

Jasmine Jimenez,	)	United States District Court
	)	
Denise Rotheimer	)	Northern District of Illinois
Plaintiffs	)	
	)	
v.	)	Judge John W. Darrah
	)	11 CV 4707
Laura Horner,	)	
Michael J. Waller,	)	
Defendants	)	

**Amended Complaint for Injunctive, Declaratory Relief, and Request for Jury Trial**

Plaintiffs Jasmine Jimenez and Denise Rotheimer, as pro se litigants, hereby amend their Complaint to exclude the State of Illinois as a defendant and name Assistant State’s Attorney, Laura Horner and Lake County State’s Attorney Michael J. Waller in their individual capacity. Plaintiffs’ Complaint against Defendants, allege as follows:

**Nature of Action**

**A. Plaintiffs Seek Declaratory Judgment**

1. Plaintiffs humbly requests that this court declare Article 1, Section 8.1(d) of the Illinois Constitution; 725 ILCS 120/9 of the Rights of Crime Victims and Witness Act; and 725 ILCS 115/4 of the Bill of Rights for Children which deprives crime victims of either appellate relief and/or a cause of action for damages in violation of the Plaintiff’s federally protected rights under the Fourteenth Amendment, Section 1 “That **no state** shall deprive **any** person of life, liberty, or property, **without due process of law; nor deny to any person** within its jurisdiction **the equal protection of the laws.**” . . .

**B. Plaintiff Seeks Injunctive Relief**

2. Order the Lake County State's Attorney's Office to include a victim-impact statement that will be written by Plaintiffs Jimenez and Rotheimer to become part of the permanent file in the Circuit Court of the 19<sup>th</sup> Judicial District pursuant to 18 U.S.C. §3771(b), (a)(4).

**Jurisdiction and Venue**

3. Jurisdiction over the parties and subject matter of this action is proper in this Court pursuant to 42 U.S.C. §1983; Amendment XIV, Sections 1 and 5 of the U.S. Constitution; Article III, Section 2, Clause 1 of the U.S. Constitution; and Article VI, Section 1, Clause 2 of the U.S. Constitution. Furthermore, it is in accordance with Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

4. This Court has personal jurisdiction over the Defendants because they reside, operate and/or are organized in the State of Illinois, within the Northern District of Illinois

5. Venue is properly founded in this judicial district pursuant to 28 U.S.C. §1391(e) because the Defendants reside in this district, a substantial part of the events giving rise to the claim occurred in this district, and the Plaintiffs reside in this district.

**Parties**

6. Plaintiff Jimenez is a crime victim and pro se litigant. Plaintiff Rotheimer is the parent of Plaintiff Jimenez and also a pro se litigant.

7. Defendants include Laura Horner and Michael J. Waller.

**Factual Background**

8. In September 20, 2002, Plaintiff Jimenez entered the criminal justice system at the age of 12-years-old, as a crime victim of Predatory Criminal Sexual Assault.

Plaintiffs allege, throughout the criminal justice proceedings, the Defendant, Laura Horner, acting under color of law deprived Jimenez and her mother Denise Rotheimer of their rights under; Rights of Crime Victims and Witnesses Act, 725 ILCS 120/6 (a):

“A victim of the violent crime or **the victim’s ... parent** is present in the courtroom at the time of the sentencing or disposition hearing, **the victim** or his or her representative **shall have the right** and the victim’s parent, upon his or her request, may be permitted by the court **to address the court regarding the impact** that the defendant’s criminal conduct ... has had upon them and the victim.”

9. On January 13, 2003, Plaintiffs Jimenez and Rotheimer attended the court proceeding at the 19th Judicial Court House of Lake County, in the case PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, -vs- MICHAEL DESARIO, Defendant, case No. 02CF3630. A continuance was granted. On this date of January 13, 2003, Assistant State’s Attorney Laura Horner instructed Plaintiff Rotheimer that she did not need to bring her daughter, Jasmine Jimenez to court on February 18, 2003 because “there may likely be another continuance.”

