IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATT STROUD ET AL, Plaintiff, v. MAGISTERIAL DISTRICT JUDGES DANIEL E. BUTLER ET AL, Defendants.	)	CIVIL ACTION No 2:19-cv- 1289 Honorable Mark R. Hornak Chief Judge Electronically Filed

BRIEF IN SUPPORT OF WILLIAM P. MULLEN'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES DEFENDANT, William P. Mullen, Sheriff of Allegheny County (hereafter "Mullen") by his undersigned counsel and submits this, his Brief in Support of his Motion to Dismiss the Complaint for Failure to State a Claim.

I. INTRODUCTION

Plaintiff Matt Stroud (hereafter "Stroud") is a journalist and the CEO and Executive director of Postindustrial, an online and print magazine. ECF 1, ¶¶7, 8. Stroud's investigative reporting has been focused on criminal justice issues, most recently bail practices in Allegheny County. *Id.* He has filed the Declaratory Judgment action seeking declaration that Pennsylvania Rule of Criminal Procedure 112, Pennsylvania Rule of Judicial Administration 1910 and Allegheny County Rule of Criminal Procedure 112.1 be deemed unconstitutional to the extent that these rules preclude the Plaintiffs from making audio recordings of bail hearings in the Pittsburgh Municipal Courts. William P. Mullen, the Sheriff of Allegheny County, has been named as a defendant in this matter. The Sheriff, a constitutionally elected row officer, and his

Office are required to enforce the rules of criminal procedure generally, and specifically the directives of judiciary of the Fifth Judicial Circuit. Notwithstanding that the Sheriff's Office has no discretion with regard to enforcement of court rules and criminal statutes and that this Office has no authority to negotiate these rules and accede to his request to record bail hearings, Plaintiffs are seeking an award of damages solely from the Sheriff's Office.

II. SUMMARY OF THE FACTUAL AVERMENTS.

Plaintiffs aver that the Pittsburgh Municipal Court (hereafter "PMC") in Allegheny County, conducts dozens of initial bail hearings each week for those persons recently arrested. ECF 1, ¶1. They contend that there is strong public interest in these proceedings stemming from public concern about cash bail. *Id.,* ¶2. Aside from the instant Plaintiffs, the RAND corporation is conducting a long-term study of bail hearings at PMC as is the University of Pittsburgh. *Id.,*¶17. Although bail hearings are conducted at PMC twenty-four hours a day, every day, Plaintiffs have only joined the Defendant Magisterial District Judges who preside over the bail decisions during regular business hours and aver that these proceedings are open to the public. *Id., ¶18.* Plaintiffs are seeking to audio record the proceedings during the workday shift. *Id.,*¶¶10, 52. Plaintiffs describe the general course of these proceedings at paragraphs 18-25. Stroud's investigative reporting has been focused on criminal justice issues, most recently bail practices in Allegheny County. *Id.,* ¶¶47, 48.

Mullen is responsible for court security at PMC and for enforcing court rules. *Id.,*¶11. An administrative Order, referenced but not attached to the Complaint, provides that the Sheriff is "responsible for enforcement of this policy." ECF 15, Ex 1. Mullen has issued an office policy

which outlines the procedures for enforcement. *Id.* ECF 15, Ex.2.[1]

Plaintiffs aver that the none of the defendants, including Mullen records the bail proceedings. ECF 1, ¶28. The Sheriff's deputies enforce the procedural rules and order by monitoring the courtrooms. *Id.*, ¶34. Signage in the courtroom alerts that cell phones are prohibited and the Magisterial District Judges have the power to enforce the rules, have contempt power and to direct the Sheriff's deputies to enforce the rule. *Id.,* ¶¶ 36, 37. Stroud avers that he has had an experience at some unspecified time and place where court staff, but not the Sheriff deputies have prevented him from taking handwritten notes in some court proceeding. *Id.,¶46.*

III. ARGUMENT

A. STANDARD OF REVIEW UNDER F.R.C.P 12 (b)(6)

Under Rule 12(b)(6), "a motion to dismiss will be granted only if, accepting all well pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 88 (3d Cir. 2011). A claim is plausible on its face if its facts allow the court to draw the reasonable inference – not just a possibility – that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-670, 129 S.Ct. 1937 (2009). "Allegations that are no more than conclusions are not entitled to the assumption of truth." *Burtch v. Milberg Factors, Inc*., 662 F.3d 212, 221 (3d Cir. 2011) quoting *Santiago v. Warminster Twp*., 629 F.3d 121, 130 (3d Cir. 2010).

