International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 20 – November 3, 2016

Courts: When Post-Conviction Restrictions Have Only Negligible Effect on Liberty or Movement, They are Not "Custody" For Habeas Purposes

Dickey v. Allbaugh, No. 15-6234 (10th Cir. Oct 25, 2016)

The Tenth Circuit has found that Oklahoma's sex registry conditions do not rise to the level of "custody"- restrictions against working with children, living within a 2,000-foot radius of school, park or licensed childcare center, and so on, were not considered severe enough to amount to custody.

Timmy Dickey was initially convicted of child sexual abuse, a conviction later modified to incest (a lesser included offense). He sought habeas relief under 28 U.S.C. § 2254, arguing his sex-offender registry conditions from Oklahoma rose to the level of being "in custody" under that Act, thus entitling his case to review. The district court rejected this argument, culminating in an appeal to the Tenth Circuit.

The Tenth Circuit recently held that Colorado's sex-offender registry conditions did not rise to the level of custody, as other circuits have for other states, but had not dealt with Oklahoma's registry conditions. Oklahoma's registry conditions include not working with children or on school premises, not living temporarily or permanently within a 2,000-foot radius of any "school . . ., educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or park . . ., or a licensed child care center," and not living in a dwelling with another sex offender. The Court first noted that a restraint is deemed severe when it is "not shared by the public generally," but also added that collateral consequences of conviction which have only negligible effect[s] on liberty or movement, do not satisfy the "custody"

requirement." It then noted that the "inability to vote, engage in certain businesses, hold public office, [] serve as a juror," the imposition of fines and restitution, the revocation of a driver's license, medical license, or license to practice law, have all been too minimal to be considered "in custody" under §2254.

Though the Court found Oklahoma's conditions more restrictive than Colorado's, it still held they were not severe enough to rise to the level of custody. As the Court put it Dickey "remain[ed] free to live, work, travel, associate, and engage in lawful activities without government approval" and thus his terms were only collateral consequences.

LINK

Personnel: Under ADA, City Not Required to Reallocate Essential Job Functions to Accommodate Disabled Employee after Position Was Eliminated

Mathis v. City of Red Bank, No. 16-5195 (6th Cir. Oct. 25, 2016)

The Sixth Circuit has found that a Tennessee city did not violate the ADA by laying off an employee diagnosed with lupus after the employee 1) failed to demonstrate that he could perform the essential functions of the position without accommodation and 2) did not meet mandatory minimum qualifications for other available jobs with the city.

Jimmy Mathis began working at the City of Red Bank, Tennessee in 1997 as a laborer for the Department of Public Works. He worked his way up the Department and was the Assistant Director for ten years before he was diagnosed with lupus, preventing him from being outside in the sun. Over time the job responsibilities of the Assistant Director changed and, by the time he was diagnosed, they included significant outdoor work. When he took a leave of absence for six months, the job duties changed even more as the City augmented personnel to fill the gap with his absence, ultimately eliminating the assistant director position altogether. When he returned to work, the City laid him off, finding no way to accommodate his lupus. Mathis filed suit, alleging the City violated the Americans with Disabilities Act by firing him, and by failing to restore him to his job as Assistant Director. The district court granted summary judgment for the City, resulting in an appeal.

The Sixth Circuit affirmed the lower court, finding that Mathis failed to show he could perform the essential job functions of his desired job with or without accommodation. First, the essential functions of Mathis' previous position as Assistant Director required outdoor work and the City received word from Mathis' doctor that he "cannot work

outside . . . [and] must avoid sunlight." Assured Mathis could not be the Assistant Director, the City tried to place him in another job; however, only two jobs were available and Mathis lacked the mandatory qualifications for either. Moreover, the Circuit noted the City was not required to recreate the Assistant Director job it had since gotten rid of to accommodate Mathis – in the language of the ADA, it was "not required to reallocate essential functions" to accommodate a disabled employee. In short, according to the Court, Red Bank did what the ADA requires: it understood Mathis' notice for medical leave as notice of a disability (that actually being beyond what the Act requires), then sought clarification from Mathis' doctor about his not being able to perform any outdoor work at all in any capacity, tried to accommodate Mathis by determining whether any job in the city could meet the disability and, finding none, resorted to laying Mathis off.

