Hi-Tech Contraband Searches

By Susan E. Coleman

The introduction of contraband (i.e. narcotics, weapons, cell phones) into prisons and jails is a major problem for custody officers and officials. For example, illicit weapons threaten the safety of inmates and staff, and cell phones can be used to order drugs or hits and conduct gang activity without detection. One of the biggest challenges for custody officials is trying to stem the introduction of contraband, which is brought in by visitors, thrown in handballs over secure perimeters, dropped in by drone, mailed in packages, and myriad other sources including rogue officers.

To detect contraband once it’s inside the prisons and jails, various methods are used including cell searches, x-rays and inspections of mail and packages, and searches of prisoners. This last category is often challenged in court, with inmates claiming invasion of their privacy and violation of their constitutional rights.

Whether the Fourth, Fourteenth, or Eighth Amendment is used to assess the constitutionality of a search depends on whether the person is a civilian, arrestee, pre-trial or ICE detainee, or a convicted prisoner. Searches range from pat-downs to visual strip searches to intrusive body cavity searches performed by medical staff.

In California state prisons, inmates suspected of having “keistered” (rectally secreted) contraband are sometimes put on contraband surveillance. This process is governed by Department Operations Manual section 52050.23, which provides for the inmate to be put into a bare cell with only a mattress and blanket and for his clothing to be duct-taped at the legs and arms to avoid access to the contraband and potential re-swallowing of items such as razor blades or drug balloons. The goal is to wait for the inmate to have one or more bowel movements and to retrieve the item(s). Officers have recovered drugs and weapons from this process, often referred to by inmates as “potty watch,” but also items such as can openers, hearing aids, and a complete tattoo kit.

The contraband surveillance procedure used by the CDCR was upheld as constitutional (on grounds of qualified immunity, not having any established cases or laws finding the process unconstitutional) by the Ninth Circuit in 2013 in the case of Rex Chappell v. Mandeville. In that case, inmate Chappell was found to have methamphetamine in his cell. He was put on contraband watch, and was restrained to the metal bed during that time with his leg and arm openings taped shut. After six days, and three bowel movements, Chappell was returned to his regular cell. The Court noted that conditions must be severe and prolonged to be considered unconstitutional, i.e. an “atypical and significant hardship,” and that Chappell’s confinement to a bare cell for six days
Burke, Williams & Sorensen, LLP offers the expertise, depth, breadth, and quality service you need in the area of Correctional Litigation through the specialized knowledge of our featured attorneys.

was done for reasons of institutional security. The Court upheld summary judgment on grounds of qualified immunity. A dissenting judge disagreed, noting that Chappell should have been able to argue to the jury that prison officials were deliberately indifferent to his health and safety based on the conditions of his confinement.

Some inmates on contraband surveillance have requested an X-ray as an alternative to days of observation in a bare cell. But, currently prison regulations allow the X-ray of inmates only if medically necessary or court-ordered.

More jails and prisons throughout the country, including the U.S. Bureau of Prisons, have begun using body scanners and similar devices to detect metal and other contraband. The SecurPass bodyscanner (approximately $150,000 each) is used in Salt Lake county jails after booking inmates into their jail and before/after transports. The device uses very low levels of radiation, with 4,000 scans equivalent to one regular X-ray. The US Bureau of Prisons also allows this scanner to be used for both routine and random searches of inmates to control contraband (CFR § 552.11).

The BOSS (Body Orifice Security Scanner) chair is used in New York State and in federal prisons: inmates sit on the chair and it detects metal hidden inside body cavities such as the rectum. The BOSS chair hit the market in 1996, and has been undergoing improvements since. The device currently costs about $7,500 to $11,500 each, and it can scan four areas of the body including feet and lower legs, midsection, and the ear/nose/mouth cavities. If the BOSS scan provides a “hit,” indicating there is metal inside the prisoner, it can provide probable cause for a medically-conducted cavity search.