In deciding this Motion, the Court is not restricted to the complaint and its exhibits. A

[1] Counsel for Plaintiffs requested these documents in an Open Records Request of the Sheriff's Office and these exhibits were produced in that response of April 26, 2019.

court may properly consider, "matters of public record, as well as undisputedly authentic documents, if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir.2010). *See also*. *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir. 2002)("documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered."). A district court may consider these documents without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

B. CLAIM FOR VIOLATION OF FIRST AMENDMENTS RIGHTS

In his sole count, Plaintiff avers that the Pa.R.Crim.P. 112, Pa. R.J.A. 1910 and Local Rule 112.1 are unconstitutional and that the Defendant's enforcement of these rules violates the First Amendment to the United States Constitution. Although not expressly set forth in the Count itself, Plaintiffs appear to brings this suit under 42 U.S.C.§1983. *Id.* ¶12.

In order to succeed on a claim under § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the constitutional deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250 (1988); *Schneyder v. Smith,* 653 F.3d 313, 319 (3d Cir. 2011). Section 1983 does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427 (1985), *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a claim for relief under § 1983, a plaintiff must demonstrate both that the defendants were acting under color of state law and that a constitutional violation was directly caused by their conduct.

Piecknick v. Pennsylvania, 36 F.3d 1250, 1255–56 (3d Cir. 1994).

Mullen is a municipal official.

While not expressly pled in the complaint, Plaintiffs' appear to claim that Mullen is a "policy maker" under *Monell* and its progeny. Plaintiffs' claim hinges on their assertion that the Sheriff has drafted a policy to enforce court orders:

> Sheriff Mullen has established a policy and practice requiring his office to enforce the prohibition on audio-recording embodied in the court rules and the administrative order: A policy memorandum specifically addressing the Sheriff's role in enforcing the Fifth Judicial District's ban on cell phones states, "It is the policy of the Allegheny County Sheriff's Office to enforce Orders of Court isssued by the Court of Common Pleas of Allegheny County."

ECF 1, ¶11.

Pennsylvania's sheriffs' primary mission is to serve the judiciary. "The sheriff's principal function is as an arm of the court, which is the duty specifically assigned to the office of sheriff by the legislature. *Com. v. Leet*, 585 A.2d 1033, 1037 (Pa. Super. 1991) "The sheriff, either personally or by deputy, **shall** serve process and execute orders directed to him pursuant to law." 42 Pa. C.S. §2921 (emphasis added). The Sheriff's execution of such orders is not discretionary.

The United States Supreme Court has held that municipalities and other local government units qualify as "persons" subject to liability under Section 1983. *Monell v. Dept. of Soc. Servs*., 436 U.S. 658, 690, 98 S.Ct. 2018 (1978).

"A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. But, under § 1983, local governments are responsible only for their own illegal acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011)(citing *Monell* and

Pembaur, infra).

> The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, e.g., *Oklahoma City v. Tuttle*, 471 U.S., at 822–824, 105 S.Ct., at 2435–2436.The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.
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> *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–83, 106 S. Ct. 1292, 1299–300 (1986)

The administrative Order of December 3, 2007 and the operative administrative order of April 26, 2017 have nearly identical language, the latter provides:

> 5. The Sheriff of Allegheny County and duly authorized deputies shall be responsible for enforcement of this policy in the Court of Common Pleas and shall have the authority to confiscate forthwith any prohibited device used within any prohibited area. The Sheriff is directed to promulgate policies and procedures to provide for the storage, retention and disposition of confiscated devices.
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> ECF 15, Ex1.

Sheriff's directive 6.14 states in the preamble: "It is the policy of the Allegheny County Sheriff's Office to enforce Orders of Court issued by the Court of Common Pleas of Allegheny County ." ECF 15, Ex 2.

Subsections (A)(1)-(5) and (A)(7) all recapitulate the provisions of the Order as to the restrictions of sound and visual recording in the courts and the signage which is to be posted by the courts, confiscation of device and the right to petition the court for their return. *Id.* The Sheriff's office shall enforce the order, including the confiscation of prohibited devices. *Id.* at (A)(6). The policy provides that the Office shall retain the confiscated devices and if no petition is not filed within thirty (30) days, then the Sheriff is authorized to donate the device to the

Women's Center and Shelter of Greater Pittsburgh. *Id.,* (A)(8). Lastly, the directive recites that if the Administrative Judge permits media to set up devices outside of the designated areas, the Court is to notify the Sheriff. *Id.,* (A)(10)(misnumbered in original).