LINK

Prisons: Deliberate Indifference Standard for Municipal Liability in Prisoner Injury Cases Also Applies to Pretrial Detainee Cases

Edwards v. Northampton County, No. 16-2601 (3d Cir. Oct. 13, 2016)

Affirming the lower court's dismissal of a *pro se* action brought by a man who claims to have contracted MRSA as a pretrial detainee in a Pennsylvania prison, the Third Circuit has held that the Eighth Amendment "deliberate indifference" standard for injury to prisoners also applies to pretrial detainees bringing actions under the Fourteenth Amendment.

Demar Edwards had ankle surgery in 2010 and was subsequently housed at Northampton County Prison in Pennsylvania in September of that year. He contracted MRSA (a staph infection highly resistant to antibiotics), after the surgery and filed suit in 2012 alleging that Northampton County (and associated entities and staff members) violated his Eighth Amendment right against cruel and unusual punishment and his First and Fourteenth Amendment rights to have "vital medical knowledge." He charged that the County kept unclean cells, provided inadequate medical treatment, and failed to enforce appropriate MRSA precautions. The district court, after an extended discovery period, dismissed Edwards' claims on summary judgment, leading Edwards to appeal.

The Third Circuit agreed with the lower court. It addressed the two allegations in Edwards' complaint: (1) that the County acted with reckless disregard for the unclean conditions of his cell and (2) that it recklessly failed to implement and enforce adequate MRSA precautions. The Circuit acknowledged that while prisoner claims are generally

adjudicated under the Eighth Amendment, because Edwards was a pretrial detainee, his case fell under the Due Process Clause of the Fourteenth Amendment. Regardless, even though Due Process cases hinged on whether the complainant's conditions amounted to punishment, the same inquiry into the defendant's mental state should apply in Fourteenth Amendment cases as Eighth Amendment cases—identifying deliberate indifference. The relevant question was whether *officials knew of the risks he faced and disregarded them*.

The Circuit found no deliberate indifference. While Edwards had complained generally about his medical care, there was no record of him complaining about the unsanitary condition of his cell, meaning the officials (and thus ultimately Northampton County) could not be deemed aware of the risks he faced from uncleanliness. Furthermore, the record did not show that prison officials' actions caused the MRSA infection, nor that an inference of causation should apply.

As to the second matter—that the County failed to implement adequate MRSA precautions--the Circuit found that the County prison facility had improved its procedures to prevent MRSA, consulting an expert and instituting manufacturer inspections of laundry, kitchen, heating, and cooling equipment upon advice of the expert, making it impossible for the Court to find the County failed to implement proper MRSA prevention procedures as Edwards alleged.

LINK

Prisons: No Deliberate Indifference Where Officials Had Prior Knowledge of Inmate's Gang Affiliation, Ongoing Gang War, and Multiple Requests for Transfer

Revere v. Owens, No. 14-15564 (11th Cir. Oct. 24, 2016)

A prison official's encouragement of a "truce" between rival gangs in conversation with an inmate and knowledge of a previous attack was not enough to demonstrate that the official was "on notice" of "substantial risk" the inmate faced in housing near a rival gang—even where the inmate requested to be moved to different housing on four separate occasions.

Jermaine R. Revere was in an altercation while in Ware State Prison in Georgia, resulting in serious injuries, including the loss of two fingers. Revere filed suit against four prison officials arguing they were deliberately indifferent to the substantial risk of harm he faced as a member of a gang, thus violating the Eighth Amendment. The district court granted summary judgment for the officials, a decision Revere appealed.

The Eleventh Circuit, ultimately affirming the lower court, first found, based on Revere's depositions, that he was the member of a gang and was being housed near a rival gang that was "at war" with his gang and that this information was clearly known to prison officials. The Court also found the warden had a full report on a previous attack that began the "war" between the gangs. It found Revere complained to the warden about being housed near the rival gang twelve days before the his assault, and that the warden's response was that he would get involved when the gangs were going to "bring a truce." It found this to be Revere's most "extensive" evidence on the matter, characterizing his other three statements to guards as "mentioning" the complaint and a passing "encounter[]" where he reiterated the complaint. With these facts, the Court found Revere did not meet the significant hurdle of showing that prison officials knew and disregarded an excessive risk to his health and safety. Rather, the Court found none of the four interactions and requests for being moved rose to the level of putting the officials "on notice that [he] was in imminent danger of the assault that eventually occurred."

LINK

Qualified Immunity: Pressuring Government Officials to Take Retaliatory Action Does Not Violate Clearly Established Law

Zaloga v. Borough of Moosic, No. 15-2723 (3d Cir. Oct. 24, 2016)

The Third Circuit has reversed a district court denial of qualified immunity to a Pennsylvania borough council president who allegedly pressured county officials not to renew an agreement with a contractor who opposed the council president's nomination for reelection, finding that the president's actions did not violate clearly established law.