10. On February 18, 2003, Plaintiff Rotheimer, who was present in court, could have addressed the court regarding the impact the crime has had on the victim had she been informed of her legal rights under 725 ILCS 120/6(a). Plaintiff Rotheimer was deprived of her Fourteenth Amendment right to due process of law to assert her right to address the court regarding the impact the criminal conduct has had on her and the victim. Since neither Plaintiff Jimenez nor her mother were informed of this protected right, which the U.S. Supreme Court in Payne v. Tennessee, “held that testimony on the form of a victim impact statement was admissible and **constitutional ...**” Plaintiff Jimenez also was deprived of her Fourteenth Amendment right to due process of law to assert her rights to attend the court proceeding and present a victim-impact

statement because Defendant Horner knowingly advised Rotheimer not to bring her daughter to court on February 18, 2003. (Bold added for emphasis.) 501 U.S. 808 (1991).

10. Furthermore, on February 18, 2003, Rotheimer was informed by the defense attorney, on the day of the scheduled court proceeding that Horner agreed to enter into a plea deal with the defense “earlier that morning for the minimum sentence of six years” without informing Plaintiffs Jimenez or Rotheimer. Nor did Defendant Horner take into consideration that by entering into a plea deal deprived Plaintiff Jimenez of her right to present a victim-impact statement. According to 725 ILCS 120/4.5 (11)(a) (1) “provide notice a reasonable time in advance of the following court proceedings: ... or to alter the conditions of bond and the sentencing hearing.” In the presence of her mother and father, Plaintiff Rotheimer confronted Horner and asked why she accepted the minimum sentence of six years. Horner replied, “You’re not a lawyer, I don’t have to explain the law to you.” Upon returning to the courtroom, Rotheimer asked the bailiff to inform the judge that she disagreed with the minimum sentence. After, the Honorable Judge Mary S. Schostok called the case and Horner made her factual basis, the bailiff, at Rotheimer’s prior urging informed the judge that she disagreed with the six-year minimum sentence. Judge Schostok called Rotheimer to the bench and asked if she disagreed with the negotiated agreement. Rotheimer briefly informed the judge of the legal definition of penetration concerning minors under 13 to support her opposition of the minimum sentence, at which point Horner interjected and said, “But Judge the victim [Jasmine Jimenez] has issues.” Based on the facts that Rotheimer disclosed of vaginal penetration, Judge Schostok refused to accept the plea

deal and called a 402 b meeting with both attorneys in chambers. Upon their return to the courtroom, the judge directed her attention toward the defendant and said,

“Mr. DeSario, that it is incumbent upon the adults that when a child is in the room, and even if that child may make a step towards you or make you feel like they want to do something inappropriate, you’re the adult. It’s incumbent upon you to step back and say this isn’t right; I’m not going to do this. I had this discussion with the attorneys in the 402 conference.”

After she carefully and tediously went over all the defendant’s rights to make sure he understood everything and that he had been informed of all his rights, the judge sentenced DeSario to 7-1/2 years with six months credit for time served. Furthermore, Plaintiff Rotheimer was deprived of her Fourteenth Amendment right to due process of law to assert her right to present a victim-impact statement according to The Bill of Rights for Children, 725 ILCS 115/3(a):

“A **parent**... of the child involved is present in the courtroom at the time of the sentencing or the disposition hearing, the **parent** ... upon his or her request, **shall have the right** to address the court **regarding the impact** which the defendant’s criminal conduct ... has had upon the child. (Bold added for emphasis).”

At no time was Plaintiff Rotheimer given an opportunity to address the court regarding the impact that the defendant’s criminal conduct had upon the child. According to the court transcript, the judge asked Rotheimer if she was **in agreement** with the negotiated plea deal. Rotheimer was not asked if she had been informed of her right to address the court with the impact the crime has had upon the child nor was she given an opportunity to address the court of the impact the crime has had upon the child.

Based on hearing only the facts presented by Rotheimer and not the impact of the crime on the child did the judge refuse to accept the state’s negotiated plea agreement for six-years. Since Plaintiff Rotheimer was able to address the court on the issue of the negotiated plea agreement should not nor shall it waive, substitute or deprive her of the right to address the court on the impact the crime has had upon the child.

11. Soon after the disposition of the criminal case, Rotheimer met with a private attorney to retain legal counsel to hold Defendant Horner liable in civil court for defaming her daughter, by giving the court the impression that Plaintiff Jimenez was acting in an inappropriate manner that would give her assailant cause to step forward and say yes to the crime of rape, which he perpetrated against her. In defense of sustaining the six-year sentence and to further defame Plaintiff Jimenez, Horner informed the court and emphasized that, “[Jasmine] the victim had been drinking.” On February 25, 2003, the private attorney contacted Rotheimer on the telephone and informed her that she does not have standing [in a civil court] due to a provision under Section 9 of the state statute which does not grant victims a cause of action for damages. The private attorney then faxed Rotheimer a copy of the Rights of Crime Victims and Witnesses Act for her review. Upon receipt of the fax, Rotheimer had first become aware of the rights she and her daughter, Jimenez were afforded under the laws as crime victims that were denied by Horner. As a result of defendant’s conduct, plaintiff was injured as follows: Jimenez and Rotheimer were deprived of all their rights as crime victims, including but not limited to their rights to present a victim-impact statement or address the court with the impact the crime has had upon her and the child.

