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# **ONE MINUTE BRIEF**

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**NUMBER:** 2018-18    **DATE:** 10-09-18    **BY:** Devallis Rutledge    **TOPIC:** Criminalizing Public Sleeping

**ISSUE:** When does the Eighth Amendment bar enforcement of a statute or ordinance prohibiting homeless sitting, sleeping or lying on sidewalks or in other public places?

The Eighth Amendment prohibits excessive bail and fines, as well as the infliction of “**cruel and unusual punishments.**” The Supreme Court has held that the ban on cruel and unusual punishments “*imposes substantive limits on what can be made criminal and punished as such.*” *Ingraham v. Wright* (1977) 430 US 651, 667.

The Ninth Circuit has ruled that criminalizing the status of being “homeless,” or criminalizing the “unavoidable consequences” of that status—such as sitting, lying or sleeping on sidewalks and other public grounds—constitutes cruel and unusual punishment, in violation of the Eighth Amendment.

- Boise, Idaho, was sued by Robert Martin and other homeless plaintiffs. Some were cited for violating a “camping ordinance” that prohibited dwelling on the streets, sidewalks, public parks or spaces (similar to many city and county ordinances in other jurisdictions); some were cited for violating a “disorderly conduct ordinance” that prohibited “occupying or lodging” without permission (similar to PC § 647(e)). Evidence showed that Boise then had 867 homeless individuals and 446 beds. The Ninth Circuit ruled that in such circumstances, enforcement violates the Eighth Amendment:

*“[J]ust as the state may not criminalize the state of being homeless in public places, the state may not criminalize conduct that is an **unavoidable consequence** of being homeless—namely, sitting, lying, or sleeping [in public]. ... We hold ... that so long as there is a **greater number of homeless individuals** in a jurisdiction **than the number of available beds in shelters**, the jurisdiction cannot prosecute homeless individuals*

*for involuntarily sitting, lying, or sleeping in public. ... [A] municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.”*

*Martin v. City of Boise* (9<sup>th</sup> Cir. 2018) 902 F.3d 1031, 1048, 1049 (Punctuation and citations omitted; emphases added.)

The court did acknowledge (but without suggesting examples) that “*Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside **at particular times** or **in particular locations** might well be constitutionally permissible. So, too, might an ordinance barring the **obstruction of public rights of way** or the **erection of certain structures.**” *Id.*, at 1048, fn. 8.*

- Law enforcement officers seeking a prosecution for public sleeping should include in written reports the **relative numbers** of area **homeless** and area **shelter beds available** on the date of violation. Prosecutors initiating a prosecution for violation of a public-sleeping ordinance should confirm that this evidence is sufficient to support prosecution.

- Because the ruling in *Martin* is now “clearly-established law” within the Ninth Circuit, officers should seek and follow the advice of the AG, county counsel, city attorney or other civil legal advisor, as to the civil liability implications of this ruling.

**BOTTOM LINE:** The Eighth Amendment bars enforcement of a statute or ordinance prohibiting homeless sitting, sleeping or lying on sidewalks or in other public places whenever the number of homeless individuals in the jurisdiction exceeds the number of available shelter beds.

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.