

SB 45

SENATE JUDICIARY
SUBMIT NO. 6
DATE 1/2/09
BILL NO. SB45

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

JIMMY RAY BROMGARD,)	CV-05-32-BLG-RFC
)	
Plaintiff,)	
)	
vs.)	
)	ORDER
)	
COUNTY OF YELLOWSTONE,)	
CHAIRMAN BILL KENNEDY,)	
COMMISSIONER JOHN OSTLUND,)	
COMMISSIONER JIM RENO,)	
)	
Defendants.)	
_____)	

On September 5, 2008, at the Preliminary Final Pretrial Conference, this Court requested briefs on the issue of duty and whether or not duty is an issue to be tried by a jury. The parties had previously briefed this issue, however, the Court's Findings and Recommendations dated January 16, 2008, and the Court's Order Adopting said Findings and Recommendations dated February 13, 2008, did not include a thorough examination of this issue. A review of the

currently pending Motion for Judgment as a Matter of Law [*doc. # 352*] and Motion in Limine [*doc. # 354*] revealed that further briefing on the issue of duty was necessary.

After reviewing the parties' briefs, the Court is prepared to rule. The Court must determine as a matter of law which entity in 1987, the State of Montana or Yellowstone County, or both, had the legal duty to provide counsel to Bromgard.

BACKGROUND

On June 11, 1987, the Yellowstone County Attorney's Office charged Bromgard with three counts of sexual intercourse without consent. Bromgard pled not guilty and on June 16, 1987, District Court Judge Russell Fillner appointed John Adams to represent Bromgard. Adams was a private attorney.¹ The District Court Judges are elected officials of the State of Montana.² At that time, the District Court Judges selected a pool of attorneys from whom they would appoint to represent indigent defendants charged with crimes in their courts.³ The District Court Judges determined the amount of compensation appointed counsel would be paid.⁴ The District

¹Adams is now deceased.

² Doc. 112, Bromgard's Response to County's Request for Admission No. 38 [Yellowstone County Exhibit No. 8; Bates Stamp Page 40.]

³ Barz Affidavit [Yellowstone County Exhibit No. 1; Bates Stamp Pages 1-2]; Baugh Affidavit [Yellowstone County Exhibit No. 2; Bates Stamp Pages 3-4]; Deposition of Conrad Burns P. 24, L. 4-7 [Yellowstone County Exhibit No. 6; Bates Stamp Page 22]; Deposition of Dwight McKay P. 42, L. 5-14 [Yellowstone County Exhibit No. 7; Bates Stamp Page 32]; Deposition of Diane Barz P. 15, L. 5-24 [Yellowstone County Exhibit No. 3; Bates Stamp Page 5]; Deposition of G. Todd Baugh P. 36, L. 14-24 [Yellowstone County Exhibit No. 4; Bates Stamp Page 12].

⁴ Barz Affidavit [Yellowstone County Exhibit No. 1; Bates Stamp Pages 1-2]; Baugh Affidavit [Yellowstone County Exhibit No. 2; Bates Stamp Pages 3-4]; Deposition of Conrad Burns P. 14, L. 17-22, P. 15 L. 8-13, P. 20 L. 2-5 [Yellowstone County Exhibit No. 6; Bates Stamp Pages 19-21]; Deposition of Dwight McKay P. 31, L. 22-25, P. 32, L. 1-3 [Yellowstone County Exhibit No. 7; Bates Stamp Pages 30-

Court Judges also supervised the appointed attorneys to the degree that they supervised any attorney that appeared before them.⁵

The Yellowstone County Board of County Commissioners paid appointed counsel the amount of compensation determined by the Judges.⁶ The County Commissioners did not choose whom the Judges could select for the pool, or the amount of compensation it would pay the attorneys.⁷ The County Commissioners did not supervise appointed counsel.⁸ The County Commissioners were never informed of a problem with any indigent defense counsel by anyone because they lacked any oversight with regard to indigent defense counsel.⁹

31]; Deposition of Diane Barz P. 25, L. 20-24 [Yellowstone County Exhibit No. 3; Bates Stamp Page 8]; Deposition of G. Todd Baugh at P. 48, L. 18-25, P. 49, L. 1-6 [Yellowstone County Exhibit No. 4; Bates Stamp Pages 13-14].

