Wildfire Fallout: Evacuating Prisoners During a Natural Disaster

By Susan E. Coleman

With the recent hot weather, and wildfires throughout the state, it is important to plan ahead for potential evacuation of prisons and jails. Historically, evacuations of prisons are rare but may occur during disasters such as floods, fires, natural gas leaks, tornados or hurricanes, and earthquakes. It could also occur during outbreak of a severe contagious disease, a nearby train derailment, or a terrorist attack. Transporting inmates and temporarily rehousing them, particularly on short notice, is a difficult and dangerous task that requires advance planning.

During Hurricane Irene in August 2011, New York City’s Mayor Bloomberg was criticized for not having an evacuation plan for Rikers Island, which houses over 12,000 inmates; luckily, the storm had less impact than anticipated. During the January 2010 earthquake in Haiti, inmates at Les Cayes Prison attempted an escape, with officers opening fire and killing 20 inmates, with 27 custody officers later found guilty by a judge of participating in a massacre. During Hurricane Katrina, over 8,000 prisoners in the Orleans Parish Prison were not evacuated, despite flood waters rising in the buildings and the loss of power, leading to harsh criticism in a report by the ACLU, accusing the New Orleans Sheriff’s Department of leaving its inmates without supervision, food, water, or adequate ventilation for days. Because inmates are in the care and custody of their jailers, the courts hold custody officials responsible for keeping them safe, fed, and watered.

One problem is that there is no quick way to move inmates safely. A recent test of disaster preparedness at New Jersey’s Bayside Prison found that it took over an hour to strip search and load 30 inmates onto a bus. At this rate, without additional staff, it would take over 6 hours to load 200 inmates safely along with their records. If a disaster is occurring or imminent, safely moving prisoners according to pre-planned disaster protocols will be difficult or impossible. The most difficult to plan for is the long-term condition such as in the aftermath of earthquake or fire damage, as opposed to a temporary withdrawal of persons.

Compounding matters, most of the prisons and jails in California have large populations. California State Prison - Corcoran houses 4,500 inmates; West Valley Detention Center, a San Bernardino County jail, houses closer to 3,500; Men’s Central Jail in Los Angeles County houses over 5,500; Taft Correctional Institution, a privately-run facility housing federal inmates, houses approximately 2,500 inmates. But even the smallest of these facilities, with lower-level prisoners, would be extremely difficult to load into secure transport vehicles and evacuate on short notice. Opportunities are ripe for inmates to escape, assault staff or other inmates, riot, and commit theft or acts of vandalism.

Successfully managing a prison or jail is challenging enough on a good day, let alone when something bad happens. It is critical to have an advance plan in place, potentially drawing on community resources such
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as other law enforcement agencies for personnel, public or school buses for vehicles, and various facilities for re-housing the inmates. Decide who has authority to order an evacuation. The plan should consider how people interacting with the facility will be handled and/or notified, such as visitors, attorneys, vendors, contract workers, maintenance staff, delivery personnel, news media, and volunteers. It is also important to disseminate the plan to everyone who will be involved to assist, and to train on the plan. Waiting until an earthquake strikes is not the time to review, train, or start drafting a plan.

When disaster looms, the first step is to verify whether the threat is real, perceived, or if it is a distraction for a break-out plan. Always be aware of motives, conflicts of interest, and liability concerns. Expect confusion, panic, and ill-advised suggestions. Manage the situation with the end in mind, and document everything. Share decision making and keep everyone informed, in order to avoid becoming overwhelmed. Obviously, inmate food and medical services must continue, along with accommodations for disabilities, restrooms, et cetera. Bigger problems may include accounting for everyone in the facility, not just regular staff who sign in and inmates who are routinely counted, and having multiple muster points in the event of contingencies. Sometimes operational plans will have to be adjusted, and mass notification is always a challenge. Above all, never compromise security.

While we can cross our fingers that none of the wildfires will cross the path of any prison or jail, and most facilities clear brush in a wide swath in order to avoid this occurrence, some advance planning will help to prevent the natural disaster from morphing into a mass riot or escape.

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I Want My [M]TV: Court of Appeals Holds Writs are Improper to Recover Contraband

By Kristina Doan Gruenberg

Many inmates believe that they can file a writ of mandate to recover items or to receive compensation for their lost property. Writs are typically a faster form or relief than civil lawsuits, and do not require an inmate to file a government claim before filing with the courts. Writs are also considered “extraordinary relief” because they can be made without the benefit of full judicial process, before a case has concluded. However, in the case of Flores v. CDCR, the Court of Appeals recently clarified that the writ process does not apply to all property claims, and that inmates must file civil actions to seek recovery or damages for property that is considered contraband.

