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# [***Ohio ex rel. Marcum v. Duchak***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCT-9FK1-F04F-1223-00000-00&context=)

United States District Court for the Southern District of Ohio, Western Division

January 11, 2018, Decided; January 11, 2018, Filed

Case No. 3:17-cv-437

**Reporter**

2018 U.S. Dist. LEXIS 4985 \*

STATE OF OHIO, EX REL TED MARCUM, Petitioner, - vs - SHERIFF DAVE DUCHAK, et al., Respondents.

**Subsequent History:** Supplemental opinion at, Magistrate's recommendation at [*Ohio ex rel. Marcum v. Duchak, 2018 U.S. Dist. LEXIS 11147 (S.D. Ohio, Jan. 23, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RGJ-X231-F7G6-619R-00000-00&context=)

**Prior History:** [*Ohio ex rel. Marcum v. Duchak, 2018 U.S. Dist. LEXIS 4983 (S.D. Ohio, Jan. 11, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCT-9FK1-F04F-1225-00000-00&context=)

**Core Terms**

allegations, waive

**Counsel:** **[\*1]**Ted Marcum, Plaintiff, Pro se, TROY, OH.

For Sheriff Dave Duchak, Rob Davie, Judge Elizabeth S Gutmann, Public Defender Steve R Layman, Defendants: Grant J. Bacon, LEAD ATTORNEY; Melanie J. Williamson, Fishel Hass Kim Albrecht Downey LLP, New Albany, OH.

Stacy Wall, Defendant, Pro se, Piqua, OH.

**Judges:** Michael R. Merz, United States Magistrate Judge. District Judge Walter H. Rice.

**Opinion by:** Michael R. Merz

**Opinion**

**REPORT AND RECOMMENDATIONS ON MOTION TO DISMISS OF STACY WALL**

This case is before the Court on Motion to Dismiss of Defendant Stacy Wall (ECF No. 4) which Plaintiff opposes (ECF No. 5).

Defendant Wall's Motion cites no particular authority for dismissal. Because the case has been removed to federal court, the Motion must be evaluated under the Federal Rules of Civil Procedure and this Court treats it as a motion to dismiss for failure to state a claim upon which relief can be granted under [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=).

Attorney Wall notes that she is purportedly sued in her official capacity as an Assistant Miami County Prosecutor but that she does not hold that office; rather, she is Law Director for the City of Piqua, Ohio.

Plaintiff responds that to his knowledge Ms. Wall is the person who, on October 12, 2017, advised him "to waive**[\*2]** his right to counsel" in the case then pending before Judge Gutmann and was also the person who first advised him of the failure of the Municipal Court to timely appoint counsel for him. (ECF No. 5, PageID 271-72). He speculates that on the occasion in question, Ms. Wall was sitting in for the assigned assistant county prosecutor. Marcum requests a full evidentiary hearing on the Motion with the Court conducting what would include what would amount to a lineup of Ms. Wall and Ms. Lenee Brosh so that Mr. Marcum can identify which of them is the person to whom he is referring.

The gravamen of Marcum's complaint against Ms. Wall is "that it is illegal, unethical, and unconstitutional for prosecutors' to approach criminally accused defendants to either incourage [sic] or advise them to 'waive' their right to counsel." (Complaint, ECF No. 2, PageID 184). At a later point he alleges ""[i]t is also a conflict of interest as well as a structural error for any prosecutor to give "legal advise [sic]" to a criminal defendant that may incourage [sic] a defendant to forfeit any of his constitutional rights. . ." *Id.* at PageID 185.

The test for dismissal under [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) has been stated by the Supreme Court as**[\*3]** follows:

Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004)("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g.,* [*Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:457B-SHV0-004C-003J-00000-00&context=); [*Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDG0-003B-42B7-00000-00&context=)(" [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); [*Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CD60-003B-S355-00000-00&context=) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

[*Bell Atlantic Corp. v. Twombly, 550 U.S.544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=).

[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller § 1216, at 233-234 (quoting [*Daves v. Hawaiian Dredging Co., 114 F.Supp. 643, 645 (D. Hawaii 1953) )*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-T650-003B-21SN-00000-00&context=); see also [*Dura Pharms., Inc. v. Broudo, 544 U.S. 336, at 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)]*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G05-93F0-004B-Y01S-00000-00&context=); [*Asahi Glass Co. v. Pentech Pharmaceuticals, Inc ., 289 F.Supp.2d 986, 995 (N.D.Ill.2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49X2-PFH0-0038-Y4V2-00000-00&context=) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent ***antitrust*** case should be permitted to go into its inevitably costly and protracted discovery phase").

[*Twombly, 550 U.S. at 558*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); *see also* [*Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545 (6th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PRS-GMX0-TXFX-8390-00000-00&context=).

*42 U.S.C. § 1983*, R.S. § 1979, the statute under**[\*4]** which Mr. Marcum brought suit, was adopted as part of the Act of April 20, 1871, and reads, as amended:

Every person who, under color of any statute, ordinance, ***regulation***, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress , except that in any action brought against a judicial officer, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The statute creates a cause of action sounding essentially in tort on behalf of any person deprived of a constitutional right by someone acting under color of state law. [*City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-BG10-004C-2005-00000-00&context=); [*Memphis Community School District v. Stachura, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HB0-0039-N37P-00000-00&context=); [*Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9060-003B-S30P-00000-00&context=).

The question before the Court on the instant Motion to Dismiss is whether Mr. Marcum has stated a plausible**[\*5]** claim that Ms. Wall deprived him of his constitutional rights if she did what he alleges she did. The answer is no. Whether or not it is unethical or "illegal" for a prosecutor to give legal advice to a criminal defendant, it is not unconstitutional to do so. In fact it is a common, even routine, practice for prosecutors to encourage defendants to waive their right to counsel in the course of pleading guilty or no contest. A person constitutionally entitled to appointed counsel cannot validly plead no contest without waiving his right to representation. Whether or not receiving advice from a prosecutor to waive counsel renders the plea involuntary is a question for Plaintiff to raise on appeal or later in habeas corpus in this case. But as pleaded the claim against Ms. Wall does not state a claim upon which relief can be granted under *42 U.S.C. § 1983*.

It is therefore respectfully recommended that this case be dismissed as to Defendant Stacy Wall for failure to state a claim upon which relief can be granted.

January 11, 2018.

/s/ *Michael R. Merz*

United States Magistrate Judge

**End of Document**