

BACK STORY

THE CONSTITUTIONAL RIGHTS OF PRISONERS

BY CAL POTTER, III, ESQ. AND TRAVIS BARRICK, ESQ.

Arguments about prisoner litigation, frivolous lawsuits and overburdened court dockets resurfaced during the recent election season. Supporters of creating an appellate court shared familiar stories about inmates suing over the loss of a jar of chunky peanut butter or the color of their uniforms, examples of frivolous cases that should not burden Nevada's Supreme Court.

In actuality, most inmate cases are filed in Federal Court pursuant to 42 USC 1983 for violations of the Eighth Amendment, concerning inadequate medical care or inmate injuries from staff or other inmates.

We are all familiar with the idiom, "Don't make a federal case out of it." Perhaps this should be the sounding cry for a "meaningful administrative process" to deal with inmate lawsuits. In fact, Nevada developed an administrative grievance process that must be exhausted before a case can be filed. This requirement is pursuant to the Prison Litigation Reform Act (PLRA).

In 1969, the U.S. Supreme Court recognized in *Johnson v. Avery*, 393 U.S. 483 (1969) that inmates can assist other inmates with their criminal cases. In *Wolff v. McDonnell*, 418 U.S. 539 (1974) the Supreme Court expanded the "jail-house lawyer" to civil rights cases. Thus, inmate lawsuits have become more common and, to a certain degree, burdensome to the court, simply because litigants are not represented by counsel.

Historically, the courts have relied on three principles in declaring prisoner-rights cases. First, that lawful incarceration necessarily deprives a prisoner of certain rights and privileges one would enjoy in the free society. Second, that a convict does not lose all their civil rights; certain fundamental rights follow an inmate, with appropriate limitations, through the prison gates. Finally, prison officials are vested with wide discretion, and unless constitutional or other fundamental rights are involved, the federal courts are reluctant to interfere with internal operations of prison discipline. (*Estelle v. Gamble*, 97 S. Ct. 287 539 (1974)).

As trial lawyers, our concern should be twofold. First, we should be willing to become involved in death and serious injury cases. Second, many of the arguments about frivolous litigation are just another variety of tort reform attempting to deny the injured and aggrieved access to the courts; we should view with caution efforts to deny individuals' access to our courts.

In practice, the courts have provided very little in the way of concrete relief to prisoners who have been denied medical treatment. Often the dispute arises between the prison official and the prisoner as to whether the treatment was sufficient. The standard for an Eighth Amendment violation is more than mere negligence. The prisoner must demonstrate obvious neglect, deliberate indifference or intentional mistreatment. (*Hopowitz v. Ray*, 682

F.2d 1237, 1252 (9th Cir. 1982) (Part of inadequacy is that the medication system results in denial or delay of distribution of proper medicine, or surgeries are denied if not lifesaving.)

Prisoners' serious injury or death during inmate-on-inmate violence presents another frequent need for legal representation. It would be fantasy to believe that even the most enlightened prison officials operating with unlimited resources could prevent all acts of violence within the prison. Moreover, even if a prison official fails, though his own negligence, to prevent an act of violence, a violation of constitutional rights is not necessarily stated. To the contrary, there must be a showing either of a pattern of undisputed or unchecked violence, or — on a different level — an egregious failure to provide security to a particular inmate who has made the prison officials aware of the potential danger, after which the correctional officers have been deliberately indifferent to the request for protection.

Recently, the authors of this article tried a federal case involving correctional officers eavesdropping on inmate conversations with attorneys. The issues were important to the justice system. After a recent trial, Travis Barrick, Esq. noted that his experience in trying to get attorneys involved in prisoner cases usually concerns an inmate who has survived summary judgment but has not taken any depositions — that discovery is closed and the case is proceeding to trial. Barrick noted that if attorneys would volunteer for cases during the discovery phase, the case would be more likely to settle or to succeed at trial. Nevada Cure, a nonprofit corporation that assists prisoners and their families, monitors similar inmate complaints. If an attorney would like to assist an inmate, Nevada Cure may be contacted at nevadacure.org. **NL**

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