Plaintiff Mark Flores was an inmate at Corcoran State Prison when he acquired a television. In 2009, correctional officers conducted a routine search of Flores’ cell during which Flores’ television was confiscated for being a “floater,” meaning that it did not have a name, CDCR identification number, or serial number engraved on it for identification. Flores claimed his television was improperly taken, and pursued an inmate appeal seeking return of the television. His appeal was denied at all levels.

In 2012, Flores filed a petition for a writ of mandate against the correctional officers who confiscated his television, seeking replacement of the television or compensation for its loss. Respondent-correctional officers argued that Flores failed to state a claim for relief through a writ because the proper mechanism to seek relief was through a civil action. The trial court granted the motion, and Flores appealed.
Burke's Correctional Litigation Team routinely deals with the following issues:

- First Amendment
- Fourth Amendment claims of unlawful search and seizure
- Eighth Amendment excessive force and deliberate indifference to safety or medical needs
- Fourteenth Amendment due process
- Religious claims under the First Amendment and RLUIPA
- Section 1983 claims of all types
- Bivens claims
- Torts including negligence, wrongful death, assault and battery, conversion, Bane and Unruh Act claims
- Class action litigation
- Parole and probation issues
- Employment issues

The Court of Appeals upheld the trial court’s dismissal of the case. The Court explained that a writ of mandate may only be used to force a public body or public officer to perform a duty “where there is not a plain, speedy, and adequate remedy in the ordinary course of law.” Here, Flores had a remedy at law because he could file a civil action for the tort of conversion, seeking to either recover the property or seek damages based on the value of the property. Flores failed to show that the remedies available in an action for conversion were inadequate.

The Court also held that Flores failed to show two more essential elements needed to obtain a writ: (1) a clear, present, and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right of the petitioner to the performance of that duty. A ministerial duty is an official duty of a public officer wherein the officer has no room for the exercise of discretion. In this case, there was no “clear, present, and ministerial duty” to replace the television or provide compensation because Flores had no evidence showing that the television was his. The television did not have Flores’ information engraved on it, as prison rules require, and the receipt that Flores provided did not have a serial number that could be used to link the confiscated television with it.

This Flores decision is helpful in clarifying when an inmate may file a writ. Many inmates like Flores improperly file writs, citing to Escamilla v. Department of Corrections & Rehabilitation (2006) 141 Cal.App.4th 498, as support for their decision to file a writ. In that case, inmate Escamilla was placed in the SHU after a prison riot. Escamilla placed his personal clothing, watch, and canteen items in a bag for safekeeping. After Escamilla was released, his property was not returned to him and he filed a writ. The trial court granted Escamilla’s petition for writ and awarded him $225 to replace his property. The court in Escamilla’s case held that when the government seizes an arrestee or inmate’s property that is not contraband, it acts as a “bailee” because it is entrusted with safekeeping of the property. As the bailee, the government has a specific duty to return the arrestee or inmate’s property when he is discharged from custody; if it fails to do so, the arrestee or inmate can file a writ to recover the property or its replacement value.

The Court of Appeals held that Escamilla was inapplicable to Flores’ situation because the property at issue in Flores’ case was contraband and not property that was taken merely for safekeeping. Therefore, if Flores wants to get his television back, he must file a civil lawsuit.

California’s Frivolous Lawsuit of the Month

By Mitch Wrosch

Looks like Beyonce’s sister Solange isn’t the only one in a fight with Beyonce and Jay Z.

On April 21, 2014, Charles Jose Dupree, Jr., an inmate at the California State Prison - Corcoran, filed suit against Beyoncé, Jay Z, Kanye West, and Rihanna, seeking $2,400,000,000 and immediate release from prison. According to Dupree, the police, FBI, and Secret Service have conspired with these entertainers to steal 3,000 to 4,000 of Dupree’s songs. The defendants were allegedly able to steal Dupree’s music with the assistance of law enforcement and “satellites.” Dupree apparently learned of the theft of his intellectual property directly from the entertainers themselves, who communicate with Dupree through his television.
This is not Dupree’s first frivolous lawsuit. Dupree’s lawsuit was submitted on a form Complaint supplied by the United States District Court for the Eastern District of California – Fresno. In response to the question asking whether he has brought other lawsuits in federal court as a prisoner, Dupree responded he had. When asked how many, Dupree stated “10 or 50.” In response to the question asking for details about the previous lawsuit(s), Dupree stated that of those “10 or 50,” he had sued the FBI, CBS, Magic Johnson, the United States Copyright Office, and Magistrate Judge Kimberly Mueller, for violating his rights. Dupree alleged the defendants conspired to use satellites or “access devices” to steal from him.