Dr. Edward Zaloga, who owns Correctional Care, a company providing medical services to correctional facilities, had been engaged in a feud with Moosic, Pennsylvania government officials, ostensibly about a tire facility located near Zaloga's home. He publicly opposed Joseph Mercatili's reelection as the President of the Moosic Borough Council. Mercatili allegedly retaliated against Zaloga by seeking to pressure county officials including prison board members not to renew their contract with Correctional Care, although the contract was ultimately renewed. Zaloga brought a § 1983 suit against county entities and individuals, alleging violation of First Amendment and Due process rights due to Mercatili's retaliatory actions. The district court granted summary judgment to all defendants except Mercatili, deciding that his qualified immunity claim depended on disputed facts and would have to be resolved by a jury.

The Third Circuit disagreed. It applied the two-pronged *Saucier v. Katz* inquiry for qualified immunity (did the official's action violate a constitutional right and was that right clearly established at the time), finding that the second prong had not been met. "To

defeat qualified immunity, the right purportedly violated must be so clearly established that every reasonable official would have understood that what he is doing violates that right. . . . [I]t is not sufficient to conclude, as the District Court did in this case, that the second Saucier prong is satisfied because there is a well-known "right against government retaliation for exercising one[']s right to [free] speech ...."

The Circuit found that merely pressuring third parties to take retaliatory action did not support a "clearly established" claim. It cited its own precedent in *McLaughlin v. Watson*, 271 F.3d 566 (3d Cir. 2001), where agents of the Pennsylvania Attorney General's office alleged that the United States Attorney for the Eastern District of Pennsylvania had acted to influence the Pennsylvania Attorney General to take adverse employment-related action against them. The Circuit had declined to find actionable conduct:

> When a public official is sued for allegedly causing a third party to take some type of adverse action against plaintiff's speech, we have held that defendant's conduct must be of a particularly virulent character. It is not enough that defendant speaks critically of plaintiff or even that defendant directly urges or influences the third party to take adverse action. Rather, defendant must "threaten" or "coerce" the third party to act.

McLaughlin thus suggested that a government official like Mercatili would not necessarily understand that mere "political pushback" could be unlawful.

The Third Circuit also noted that it has nowhere been established that a governmental official who does not himself retaliate but instead pressures another individual to retaliate can be held personally liable. It cited a Fifth Circuit decision which expressly held that there is no liability in such circumstances; the Tenth Circuit has called the issue an unsettled question. Reversed and remanded.

LINK

Searches: No Expectation of Privacy in Digital File Downloaded to Publically-Accessible Folder through File-Sharing Software

People v. Evensen, No. A145162 (Cal. Ct. App. Oct. 27, 2016)

The California Court of Appeals has upheld a Napa County court decision finding that a child pornographer had no reasonable expectation of privacy in files that were publically-accessible, despite his having taken measures to obfuscate them.

After the trial court denied his motion to suppress evidence, defendant Richard Evensen pleaded guilty to various sex crimes. This evidence had been obtained through software tools known as "RoundUp" that targets peer-to-peer-file-sharing networks to identify Internet Protocol ("IP") addresses associated with known digital files of child pornography. RoundUp is only available to law enforcement officials. A public website identified one such IP address to be registered with Comcast, which, upon execution of a search warrant, revealed the subscriber of the IP address to be Evensen's mother. A second search warrant was then executed, leading to further inculpatory evidence. Upon Evensen's arrest, further evidence of wrongdoing was also found.

In his motion to suppress, Evensen argued that the software tools used by the police violated his Fourth Amendment rights. The trial court rejected this and the appellate court affirmed.

According to the court, while computer users "generally have an objectively reasonable expectation of privacy in the contents of their personal computers," there are certain exceptions. One such exception is in the contents of a file that has been downloaded to a publically accessible folder through file-sharing software. Although Evensen argued that he took several measures to ensure the privacy of his computer files by changing his file sharing software's default setting to prevent others from accessing his shared public folders, the court noted that these measures still left his files occasionally open to the public (depending on how often he moved his files from his "shared" folder to his "private folder"). Had his files been completely private, they would not have been identified by "RoundUp". Therefore, he had no reasonable expectation of privacy.