As technology continues to evolve, there will be new and improved ways for prison and jail officials to stop the introduction of contraband. Although inmates no doubt will continue to invent new ways to import illicit items, such as drones flying over the yard to make drops, the means of detection will also continue to improve.

Liar Liar, Pants on Fire: Using Rule 11 Terminating Sanctions Against Inmates  
By Kristina Doan Gruenberg

Inmates often fabricate allegations in their complaints against correctional officers and staff. Even worse is when they submit falsified “evidence” to the Court such as signed declarations from other inmates with obvious lies. Though this can be extremely frustrating, sometimes the more an inmate lies, the better grounds the Court has to impose Rule 11 sanctions and terminate the case.

Federal Rule of Civil Procedure Rule 11(b) requires that an attorney or unrepresented party certify that, to the best of his or her knowledge:

1 Eleven California state prisons used the Secure 1000 backscatter x-ray device between 1999 and 2001, to scan visitors for potential contraband including drugs, weapons, and money. The device was discontinued after numerous visitors claimed it violated their privacy rights because of the level of detail revealed about their body on the scanned image. A class-action lawsuit, Harrington-Wisely v. State of California, brought by visitors who had been scanned during visits, resulted in a settlement and stipulated judgment.
At Burke, the broad range of our areas of expertise mirrors California's own vitality, with respected, proven practices in:
- Construction Law
- Education Law
- Environmental, Land Use, and Natural Resources
- Labor & Employment
- Litigation
- Public Law
- Torts
- Real Estate & Business Law
- Law Enforcement Defense

“1) [pleadings, motions, or other submissions are] not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . .”

If a party violates Rule 11, the courts have held that they have the “inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the administration of justice.” Anheuser Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 348 (9th Cir. 1995.)

In deciding whether to dismiss a case, the Court must consider “(1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, and finally, as optional considerations where appropriate, (5) the prejudice to the party victim of the misconduct, and (6) the government interests at stake.” Halaco Eng’g Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988.)

In one case our firm handled, an inmate claimed that a correctional officer went through his legal papers, threw his Bible on the cell floor, and poured coffee on his Bible. He also claimed that when he confronted the correctional officer, she used excessive and unreasonable force on him. The inmate submitted declarations from two inmates claiming that they witnessed the excessive force. When we interviewed the two inmates, they recanted their stories and said they didn’t see the incident. It appeared that Plaintiff tricked one inmate into signing the declaration by misrepresenting what was in the declaration, and promised the other inmate compensation if he signed a declaration.

These inmates were willing to sign new declarations admitting that they never saw anything, which our office filed in support of Motion for Summary Judgment. We also submitted movement history records from the institution showing that these inmates were not even housed on the same yard where the incident occurred, and therefore could not have witnessed the incident.

After reviewing both sets of declarations from the two inmates, the Court ordered an evidentiary hearing to determine which declarations (if any) were truthful.

During the hearing, both inmate-witnesses took the stand and affirmed that they never saw anything, and did not live on the yard
where the incident took place. The Court determined that Plaintiff knew the information he submitted was not true because he personally drafted false declarations and obtained signatures on them using trickery. The Court therefore found that Plaintiff’s actions were willful and made in bad faith. The Court imposed Rule 11 sanctions and dismissed the case.

Although many inmate-witnesses lie for each other, it is worthwhile to follow-up with the witnesses to see if their declarations are true and if the inmates will stand by them. There is often little loyalty between inmates, especially if they are no longer housed at the same institution. An inmate may have a change of heart and tell the truth if he no longer feels pressured/in danger, does not think he will get the original compensation promised to him, or does not want to be hauled into court. Inmates also often take advantage of other inmates who may not understand or care what they are signing.

This case also reminds us that Rule 11 requires both attorneys -- and parties representing themselves -- to tell the truth in their submissions to the court, and that judges are willing to scrutinize inmates’ evidence and hold them accountable for falsely submitting evidence to the court or suborning perjury.

