

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JASMINE JIMENEZ and DENISE ROTHEIMER,)
)
Plaintiffs,)
)
v.) 11 CV 4707
)
STATE OF ILLINOIS; MICHAEL J. WALLER,) Judge: John W. Darrah
Lake County State's Attorney; and LAURA) Magistrate: Geraldine Soat Brown
HORNER, Lake County Assistant State's)
Attorney,)
)
Defendants.)

MOTION TO DISMISS
COMPLAINT FOR VIOLATION OF CONSTITUTIONAL RIGHTS

Defendants, Michael J. Waller, Lake County State's Attorney ("Defendant Waller"),¹ and Laura Horner, Lake County Assistant State's Attorney ("Defendant Horner"), by and through their attorneys, Kevin J. Berrill and Carla N. Wyckoff, Lake County Assistant State's Attorneys, respectfully file this Motion to Dismiss Plaintiff's Complaint for Violation of Constitutional Rights ("Complaint") for lack of subject matter jurisdiction and for failure to state a cause of action against them, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and state in support thereof:

1. Plaintiffs Jasmine Jimenez ("Plaintiff Jimenez") and her mother, Denise Rotheimer ("Plaintiff Rotheimer"), have brought Section 1983 claims against Defendants Waller and

¹ The Complaint names both the "Lake County State's Attorney's Office" and "Michael J. Waller, Lake County State's Attorney" as defendants herein; however, the State's Attorney's Office is a non-suable entity, in that it is redundant to name both the State's Attorney, in his official capacity, and the State's Attorney's Office. See, e.g., *Mayer v. Elrod*, 470 F.Supp. 1188, 1192 (N.D.Ill. 1979) (where Cook County and the Cook County Board of Commissioners were named as defendants, there was "no need or purpose in naming" the Board, as it "does not enjoy a separate legal existence independent of" Cook County itself.)

Horner relating to the prosecution in state court of criminal defendant Michael Desario ("Desario"). Complaint Page 1, ¶¶ 3, 5.²

2. On February 18, 2003, in 02 CF 3630, a case in the Nineteenth Judicial Circuit of Lake County, Illinois, Desario pled guilty to Predatory Criminal Sexual Assault, a crime to which Plaintiff Jimenez was the victim. *Id.*

3. Plaintiffs Jimenez and Rotheimer now allege that their rights as crime victims, as defined by Illinois law in 725 ILCS 120/1 et seq.³ of the Illinois Code of Criminal Procedure and Article I, § 8.1(d) of the Illinois Constitution, were violated when Defendants Waller and Horner did not inform them of their alleged rights to counsel and to submit victim impact statements to the sentencing court in 02 CF 3630. Complaint Pages 1,2, ¶¶ 4, 6.

4. Plaintiffs Jimenez and Rotheimer further allege that, because Illinois law does not provide a cause of action for deprivation of their rights as crime victims, their substantive due process rights afforded by the Fourteenth Amendment to the United States Constitution were violated, and they pray for a declaration that the applicable sections of the Illinois Code of Criminal Procedure and the Illinois Constitution are unconstitutional. Complaint Pages 5-6, ¶ 16. They also pray for an order directing Defendant Waller to have Plaintiffs' victim impact statements included in the court file for 02 CF 3630. *Id.*

5. Pursuant to Federal Rule of Civil Procedure 12(b)(1), Plaintiff Rotheimer must be dismissed from this cause of action, because the Court does not have subject matter jurisdiction with respect to her. Plaintiff Rotheimer does not have standing to state a claim because she was

² The Complaint does not include paragraph numbers; in the interest of clarity, Defendants will hereby refer to each individual paragraph of the Complaint in chronological order, such that the paragraph beginning, "This is a claim . . ." is "Complaint Page 1, ¶ 1" and the prayer for relief beginning "WHEREFORE, plaintiffs ask . . ." is "Complaint Pages 5-6, ¶ 16."

³ The Complaint repeatedly cites to "720 ILCS 120/1 et seq.", which is presumably a scrivener's error, as the Rights of Crime Victims and Witness Act is 725 ILCS 120/1 et seq.

not a "crime victim" as defined by applicable Illinois law. *See* 725 ILCS 120/1 eq seq.; *see also* Ill.Const. art. I, § 8(a).

6. Pursuant to Federal Rule of Civil Procedure 12(b)(1), Plaintiff's Complaint must be dismissed because Defendants Waller and Horner are entitled to immunity under the Eleventh Amendment, stripping the Court of subject matter jurisdiction over Defendants. *See* U.S. Const. Amend. XI; *see also* *Virginia Office for Protection and Advocacy v. Stewart*, 131 S.Ct. 1632, 1639 (2011).

7. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiffs' Complaint must be dismissed because, as evidenced by the allegations contained within the Complaint, their claims are time-barred. *See* *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir. 1998).

8. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiffs' Complaint must be dismissed because it fails to state a cause of action in that it does not allege a life, liberty or property interest entitling Plaintiffs to constitutional protection. *See* 42 U.S.C. § 1983; *see also* *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

9. Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint is filed herewith and incorporated herein for all purposes.

WHEREFORE, Defendants Michael J. Waller and Laura Horner respectfully request that the Court enter an order dismissing Plaintiff's Complaint for Violation of Constitutional Rights pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a cause of action; that the Court award the Defendant his reasonable attorney fees and costs associated with bringing this Motion to Dismiss; and for other just and further relief to which they may show themselves entitled.

Respectfully submitted,

DEFENDANT MICHAEL J. WALLER
LAKE COUNTY STATE'S ATTORNEY

DEFENDANT LAURA HORNER
LAKE COUNTY ASSISTANT STATE'S
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