-5 Superior Court Commissioner Appointment Orders, 2004.

issue Superior Court orders.[85] The problem is that the appointment orders appoint four constitutional commissioners in Clark County[86] while the Washington State constitution strictly limits them to '*not exceeding three in number*'. If their appointment orders as constitutional commissioners violated the constitutional limits, then the appointment orders are themselves not valid and any orders and decisions based on those appointment orders are also invalid.[87]

As no other court has addressed the issue of individual jurisdiction for the Washington 'restraining order',[88] this court is asked to hold the restraining order as invalid and direct the city and state to remove all references to this order from the arrest record with respect to employment decisions..

6. Bail Amount Set and Required Before Appearance Permitted

The administrative procedures provided by the Multnomah County Circuit Court, Parking Unit does not provide '*the opportunity to be heard "at a meaningful time and in a meaningful manner."*' *Armstrong v. Manzo*, 380 U. S. 545 ... (1965)' *Mathews v. Eldridge*, 424 U.S. 319 (1976) in that Mr. Carr has not been provided with the evidence against him (in particular the information to determine if the person issuing the citation was authorized to issue the citation) nor any reasonable method to present evidence on his behalf.

The setting of an arbitrary bail amount without any hearing (as a prelude to any hearing and in order to 'appear' in the matter) absolutely fails the requirement of the opportunity to be heard in a meaningful time and in a meaningful manner as it intrinsically precludes

85 Record 21-2 Order from Western Washington District Court, November 5, 2007, page 4 line 23.
86 Record 29-5 Superior Court Commissioner Appointment Orders, 2004.
87 An order can be 'declared void for the reason that the ... court did not have jurisdiction to enter such decree.' *Barker v. Barker*, 31 Wn. (2d) 506 (1948). It is also well established that all subsequent actions based on the void order are void *ab inito* or void from the beginning *Beyerle v. Bartsch*, 111 Wash. 287 (1920). Any Orders for Protection, arrests and convictions based on these invalid orders are similarly void.
88 Record 29-4 Order for Protection, October 27, 2004.

the contesting of the bail amount, both the need and amount for bail.

The lower federal court incorrectly concluded that Mr. Carr simply needed to pay the $10 fee to abide by the procedures of the state court,[89] but ignored the fact that the Portland Police Records Bureau would only provide the required records via mail and that such requests took longer (three weeks) than Mr. Carr had in order to meet the deadline specified by a clerk of the court.[90] Further the rules of the state court precluded Mr. Carr any method of asking for an extension of the deadline or any other relief without first paying the bail amount[91] which was clearly excessive; it was prosecutorial negligence to pursue a prosecution which the city knew was unfounded. The lower federal court denied the request to amend the complaint as the issues were '*frivolous*'.'[92]

A review of the procedures implemented by the Multnomah County Circuit Court, Parking Unit indicates that said court is not an impartial authority capable of fairly reviewing the evidence before it, but instead a collection agency for the state and, in this case, the city. No effort is made to insure the defendants are afforded an opportunity to review the evidence against them, obtain required evidence from the best available source (discovery), and present evidence before substantial property issues are determined.

Conclusion

The problems of this case started in early 2004 when the Clark County courts chose to continue their policy of ignoring the restrictions on their respective jurisdictions, in particular the constraints of the Washington state constitution. This created an environment where there were numerous other errors and came to involve several other courts who, to avoid the stink, ignored the law which would

89 Record 40 Order Denying Motion to Amend Complaint, September 29, 2008, page 3.
90 Record 45 Plaintiff's Declaration, August 11, 2008, ¶10-11. This is a corrected version of Record 36 which had a missing page, scanning error by the clerk.
91 Multnomah County Circuit Court Supplementary Local Rules SLR 17.015 Parking Citations - Defendant's Appearance, see Record 45 Plaintiff's Declaration, August 11, 2008, ¶13.
92 Record 40 Order Denying Motion to Amend Complaint, September 29, 2008, page 3.

be so troublesome were they to apply it as written. However, *U.S. v. Lee* 106 U.S. 196, (1882) states

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives.

The Clark County courts decided they could ignore constitutionally mandated restrictions and took actions which violated the constitutions, statutes, and their oaths of office. However, the members of the Washington state judiciary must not be permitted to simply ignore the rule of law.

While the courts in Washington seem to have concluded that they are above the law and can do what they want with impunity, the courts in Oregon seem to have become too obedient to the state, again seeking efficiency and speedy processing but at the expense of due process, ignoring the requirements of a fair and impartial hearing before reaching a decision and instead relying on the state prosecutor to use good judgment which, apparently, is not a reasonable expectation.

There are several issues raised in this matter which are controversial, disruptive and politically unpopular. This court has little to gain from dealing with these issues; this sort of controversy is unlikely to help any judge's career. It would be much safer for this court to simply hold its nose, look away, and make a decision which avoids the tough issues before it and just confirms the decision of the lower court, addressing ancillary issues and creating fiction as necessary. Indeed nine other courts have done just that and worse with these issues. There is very little chance that an 'easy' decision from this court will get reviewed to be an embarrassment.

The problem with this is that it is all too common. When the judiciary gets into the habit of ignoring the law when it is inconvenient, the people of the U.S. will come to realize that they do not really live under a government of law, but instead a 'strong man rules' government. When the other parts of the government come to that realization, those parts with more intrinsic power, such as the military, will follow suit and we will soon have a military dictatorship.

Our government of law was founded with great sacrifice by patriots who risked life and limb to create something better. For the last 200 years our government of law has been maintained by unsung patriots who supported and upheld the law even when it was difficult and costly, sacrificing of themselves as needed to preserve the rule of law. This court is asked to continue that tradition and take the tough stand, addressing the central issues as they are and doing what the court can to preserve our government of law.

Respectfully submitted, December 15, 2008 (Vancouver, WA).

_____

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Certification

I certify that pursuant to FRAP 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached opening brief uses a 14 point proportionately spaced font with serifs and contains less than 14,000 words (9,430 at last count).

True and accurate copies of this Brief were served on the defendants-respondents by mailing with the United States Postal Service using First Class Mail. Two copies of this Brief were mailed to each counsel for the defendants-respondents at:

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Dated: December 15, 2008

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