Unfortunately for taxpayers and for Beyoncé, the judge in Dupree’s latest farce has not yet dismissed his Complaint as frivolous, and has ordered Dupree to submit documents to support his application to proceed in forma pauperis, i.e. at taxpayer expense.

Is there any wonder why our federal courts are overburdened?

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**Peralta v. Dillard: The Ninth Circuit Confirms a New Defense for Claims of Deliberate Indifference to a Prisoner’s Medical Needs**

*By Martin Kosla*

Last year, a three-judge panel in the Ninth Circuit held in *Peralta v. Dillard, et. al.*, that practitioners may be able to raise budgetary constraints as a defense to medical deliberate indifference claims under the Eighth Amendment. Since then, inmate-plaintiff Peralta filed a petition with the Ninth Circuit for his appeal to be heard by the Court of Appeals’ full panel. The Ninth Circuit recently issued its decision en banc, affirming its earlier decision.

By way of background, after arriving at California State Prison - Los Angeles County (“Lancaster”), Peralta requested dental care almost immediately. He complained that his teeth hurt, he had cavities and his gums were bleeding. When he hadn’t received care a few weeks after his initial request, Peralta filed a written appeal. In the informal appeal response, Peralta was put on a waiting list, which was generally nine to twelve months long. Peralta then pursued a formal appeal. He was subsequently interviewed by a staff dentist. The defendant-dentist asked Peralta which tooth hurt most, took X-rays, and scheduled Peralta for an extraction of that tooth. The dentist also gave Peralta more Ibuprofen and medication for an infection. Eleven months after that, the defendant-dentist saw Peralta again and took X-rays, reviewed Peralta’s history and cleaned his teeth.

After Peralta declined to have his tooth extracted, but before his cleaning, he filed a lawsuit claiming deliberate indifference to his medical needs under the Eighth Amendment. At trial, the jury returned a verdict in favor of the defendant-dentist, who relied in part on evidence that resources at the prison were limited and that the inmate-patients are numerous. Peralta appealed, arguing that case law precludes consideration of available resources as a defense when an
individual is sued for violating a prisoner’s Eighth Amendment rights due to deliberate indifference to their serious medical needs. On appeal, the Ninth Circuit’s three-judge panel affirmed the jury’s verdict.

After the case was heard en banc, the majority of the full panel first noted that even if an official knows of a substantial risk, he is not liable if he responded reasonably. However, what is reasonable depends on the circumstances, which normally constrain what actions a state official can take. Here, Peralta rested his claim on having to wait for dental care, but prisons are a particularly difficult place to provide such care due to security concerns. Further, there simply weren’t enough dentists at Lancaster to provide every prisoner with dental care on demand. Peralta didn’t, and couldn’t, argue that the defendant-dentist was responsible for these constraints, since the dentist had no control over the prison’s budget.

The majority also held that the lack of resources is not a defense to a claim for injunctive relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations. Damages are, by contrast, entirely retrospective. They provide compensation for something officials could have done but did not. What resources were available is highly relevant because they define the spectrum of choices that officials had at their disposal. Here, Peralta sought only monetary damages. Allowing the jury to consider the constraints under which an individual doctor operates in determining whether he is liable for money damages doesn’t mean that prisoners have no remedy for violations of their Eighth Amendment rights. For example, although prisoners can’t sue the State of California for monetary relief, due to Eleventh Amendment immunity, they can sue the Director/Secretary or other officials of the Department, seeking an injunction to correct unconstitutional prison conditions.

The majority of the full panel concluded that a prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged jury instruction thus properly advised the jury to consider the resources the defendant-dentist had available in determining whether he was deliberately indifferent.

The full panel’s decision in the Peralta v. Dillard case will be very helpful in defending lawsuits against individual medical staff where treatment may have been affected by limited resources. Additionally, this decision may be useful in defending cases in which inmates sue for inadequate outdoor exercise under the Eighth Amendment, such as those involving inadequate Individual Exercise Modules to accommodate prison gang members assigned to walk/alone status, since the defendant-officials at the local prison may seek budget funding to build additional modules to allow more walk/alone yard time but typically are constrained by budgetary decisions made by the Governor and other high-level officials.