**PLRA Exhaustion Update: The Ninth Circuit’s Ruling in Reyes v. Smith**

*By Christopher T. Kim*

On January 12, 2016, the Ninth Circuit issued an opinion in *Reyes v. Smith*, which decided whether an inmate exhausted his administrative remedies under the Prison Litigation Reform Act of 1995 (PLRA) when his grievance was decided on the merits at all available levels of administrative review, despite failing to comply with a procedural rule requiring identification of all involved staff. The Ninth Circuit ruled that in such circumstances the inmate’s claim is in fact exhausted. Until this case, the Ninth Circuit had not addressed this issue; seven sister circuits though have already ruled on this issue and have similarly concluded that the PLRA exhaustion requirement is satisfied if prison officials decide a potentially procedurally flawed grievance on the merits.

In January 2011, David Reyes was a California state inmate at Mule Creek State Prison. He was placed on a pain medication regimen, which included morphine, for his degenerative spine condition. In May 2011, medical staff ordered Reyes’ pain medication to be gradually reduced and discontinued.

Reyes filed a grievance complaining of this change to his pain medication regimen. Reyes claimed that he experienced “unbelievable pain,” but that the medical staff only gave him aspirin. The grievance also requested an examination by a physician, alleged that “[d]eliberate indifference to medical needs‘ violates the [Eighth] Amendment,” and included citations to case law regarding the Eighth Amendment.

In response to the grievance, Reyes was interviewed by a physician’s assistant who issued a decision denying Reyes’ request for pain medication. The decision noted that Reyes was functioning
well with his current medical treatment and that the Pain Management Committee determined narcotics were not medically necessary. Reyes appealed this decision to the Chief Executive Officer of Health Care Services, who denied Reyes’ request for morphine on the same grounds. Reyes appealed again; this time to the Chief of the Office of Third Level Appeals for Healthcare. This appeal was also denied on similar grounds. The order from the Office of Third Level Appeals for Healthcare concluded that its decision exhausted Reyes’ available administrative remedies.

Following this order, Reyes filed a Section 1983 suit against two doctors and other prison officials, alleging they violated his Eighth Amendment rights and were deliberately indifferent to his medical needs because they denied him pain medication. However, the lower court dismissed Reyes’ suit for failure to exhaust under the PLRA against the two doctors because Reyes failed to name them in his grievance. Pursuant to Title 15 section 3084.2(a), inmates are required to “list all staff member(s) involved” in a grievance and “describe their involvement in the issue.”

In its opinion, the Ninth Circuit recognized that the PLRA attempts to eliminate unwarranted interference with the administration of prisons, and thus seeks to give prison officials a chance to address grievances internally before allowing an inmate to file a lawsuit. It further noted that requiring exhaustion provides prison officials a fair opportunity to correct their own mistakes and creates a record for grievances that eventually become the subject of federal suits. But, the Ninth Circuit explained that “[w]hen prison officials opt not to enforce a procedural rule but instead decide an inmate’s grievance on the merits, the purposes of the PLRA exhaustion requirement have been fully served: prison officials have had a fair opportunity to correct any claimed deprivation and an administrative record supporting the prison’s decision has been developed.” Against this reasoning, the Ninth Circuit held that a prisoner exhausts such administrative remedies as are available under the PLRA despite failing to comply with a procedural rule if prison officials waive the requirement and make a decision on the merits of the grievance.

What does this all mean for prison officials moving forward? This case does not change the procedural requirements, such as filing grievances on the correct form or filing and appealing grievances within stated time limits, which inmates must follow in order to properly exhaust their administrative remedies under the PLRA. But following this case, prison officials should be reminded that they need to carefully screen inmate grievances to ensure that any procedural defects are properly addressed before the grievance is decided on its merits. Any resolution of the appeal on the merits will be deemed a waiver of its procedural defects by the courts.