LINK

Sentencing: *Roper* Rule Invalidating Death Penalty for Minors Does Not Retroactively Undo Plea Bargain by Minor Facing Death Penalty

Dingle v. Stevenson, No. 15-6832 (4th Cir. Oct. 25, 2016)

A South Carolina man who faced the death penalty as a 17 year old in 1993 and plea bargained for life with the possibility of parole could not retroactively obtain the benefit of the Supreme Court's 2005 *Roper* decision which had invalidated the death penalty for juveniles on Eighth Amendment grounds.

Ronald Donald Dingle was indicted for murder in 1993 at the age of 17. He was faced with the death penalty and took a plea for a life sentence with the opportunity for parole after 30 years. When the Supreme Court subsequently decided *Roper v. Simmons*, 543 U.S. 551 (2005) invalidating the death penalty for juveniles as cruel and unusual punishment, Dingle sought to challenge the validity of his earlier guilty plea. He was unsuccessful at the South Carolina Supreme Court and subsequently at federal district

court where he sought relief under 28 U.S.C. § 2254. The Fourth Circuit granted a certificate of appealability to review specifically whether *Roper* retroactively invalidated Dingle's plea as a minor.

The Fourth Circuit began its analysis noting that *Roper* indeed set forth a distinct substantive rule, specifically a constitutional prohibition on imposing the death penalty on juvenile offenders. It highlighted that the Supreme Court was clear that this rule *only applied* to the sentence in the case before it – capital punishment. Dingle argued that this rule should apply to his guilty plea – which was not a capital punishment sentence. The Court called the relationship between Dingle's argument and *Roper* "apples and oranges." Simply put, Dingle had not been sentenced to the death penalty and he did not receive a life sentence without parole (for which the Supreme Court's subsequent *Miller* decision may have become relevant). Rather, he was sentenced to life with the possibility of parole after thirty years, meaning, in the Court's words that he sought to "extrapolate from the distinct constitutional right recognized in *Roper* to a much broader substantive rule that extends to plea agreements negotiated in the shadow of the death penalty." It thus agreed with the lower court that the death penalty in Dingle's case "operated only as part of the calculus in the plea negotiations, and acknowledging that *Roper* might have altered the calculus is a far cry from finding its substantive rule appli[cable]." It thus affirmed the lower court.

LINK

Speech: California Law Prohibiting Most Robo-Calls Satisfies Intermediate Scrutiny and Survives First Amendment Challenge

Gresham v. Picker, No. 2:16-cv-01848-JAM-CKD (E.D.Ca. Oct. 6, 2016)

A California District Court has declined to grant a First Amendment-based injunction to a political consulting firm that was prohibited by a California law from making automated electoral calls—even though the law allows certain types of robo-calls, including those from police to inform the public about dangerous conditions or from schools to provide information to parents. The court did not detect an impermissible content-based scheme of the type invalidated by *Reed*, finding instead that the exceptions to the robo-call statute were based on the relationship between caller and recipient, not on the call's content.

Victor Gresham is a political consultant whose company seeks to make politically related, automated telephone calls ("robo-calls") in California during the 2016 election cycle. He has refrained from doing so since spring 2016, due to California Public Utility

Code §§ 2872, 2874(a), and 2876 ("ADAD Statute"), which imposes fines of up to $500 for each violation, and has lost potential business opportunities and revenue as a result.

The ADAD statute prohibits the use of automated dialing systems unless "pursuant to a prior agreement between the persons involved, whereby the person called has agreed that he or she consents to receive such calls from the person calling" or where the calls are preceded by an unrecorded, natural voice that requests consent from the caller to play the prerecorded message. There are also a number of exemptions to ADAD's prohibitions, which allow:

- schools to contact parents about pupil attendance;
- cable companies or utilities to contact subscribers regarding previously arranged installation times; and
- refineries, nuclear power plants, law enforcement, public health organizations and the like to contact the community about emergencies.

In August, Gresham and his company brought two causes of action under § 1983, moving to enjoin ADAD on the grounds that it violates plaintiffs' free speech rights and imposes impermissible prior restraints devoid of adequate standards or guidelines to control the discretion of the decision-maker.

The district court recited the now-familiar standards for granting injunctive relief, and discussed the relative hurdles for injunctions seeking to preserve or modify the status quo ("prohibitory" injunctions, which prohibit a party from taking action thereby preserving the status quo versus "mandatory" injunctions, which order a party to take action and change the status quo).

> Mandatory injunctions are particularly disfavored and generally "are not granted unless extreme or various serious damage will result[;] they are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." Id. (quoting *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1980)).