⁵ Barz Affidavit [Yellowstone County Exhibit No. 1; Bates Stamp Pages 1-2]; Baugh Affidavit [Yellowstone County Exhibit No. 2; Bates Stamp Pages 3-4]; Deposition of Diane Barz P. 22, L. 11-22 [Yellowstone County Exhibit No. 3; Bates Stamp Page 7]; Deposition of G. Todd Baugh at P. 23, L. 5-10 [Yellowstone County Exhibit No. 4; Bates Stamp Page 10].

⁶ Barz Affidavit [Yellowstone County Exhibit No. 1; Bates Stamp Pages 1-2]; Baugh Affidavit [Yellowstone County Exhibit No. 2; Bates Stamp Pages 3-4]; Deposition of Diane Barz P. 25, L. 17-24 [Yellowstone County Exhibit No. 3; Bates Stamp Page 8]; Deposition of G. Todd Baugh P. 48, L. 18-25, P. 49 L. 106 [Yellowstone County Exhibit No. 4; Bates Stamp Pages 13-14]; Deposition of Conrad Burns P. 31, L. 1-9 [Yellowstone County Exhibit No. 6; Bates Stamp Page 26]; Deposition of Dwight McKay P. 31, L. 22-25, P. 32, L. 1-3 [Yellowstone County Exhibit No. 7; Bates Stamp Pages 30-31].

⁷ Barz Affidavit [Yellowstone County Exhibit No. 1; Bates Stamp Pages 1-2]; Baugh Affidavit [Yellowstone County Exhibit No. 2; Bates Stamp Pages 3-4].

⁸ See Bromgard's Response to County's Request for Admission No. 14 [Yellowstone County Exhibit No. 8; Bates Stamp Page 39].

⁹ Deposition of Conrad Burns P. 25, L. 15-25, P. 26, L. 1-16, P. 37, L. 5-11, P. 44, L. 13-19 [Yellowstone County Exhibit No. 6; Bates Stamp Pages 23-24, 27-28]; Deposition of Dwight McKay P. 52, L. 22-25, P. 53, L. 1-5, P. 53, L. 19-25, P. 54, L. 1-5, P. 61, L. 22-25, P. 62, L. 1-15 [Yellowstone County Exhibit No. 7; Bates Stamp Pages 30-31]; Deposition of Allen Beck P. 80, L. 23-25, P. 81, L. 1-5, P. 107, L. 5-11 [Yellowstone County Exhibit No. 5; Bates Stamp Pages 16-18].

On November 16, 1987, Bromgard's trial began. District Court Judge G. Todd Baugh presided over the three-day trial. On November 19, 1987, the jury convicted Bromgard on all three counts. On December 11, 1987, Judge Baugh sentenced Bromgard to 40 years incarceration on each count to run concurrently. Bromgard appealed his conviction, which was later affirmed by the Montana Supreme Court. *See State v. Bromgard*, 261 Mont. 291, 862 P.2d 1140 (1993).

On October 1, 2002, after DNA test evidence excluded Bromgard as the source of the semen found at the scene of the alleged assault, the County Attorney's Office dismissed the case. Bromgard was released from custody after approximately 16 years of incarceration.

In 2004, Bromgard filed a Complaint alleging nine causes of action against the State of Montana and one § 1983 cause of action against Yellowstone County resulting from his arrest, trial, and conviction in 1987. The State of Montana, Arnold Melnikoff, and Mike Greely have been dismissed after settlement. In his only cause of action against the County, Bromgard alleged that Yellowstone County violated his Sixth Amendment right to effective assistance of counsel by "(1) failing to adequately screen attorneys . . . before entering into a contract with them to provide indigent representation to the county residents; (2) failing to provide supervision or training to attorneys . . . ; and (3) inappropriately retaining attorneys," and "[a]s a result of Yellowstone County's policy, custom and practice for providing indigent representation, Plaintiff received ineffective representation before and during his trial . . ." In its Answer, the County denied all allegations made by Bromgard.

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Once a motion for summary judgment has been properly made and supported, the opposing party must set out specific facts showing a genuine issue for trial. Fed.R.Civ.P. 56(e)(2). The opposing party "may not merely rely on allegations or denials in its own pleading," rather it must establish genuine factual issues by affidavits or demonstrate why it cannot present facts essential to justify its opposition. Fed.R.Civ.P. 56(e)(2) & (f).