12. On April 15, 2009, convicted child sex offender, DeSario was again placed in the custody of the Department of Corrections at Statesville less than two months after he was released on parole from Dixon Correctional Center on February 18, 2009. The following day, Rotheimer learned of DeSario’s arrest and contacted the Lake County State’s Attorneys Office for information on the charge. On April 23, 2009 Rotheimer

personally visited the State's Attorneys Office to request information on the charge against her daughter's convicted sex offender because she did not receive a returned phone call from the Assistant State's Attorney handling the case. While Rotheimer spoke to the receptionist and asked if she could speak with the Assistant State's Attorney handling the case, State's Attorney Michael Waller entered the room and instructed the receptionist that "no one was to speak with her," (meaning Rotheimer). Rotheimer responded, "I am a crime victim. I have the right to information on this case." State's Attorney Waller replied, "Be Gone!" Linda Sielk, who was present at the time signed an affidavit and was sworn on oath that she would testify competently as to each fact set forth herein on April 23, 2009. Defendant Waller, acting under color of law denied Plaintiff Jimenez, through her mother, Denise Rotheimer of her right to information on the case and the rights affording both Plaintiffs to either present a victim-impact statement or address the court on the impact the crime has had on the child during the sentencing or disposition hearing.

13. On May 29, 2009, Patricia Fix, Chief, Felony Trial Division of Lake County State's Attorneys Office addressed and mailed a letter to the attention Ms. Denise Rotheimer at -----, Augustana, Ingleside, IL 60041. Chief Fix states, "We are in receipt of an inquiry regarding the status of inmate Michael DeSario. ... As a result of his conviction in 02F3630, he is required to register as a sex offender. ... On April 15, 2009, records show Michael DeSario was again placed in the custody of the Illinois Depart of Corrections at Statesville. This was **not** as a result of an arrest for a new offense." Please let the court take note that *DeSario's arrest on April 15, 2009 was NOT as a result of an arrest for a new offense* and attaches to his conviction in

02F3630, which Rotheimer was seeking to obtain information on behalf of her daughter, Jasmine Jimenez, who was the crime victim.

**Argument**

**A. Fourteenth Amendment Infractions**

14. Plaintiffs respectfully submits Fourteenth Amendment guarantee violations in two significant ways. First, language in 725 ILCS 120/9 reads,

“Nothing in this act shall create a ground for Appellate relief...failure of the crime victim to receive notice as required, however, shall not deprive the court of the power to act regarding the proceeding before it.”

This language clearly strips plaintiffs of due process and equal rights afforded under the laws; furthermore, these are rights that plaintiffs have a legitimate claim of entitlement to in pursuing knowledge, justice, and long-recognized privileges that define her sense of happiness. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

Beyond some abstract desire or fascination these are crucial to the development of her liberty expectations that have been broadly developed and should be recognized. *Id.*

Additionally, when such interests are vital to the plaintiff they are not to be denied or taken away. *Bell v. Burson*, 402 U.S. 535, 539 (1971). Ultimately, Plaintiffs’ requests fall within the nature and scope of liberties granted under the Fourteenth Amendment.

15. Secondly, Plaintiffs repeat and reassert the contentions of paragraphs 8-13 in this paragraph 15 as if set forth fully herein. It is clear that Defendants Horner and Waller’s actions represent a long pattern of abuse that has stripped the rights afforded to Plaintiffs Jimenez and Rotheimer under 18 U.S.C §3771(b), (a)(4) (see also U.S.S.G. §6A 1.5 extending the breadth of crime victims’ rights under §3771 to any other area of federal law) such as the right not to be excluded from public court

proceedings without justification, and the right to be reasonably heard amongst others. *See U.S. v. Clark*, 335 Fed.Appx. 181, 184 (3rd Cir. 2009). Without injunctive relief, Plaintiff's due process and equal protection rights are prospectively threatened as are a whole class of potential victims across Illinois from this prejudicial and discriminatory state abuse.