Against this backdrop, the court analyzed plaintiffs' First Amendment arguments in light of *Reed*. As the court framed it, "The ADAD Statute's constitutionality depends on whether the statute is content-based or content neutral," noting that, under *Reed*, content-based restrictions would require strict scrutiny review—an extremely difficult hurdle. In essence, plaintiffs' case depended upon whether *Reed* overruled the Ninth Circuit's 1996 *Bland* decision, which had upheld ADAD as a content-neutral regulation allowing ample alternative channels for communication and subject to intermediate scrutiny.

The court applied the Ninth Circuit's law-of-the-circuit rule:

> [C]ourts are bound by a prior circuit decision unless that decision is 'clearly irreconcilable with intervening Supreme Court precedent.' " . . . Although [the

> court] should consider the intervening authority's reasoning and analysis, as long as [it] can apply our prior circuit precedent without running afoul of the intervening authority, [it] must do so. It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent or for the intervening higher authority to cast doubt on the prior circuit precedent.

Under this analysis, the district court found that *Bland* was not "clearly irreconcilable" with *Reed.* Although *Reed* was "in tension with some of the Ninth Circuit's language in *Bland,*" the *Bland* court had found that all of the ADAD exemptions were based "on existing relationships implying consent to the receipt of ADAD calls" or messages like public safety and emergency information that the recipient wanted to hear. "This Court would be reading too far beyond the holding in *Reed* to find that the decision reaches relationship-based, consent-based, or emergency-based distinctions."

The California district court cited two post-*Reed* district court decisions (in Minnesota and Indiana) that each upheld a state ADAD statute exempting certain calls placed to recipients having a preexisting relationship with the caller.

Similarly, the court found that the California ADAD statute did not run afoul of *Citizens United.* While that decision prohibits restrictions on political speech which are based on the identity of the speaker, the California law was not identity-based but based on the caller-recipient relationship. Again, the Ninth Circuit's *Bland* decision was not "clearly irreconcilable" with *Citizens United*.

Under controlling Ninth Circuit precedent, the ADAD law would not violate the First Amendment. Thus, plaintiffs were not likely to succeed on the merits and the injunction was denied.

NOTE: On October 31, 2016, this case was stayed pending a decision on plaintiffs' appeal to the Ninth Circuit.

Link

Trials: Failure to Cite to Specific Record References in Takings Case Dooms Plaintiffs' Response to City's Summary Judgment Motion

Schock v. Baker, No. 16-1678 (3d Cir. Oct. 27, 2016)

The Third Circuit has declined to accept plaintiffs' last-minute argument that health issues contributed to their failure to support their response to the city's motion for summary judgment. Without specific references to the record, plaintiffs could not demonstrate the existence of a material fact in dispute.

The Schock family owned a warehouse in Wilmington, Delaware (City) that was demolished by the city after being designated a nuisance. The Schocks filed suit under § 1983 alleging the demolition was done improperly, to facilitate redevelopment—which violated their rights to due process and equal protection, and amounting to an unjust taking of their property. The City and its associated defendants moved for summary judgment after lengthy discovery, arguing the claims failed as a matter of law and that no municipal liability was established. The Schocks' response did not include specific citations to the record or support, leading the Court to dismiss the case under Federal Rule of Civil Procedure 56(c)(1)(A) – specifically that the Schocks "failed to cite any portion, particular or general, of the record in this case that demonstrates the existence of any material fact in dispute between the parties that raises a genuine issue for trial." Their subsequent motion for reconsideration was denied, leading to an appeal.

On appeal the Schocks conceded that their summary judgment brief lacked record facts sufficient to create a genuine issue of material fact, but argued reconsideration should have been granted because of their *pro se* status and because they suffered health problems leading to pressure to meet the filing deadline and, ultimately, their inability to set forth the record facts as required. The Third Circuit noted that reconsideration under Rule 56 "is extremely limited," and should "be used only to correct manifest errors of law or fact or to present newly discovered evidence." While the Court agreed that some leeway should be provided for *pro se* parties, failing to comply with Rule 56, especially with a four month window to do so before the district court dismissed their case, was too much leeway. As for the health issues, the Court noted the Schocks' had indeed taken advantage of extensions of time for other filings in the case, but failed to do so for this one, leaving the Court unpersuaded that the lower court abused its discretion in denying the reconsideration. It affirmed the lower court in favor of the city et al.

LINK