ANALYSIS

In the 1963 decision of *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), the United States Supreme Court charged the States with the duty to provide counsel for indigent defendants. The Court concluded that the Sixth Amendment's guarantee of counsel was a fundamental right essential to a fair trial and was "made obligatory upon the States by the Fourteenth Amendment." *Id.* Each of the fifty states determined for itself how it would implement the Supreme Court's charge from *Gideon*. Some states kept this constitutionally-imposed legal duty while others passed specific legislation mandating its cities or counties to establish indigent defense counsel systems.

A county may be held liable under Section 1983 for violations of a plaintiff's constitutional rights when the constitutional deprivations are caused by official municipal policy or custom. *See Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). As the Supreme Court and the Ninth Circuit have held, a county's failure to supervise and train its agents and actors may give rise to Section 1983 liability where a plaintiff shows (1) that he possessed a constitutional

right that was violated; (2) that the county had a policy; (3) that this policy amounted to deliberate indifference to his constitutional right; and (4) that the policy was the moving force behind the constitutional violation. See *City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185-86 (9th Cir. 2006); *Barry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *Blair v. City of Pamona*, 223 F.3d 1074, 1079 (9th Cir. 2000).

Under *City of Canton* and Ninth Circuit law, a municipality's failure to act is done with deliberate indifference when "the omission 'reflects a deliberate or conscious choice' to countenance the possibility of a constitutional violation." *Gibson v. County of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002) (quoting *City of Canton*, 489 U.S. at 389-90) (internal quotation marks omitted). "The continued adherence by policymakers 'to an approach that they know or should know has failed to prevent tortious conduct by employees may establish a conscious disregard for the consequences of their actions – the deliberate indifference – necessary to trigger municipal liability.'" *Long*, 442 F.3d at 1186 (quoting *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997) (internal citation and quotation marks omitted).

To determine whether an entity owes a constitutionally-imposed legal duty, the Court must review that state's law in effect at the time of an alleged § 1983 violation. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997); *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004). "[T]he identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (internal quotation marks and citation omitted).

In *City of St. Louis v. Praprotnik*, the U.S. Supreme Court summarized the principles governing municipal liability under § 1983 when it stated:

First, . . . municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." 475 U. S., at 480. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Id.*, at 483. Third, whether a particular official has "final policymaking authority" is a question of state law. *Ibid.* Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the [entity's] business. *Id.*, at 482-483, and n. 12.

485 U.S. at 123 (quoting Justice Brennan's plurality opinion in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 482-83 & n.12 (1986) (citations omitted)).

In *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997), the U.S. Supreme Court concluded, after reviewing Alabama's statute and constitution, that for § 1983 purposes, the Monroe County Sheriff would be considered a state official and affirmed the dismissal of Monroe County from the action. *Id.* at 786, 793. The Supreme Court noted that even though: (1) the sheriff's salary was paid out of the county treasury; (2) the county provided the sheriff with materials and reimbursed him for reasonable expenses; (3) the sheriff's jurisdiction was limited to the county's borders; and (4) the sheriff was elected by county voters, the Court found under a § 1983 analysis, the county sheriff, when acting in a law enforcement capacity, had final policymaking authority on behalf of the State of Alabama, not the county. *Id.* at 791. The Court emphasized that since state officials maintained some degree of control over the Alabama sheriffs, the State of Alabama remained the responsible party. *Id.* at 790. The Court did make special

note that payment of the sheriff's salary by the county did not translate into control over him. *Id.* at 791.¹⁰

This case is similar to *McMillan* in that Montana's State District Court Judges served as the State's final policymaker in the area of indigent defense. The District Court Judges, not the County Commissioners, retained the power to select, appoint, supervise and set the compensation for counsel representing indigent felony defendants in their courts. For example, consider the 1988 decision of *State v. Moran*, 231 Mont. 387, 388 (1988), wherein State District Court Judge Thomas A. Olson appointed an attorney to represent defendant Moran on several felony offenses and later declared a mistrial because "the defendant was being denied effective assistance of counsel." The Montana Supreme Court stated: "the trial judge was in the best position to judge the performance of counsel and the effect of the evidence. . ." *Id.* at 391.