In sum, this directive instructs the deputies to follow the administrative Order, retain the confiscated items and dispose of them if not retrieved pursuant to a subsequent Order of the court directing the Sheriff to return. The "policy" pertains solely to device and otherwise make no limitations or expansions on any of the Court rules challenged by the Plaintiffs.

Plaintiffs are seeking a declaratory judgment deeming the challenged court rules as unconstitutional, at least in part as it pertains to bail hearings, and are also seeking costs and fees for initiating this suit. A judge is immune from liability for all acts taken in his judicial capacity. *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 1104 (1978); see also *Azubuko v. Royal*, 443 F.3d 302, 303 (3d Cir. 2006) ("A judicial officer in the performance of his duties has absolute immunity from suit and will not be liable for his judicial acts."). The averments as to the several named judges in Plaintiffs' Complaint are predicated solely upon judicial acts taken within their jurisdiction, for which they are clearly immune. In other words, they have no claim for financial recovery as to bench. The Sheriff does not enjoy absolute immunity and it is this defendant solely from which they claim monetary relief.

The Sheriff's pleonastic preamble – that his office has a policy to perform its requisite mission does not satisfy *Monell* and its progeny. The legislature has not granted any sheriff the authority or discretion in enforcing court rules. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of

state law." *Pembauer*, 475 U.S. at 481–83. As to the Administrative Order, the only authority granted is to develop procedures for the storage and disposition of confiscated devices. Neither the legislature nor the Court of Common Pleas has granted the Sheriff final policymaking authority as to anyone making audio recordings in the courtrooms or other areas of the courthouse. The Sheriff has no authority to promulgate any court rules or orders– he is legislatively mandated to execute them with fidelity. That the Sheriff in his policy directive recites that it he and his deputies shall perform the essential mission of he office does not establish that he has discretion to do otherwise. One cannot be said to have formulated a discrete policy to perform what is statutorily mandated.

This Office can only be responsible for its own illegal acts. *Id.,* 475 U.S. at 479. Plaintiffs have alleged no action by the Sheriff other than he has issued the directive to enforce Orders of Court and that Deputies monitor the courtrooms to endure that no one makes records. ECF 1, ¶¶11, 12. There is no allegation that this Defendant confiscated Stroud's phone or other device at the direction of a magistrate judge or charged him with unlawful use of an audio device pursuant to 18 Pa.C.S.A. § 5103.1.

Should this Court determine that the Allegheny County Court of Common Pleas generally or that President Judge Clark erred in denying the Plaintiffs' request to record bail hearings, such liability does not inure to the Sheriff.

Notwithstanding that the Sheriff has no interest in how the Court rules on the Plaintiffs' prayer that they may record at bail hearings, to the extent that the constitutionality of the challenged rules will be considered by this Court in determining liability as to this Defendant, he anticipates that the judicial defendants will address at length the issue of the constitutionality of

Pa. R.Crim. P. 112, Pa. R.J.A. 1910 and Local Rule 112.1 and likely, by extension, the Order at Administrative Docket 168 of 2017, Defendant joins in the argument of their Brief by reference and incorporates it herein as an additional basis for the dismissal of this matter.

Accordingly Plaintiffs' claims against this defendant should be dismissed, with prejudice.

C. THE SHERIFF IS ENTITLED TO QUALIFIED IMMUNITY FROM THE INSTANT CLAIM WHERE THE RULES AT ISSUE HAVE BEEN IN EFFECT AND UNCHALLENGED FOR YEARS.

Qualified immunity operates to ensure that, before they are subjected to suit, government officials are put on notice that their conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "Because qualified immunity is an immunity from suit rather than a mere defense to liability it is effectively lost if a case is erroneously permitted to go to trial. Indeed, we have made clear that the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery." *Id. (*Internal cite omitted). At the 12(b)(6) stage, qualified immunity will be found "when the immunity is established on the face of the complaint." *Cunningham v. N. Versailles Twp.*, No. Civ. A. 09-1314, 2010 WL 391380, at *13 (W.D. Pa. Jan. 27, 2010) (Ambrose, J.) (quoting *Thomas v. Independence Twp.*, 463 F.3d 285, 291 (3d Cir. 2006) *Thomas*, 463 F.3d at 291).

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of

> the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). We recently reaffirmed that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Courts should think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will "have no effect on the outcome of the case." *Id.*, at 236–237, 129 S.Ct. 808; see *id*., at 237–242, 129 S.Ct. 808 .

Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011).

