

United States Court of Appeals
for the Ninth Circuit

Brian P. Carr
Plaintiff-Appellant

versus

The State of Oregon et al
Defendants-Respondents

Case No. 08-23726

Motion to Expand Record
and for new Time Schedule

Plaintiff, Brian P. Carr, *pro se*, in compliance with [FRAP 27](#), respectfully requests that the Court:

1. Expand the record in this matter to include electronic versions of documents which were submitted to the lower court in accordance with the rules of the court but which were not included in the record and, further, directing all parties to utilize the electronic versions except when there are differences between the electronic version and the scanned version and then only to as necessary to highlight the differences and
2. Assign a new Time Schedule based on the revised settlement of the record.

This relief is requested based on:

Expand Record

1. 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.

2. The constitutional provisions of due process guarantees the right of the affected individual to be heard in a meaningful manner which implies there must be an impartial deciding 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. 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 and no documents which Mr. Carr submitted were sealed.¹ 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.
3. 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.
4. While the electronic record may not have been of great significance in the lower court, it is the electronic record which is the basis for the appeal and it would be prejudicial if the portions of the record submitted by one party are degraded, inaccurate and less readable than that for other parties. The scanned versions of Mr. Carr's documents which the lower court included in the record are, in fact, much harder to read than the electronic documents which were submitted by the City of Portland and Mr. Carr.

¹ 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.

5. 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 while the decision has none. 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 which couldn't be dismissed. 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.

6. As the readability of the scanned documents versus the electronic documents is one of the issues intended to be raised on appeal, it is essential that the electronic documents as previously filed with the lower court be included in the record on appeal. Further, in order for the hearing before this court to be equitable, it is necessary that the parties rely on the clearest possible statement of the parties individual positions which are the electronic versions as submitted to the lower court.

7. While it could be argued that this court is able to overcome the intrinsic bias of having one party's portion of the record arbitrarily degraded and barely readable, there is no justification for inconveniencing this court in this manner. The local rules of this court make it apparent that this court encourages all parties to present their case with the greatest clarity possible allowing the court to focus its attention on the underlying issues rather than struggling with interpreting degraded documents. This reason alone justifies using the clearest documents available which is the electronic versions of documents submitted by Mr. Carr.

New Time Schedule

8. It is not possible for the parties to prepare their briefs until the record is settled and so it is requested that time schedule be revised to reflect the date when the record is settled.

Conclusion

For the reasons set forth above, the plaintiff-appellant respectfully requests that this court order the lower court to include in the record all electronic documents which the plaintiff previously filed with the clerk of the court and which were not included in the record. Once the revised record is available, the court is asked to assign a new time schedule for the submission of briefs.

Respectfully submitted, November 11, 2008 (Vancouver, WA).

s/ Brian Carr
Signature of Plaintiff-Appellant
Brian Carr
11301 NE 7th St., Apt J5
Vancouver, WA 98684
503-545-8357

United States Court of Appeals
for the Ninth Circuit

Brian P. Carr
Plaintiff-Appellant

versus

The State of Oregon et al
Defendants-Respondents

Case No. 08-23726

Plaintiff's Declaration in
Support of Motion to
Expand Record and
for new Time Schedule

I, Brian P. Carr, am the plaintiff-appellant in this matter, have knowledge of the facts of this matter, and make the following statements under oath and penalty of perjury:

1. On April 7, 2008 I submitted a motion to the Oregon Federal District Court seeking access to the court's CM/ECF system which was denied on April 9, 2008 with no justification or document associated. Motions to Reconsider were submitted on April 21, 2008 and May 15, 2008. On April 29, 2008, the court ordered that I be provided a copy of all documents filed in the court's CM/ECF but did not allow me to file documents in the court's CM/ECF or for the clerk to file electronic documents which I provided on digital media. Exhibit 1 is a copy of my notice of this decision. On May 29, 2008, the court again denied my request to be able to submit electronic documents as permitted to opposing counsel. Exhibit 2 is a copy of my notice of this decision. The motion of May 15, 2007 was the first in which the other parties had made an appearance and was unopposed. No justification was ever given for the denial of these requests.
2. While I submitted digital copies of all papers submitted to the clerk on the specified digital media (3.5" diskettes or CDs), none of the electronic versions were included in the record. These same electronic documents were separately provided to opposing

counsel. The scanned images included in the record are barely readable while the electronic version is quite crisp and easily readable. Exhibit 3 is a copy of the first page of the electronic version of the complaint as submitted to clerk of the lower court. Exhibit 4 is a copy of the first page of the complaint as entered in the record. While there are several hand markings on the first page of the complaint from the record, none have substantial bearing on the issues presented and the only other difference in the remainder of the complaint is the signature on the last page. Further, the complaint in the record is a series of images without the associated text making the complaint unsearchable by normal automated search methods. While some of the documents which I submitted later were scanned to include searchable text, the text recognition was done automatically and contains numerous errors.

3. Both the state and city submitted almost all of their documents electronically and the documents submitted by Portland in particular were quite crisp and easily readable (as clear as the electronic documents which I submitted to the clerk and opposing counsel).
4. The complaint in this matter references employment eight times while the deciding decision does not address it at all. Similarly the complaint has a full dozen references to criminal records while the decision has none. These differences are easily determined in the electronic version, but most difficult to determine with accuracy in the scanned version.
5. 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. However, all of these documents were submitted by opposing counsel and no documents which I submitted were sealed.²
6. On November 5, 2008, I inquired via email to opposing counsel as to their position with respect to this motion. The City of Portland takes no position on this motion. The State of Oregon informed me that it is likely that the state will be represented by a

² 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.

different attorney in the appeal and did not otherwise respond to my queries. The state took no position on the motion to include the electronic versions of documents in the record before the lower court and so it is deemed likely that the state will not take any position on this motion.

7. On November 11, 2008, a true and accurate copy of this motion along with this declaration and associated exhibits was served on the defendants-respondents by mailing with the United States Postal Service using First Class Mail. A copy was mailed to each counsel for the defendants-respondents at:

JOSEPH G. GROSHONG #04010
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

and

TRACY POOL REEVE, OSB #89112
Senior Deputy City Attorney
Office of City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

Respectfully submitted, November 11, 2008 (Vancouver, WA).

s/ Brian Carr
Signature of Plaintiff-Appellant
Brian Carr
11301 NE 7th St., Apt J5
Vancouver, WA 98684
503-545-8357