The State of Montana retained *Gideon's* constitutionally-imposed legal duty to provide counsel to indigent felony defendants charged in the State's District Courts when it revised its entire criminal procedure section in 1967. Mont. Code Ann. § 46-8-101 (1987) was the controlling law in the State of Montana at the time of Bromgard's arrest, trial, and conviction. That statute reflects the U.S. Supreme Court's *Gideon* mandates and states, in pertinent part:

- Right to counsel. (1) Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel.
- (2) The defendant, if charged with a felony, must be advised that counsel will be furnished **at state expense** if he is unable to employ counsel as determined under the provisions of 46-8-111. If the offense charged is a

¹⁰Compare with Montana's payment method in which the State of Montana reimbursed the counties for the payments for indigent defense with Alabama's payment method where the county was never reimbursed for the sheriff's expenses. Yet, the Supreme Court still found the sheriff to be the final policymaker for the State of Alabama.

felony and if the defendant desires counsel and is unable to employ counsel, a court must assign counsel to him.

Mont. Code Ann. § 46-8-101 (1987), in part (emphasis added).

This legislation clearly called for appointment of counsel by State District Court Judges. In 1987, the Thirteenth Judicial District Court Judges followed State law and appointed private attorneys to indigent defendants since none of its four counties had established a public defenders' office. This appointment followed the State's policy to execute through the judiciary the responsibility and obligation to provide effective counsel for indigent defendants in counties without a public defenders' office. See Mont. Code Ann. §§ 3-5-901 (1985) & (1987); 3-5-902 (1985) & (1987); 46-8-101 to 46-8-114 (1985) & (1987).

The County's official archived records reflect the State of Montana followed the statutory scheme and administrative rules and reimbursed Yellowstone County for felony indigent attorney expenses. While a County could be asked to contribute for any respective outstanding balances if the State's indigent defense fund became insufficient, in 1987, as in all previous years, the State indigent defense fund remained solvent. For example, see Exhibit 2 to Yellowstone County's Brief on the Issue of Legal Duty in Response to the Court's Scheduling Order of September 5, 2008 [*doc. #369*], with supporting documentation that the State of Montana fully reimbursed Yellowstone County for District Court expenses, including indigent felony defense for fiscal year 1985-1986.

Bromgard has asserted that the County "assumed" responsibility over the indigent defense system from the State at the time of his criminal proceeding. This argument ignores the

undisputed facts and Bromgard has not identified any point in time or any action prior to 1992 in which said "assumption" occurred.¹¹

In Counties without a public defenders' office, the State's Judiciary, not county commissioners, controlled court-appointed counsel. The judiciary selected the attorneys, set their salaries,¹² supervised their work, and removed court-appointed counsel when necessary. *Id.*

Bromgard is incorrect in his argument that the State of Montana delegated to Yellowstone County the responsibility of implementing the Supreme Court's charge in *Gideon*. Mont. Code Ann. § 46-8-202 (1987) reads:

Public defenders office. Any county through its board of county commissioners **may provide** for the creation of a public defender's office and the appointment of a salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements on providing for defendants unable to employ counsel. The costs of such office shall be at state expense payable according to procedures established under 3-5-902(1) and, to the extent those costs are not paid by the state, at county expense in accordance with 3-5-901(3) and 3-5-902(1).

(emphasis added). This is not an obligation that the State placed upon counties, but was an option Yellowstone County did not exercise.

CONCLUSION

For Bromgard's § 1983 claim to survive, the State would have had to have enacted legislation specifically delegating to its counties *Gideon's* constitutionally-imposed legal duty to

¹¹An assumption of duty by Yellowstone County did occur long after Bromgard's criminal proceedings with the creation of a County Public Defenders' Office in 1992.

¹²According to Montana's statutory scheme, only State Supreme Court Justices or State District Court Judges could determine the compensation to be paid by court-appointed counsel. *See* Mont. Code Ann. §46-8-201(1) (1985 & 1987).

provide counsel to indigent felony defendants. That delegation did not exist. In 1987 the State of Montana, through its State District Court Judges, retained final policymaking authority over court-appointed attorneys, including the exclusive powers of selection, retention, compensation and supervision. Therefore, summary judgment in favor of Defendant is appropriate. The Clerk of Court is directed to enter judgment and close this file accordingly.

DATED this 9th day of December, 2008.

/s/ Richard F. Cebull
RICHARD F. CEBULL
U.S. DISTRICT COURT JUDGE