The *al-Kidd* case is instructive here. After the September 11 terrorist attacks, then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals with suspected ties to terrorist organizations. *Id.*563 U.S. at 734, 131 S. Ct. at 2079. "The federal material-witness statute authorizes judges to 'order the arrest of [a] person' whose testimony 'is material in a criminal proceeding ... if it is shown that it may become impracticable to secure the presence of the person by subpoena.' 18 U.S.C. § 3144." *Id.* In 2003 while at the airport to board a flight for Saudi Arabia Abdullah al-Kidd, a native born United States citizen, was arrested pursuant to a federal warrant premised on his being a material-witness with suspected ties to terrorist organizations. *Id.* al-Kidd was never called as a witness and sued Ashcroft alleging in his Complaint that federal officials had no intention of calling him or other as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime. *Id.*

Ashcroft filed a motion to dismiss based, in part on qualified immunity.[2] *Id.* The Court explained:

> Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). We recently reaffirmed that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).
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> *Id*, 563 U.S. at 735, 131 S. Ct. at 2080.

The Court then went on to examine whether the right was "clearly established" at the time of the allegedly unconstitutional conduct. " A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right."*Id.* 563 U.S. at 741, 131 S. Ct. at 2083(citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

The Supreme Court held that Ashcroft, as Attorney General and the executive officer of the federal justice department, was entitled to qualified immunity because at the time of al-Kidd's arrest, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." *Id.*

The Rules that are challenged here have been in effect for years. Pa.R. Crim.P. 112 was first enacted in January 1970 with various minor changes and its current iteration was enacted in 2002. The only challenge to the Rule was in 1993 when a newstation filed a suit claiming the

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[2] He also claimed absolute immunity which the court declined to reach after granting his motion on qualified immunity grounds.

extension of the rule to a juries viewing of a crime scene was unconstitutional. The Pennsylvania Superior Court disagreed. *See Com. v. Davis*, 635 A.2d 1062 (Pa. Super. 1993). Pa. R.J.A. 1910 was adopted Jan. 8, 2014 and made effective July 1, 2014 and there are no cases to be found regarding this rule. Similarly, All.C.R.Crim. P. 112.1 has not been previously litigated. As noted above, the Administrative Rule relating to confiscation of devices has been in effect for a dozen years with no substantive changes.

"Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Mullenix v. Luna*, [577 U.S., at —— 136 S.Ct. 305, 308 (2015)] While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' Id., at ——, 136 S.Ct., at 308. In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' Ibid." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). "As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*., 137 S. Ct. at 552. (Citing *Anderson v. Creighton*, *supra,* 483 U.S. at 640, 107 S.Ct. at 3034.)

As in *Ashcroft*, there is no case law which would advise the Sheriff that the constitutionality of these several court rules was in any doubt whatsoever. Other than this matter,

despite, as Plaintiffs have pled in their Complaint, there being several institutions targeting bail hearings for study in the past several years, this is the first constitutional challenge.[3]

As argued above, the Plaintiffs have alleged no conduct by the Sheriff as to either Stroud or any other employee of Postindustrial that indicates he and his deputies have interacted with him/them in any manner. If Plaintiffs claim is founded on the proposition that the Deputies monitoring the courtroom creates an unlawful prior restraint of their First Amendment rights, then qualified immunity is still contextually warranted.

As the Supreme Court held in *al-Kidd*, "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." Ashcroft deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression. He deserves qualified immunity even assuming—contrafactually—that his alleged detention policy violated the Fourth Amendment." *Ashcroft v. al-Kidd*, 563 U.S. at 743, 131 S. Ct. at 2085(internal cites omitted).

All these Court rules are presumptively facially valid. But for this case, there has been no open legal for the Sheriff to make any judgment other than these Rules are valid. Until there is a federal court ruling Sheriff Mullen has made no mistake of law in enforcing the court rules as written. Plaintiffs have pled no precedent, and there are no cases which reveal that Mullen was on notice that the Rules were in any way uncertain. "Qualified immunity operates to ensure that, before they are subjected to suit, government officials are put on notice that their conduct is

[3] Only recently, in the undersigned's briefing of this matter, the Sheriff has become aware that a parallel action in the Eastern District of Pennsylvania is pending at *Reed v. Arraignment Court Magistrate Judges*, 19-cv-03110, Motions to Dismiss have been filed but not ruled upon.

unlawful." *Hope, supra*. The facts– or dearth thereof– reveal that a grant of Qualified Immunity is wholly appropriate in this matter and the Plaintiffs claims must therefore be dismissed as a matter of law, with prejudice.

IV. CONCLUSION.

For all the reasons set forth herein, the Plaintiffs' claims against William P. Mullen, Sheriff of Allegheny County, must be dismissed, and as no set of facts can be pled to cure the defects, with prejudice.

Respectfully submitted,
/s/ Lisa G. Michel

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