16. Plaintiffs proffer that this evidence significantly justifies the plausibility of a genuine issue of material fact and will further prove how the Section 1 of the Fourteenth Amendment of the U.S. Constitution has been violated. Finally, Plaintiffs rejects any contention that there is a complete lack of evidence regarding the claim in question, and thereby requests that it move beyond the pleading stage. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

**B. Defendants Horner and Waller are subject to Suit in their individual capacity Under 42 U.S.C. §1983**

17. Plaintiffs repeat and reassert the contents of paragraphs 8-13 in this paragraph 17 as if set forth fully herein. In these circumstances, courts have allowed states, their officials, and their employees to be the subjects of suits for declaratory and injunctive relief. *Ex Parte Young*, 209 U.S. 123, 161 (1908); *see also Hafer v. Melo*, 502 U.S. 21, 27-28 (1991); *see also Kentucky v. Graham*, 473 U.S. 159, 166-167 (1985). Thus, for the purposes of this proceeding, plaintiffs respectfully submits that defendants are in fact subject to suit under §1983.

**C. Defendants do Not have Eleventh Amendment Immunity**

18. The Eleventh Amendment of the U.S. Constitution has been broadly construed overtime to limit the breadth and scope of suits against states. *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984). However, as the powers of Congress are

inevitably limited, so too are the immunities of state officials, these instances of vulnerability occur when state officials, acting under color of law relinquish protection or when Congress overrides the Eleventh Amendment through legislation. *See Tennessee v. Lane*, 541 U.S. 509 (2004). Additionally, state officials acting under color of law do not have free reign to abandon the Constitution or applicable federal law. *Alden v. Maine*, 527 U.S. 754-755 (1999); *see also Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993). Acknowledging the supremacy of the Constitution, plaintiffs contend, as per *United States v. Georgia*, that this is the appropriate context to abrogate state immunity for state officials where there has been a similar violation of Fourteenth Amendment rights in defendants' conduct. 546 U.S. 151 (2006); *see also Alaska v. EEOC*, 564 F.3d 1062, 1079 (9<sup>th</sup> Cir. 2009) (holding that state immunity cannot extend to discrimination, harassment, and retaliation claims when there are constitutional violations).

**D. Plaintiffs Fulfill the Statute of Limitations Requirements**

19. Plaintiffs repeat and reassert the contentions of paragraphs 8-13 in this paragraph 19 as if set forth fully herein. Acknowledging that the focus of this case is declarative relief and not monetary damages, the customary statute of limitations requirements should not be adopted and should not bar plaintiff from recovery. *But see Ashafa v. City of Chicago*, 146 F.3d. 459, 461 (7th Cir. 1998) (ruling that in personal injury claims under §1983 plaintiffs were limited to two years in bringing suit). However, in addition to the personal injury distinction, it must be noted that in the instant case there is no underlying substantive action at law; thus, this complaint for declarative relief should not be barred by statute of limitations.

*Romer v. Leary*, 425 F.2d 186 (2d Cir. 1970); *see also Luckenbach S. S. Co. v. U.S.*, 312 F.2d 545, 1963 A.M.C. 1749 (2d Cir. 1963).

20. On January 31, 2011 Plaintiff Rotheimer filed a federal complaint alleging prosecutors deprived her of her Fourteenth Amendment right to due process and equal protection of the laws within the two year statutes of limitation period. Practically, Plaintiffs proffer these violations have not exceeded the limit and are in fact presently occurring. To bar this action would be to ignore the constant and current stream of abuse presently affecting the Plaintiffs, the distant start of this account should not blind one to the present affliction at hand, as well as the actual relief that is sought.

**E. Plaintiff Rotheimer Has Standing Consistent with Claims**

21. Plaintiff Rotheimer humbly contends that she does have standing pursuant to her class and rights. Contained in the Bill of Rights for Children, in 725 ILCS 115/3(a), affords parents of child crime victims in violent offenses the rights of standing to address the court with the impact the crime has had upon the child; and, Rights of Crime Victims and Witnesses Act, 725 ILCS 120/6 (a), affords the victim's ... parent who is present in the courtroom at the time of the sentencing or disposition hearing, the victim or his or her representative shall have the right and the victim's parent, upon his or her request, may be permitted by the court to address the court regarding the impact that the defendant's criminal conduct ... has had upon them and the victim. This plain reading suggests that Plaintiff Rotheimer has proper standing before this court.

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