Medical marijuana is legal in California. But does that mean that parolees, probationers, and inmates can have access to it? The answer is that it depends.

The terms and conditions of an individual’s parole or probation are set and can be modified by the court, as well as parole and probation officers. However, the California Health and Safety Code states that any individual on parole or probation who is medically eligible to use medical marijuana may request that he or she be allowed to use medical marijuana. (HS § 11362.795(a)-(b).)

In support of their position, many individuals requesting that they be allowed to use medical marijuana cite People v. Tilehkooh (2003) 113 Cal.App.4th 1433, where the Court of Appeal stated that it is an unreasonable probation condition to test medical marijuana patients for marijuana.

Ross v. Blake:

REINFORCING OR UNDERMINING THE PRISON LITIGATION REFORM ACT (PLRA)

Once again, the U.S. Supreme Court has reiterated that the Prison Litigation Reform Act statute means what it says: “no action shall be brought” unless all available administrative remedies are exhausted.

Previously, the high court has overturned Circuit Court rulings and emphasized the exhaustion requirement in Booth v. Churner, Porter v. Nussle, and Woodford v. Ngo, each time reverting to the plain meaning of the statute and Congressional intent to curtail frivolous prisoner litigation.

Earlier this month, the Supreme Court issued another case reinforcing the exhaustion requirement of 1997e(a). In Ross v. Blake, 578 U.S. ___ (June 6, 2016), the Court overturned the Fourth Circuit’s “special circumstances” exception to the PLRA.

The case stems from an incident in an Illinois prison. Officers Ross and Madigan escorted inmate Blake to segregated housing. Officer Madigan was accused of assaulting inmate Blake en route. Blake reported the incident to an officer, who

Joint in the Joint?

AN OVERVIEW OF MEDICAL MARIJUANA IN THE CORRECTIONAL CONTEXT

Realignment has brought a lot of changes to California’s prisons and jails in recent years. Since Realignment legislation was first signed in 2011, California has stemmed growth in prison populations by sending low-level offenders to county jails. Overcrowding continues to be an issue, however, and so this November a new measure will be on the ballot: the Parole, Early Release and Juvenile Trial Reform Initiative.

Governor Brown’s latest prison reform legislation will be on the ballot this November | by Scott Nenni

More Changes on the Way for California’s Overcrowded Prisons

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Ross v. Blake: Reinforcing or Undermining the Prison Litigation Reform Act (PLRA)

by Susan E. Coleman

In support of their position, many individuals requesting that they be allowed to use medical marijuana cite People v. Tilehkooh (2003) 113 Cal.App.4th 1433, where the Court of Appeal stated that it is an unreasonable probation condition to test medical marijuana patients for marijuana.

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With respect to testing state parolees, CDCR’s Division of Adult Parole Operations issued a memorandum in 2005 stating:

Parolees who qualify to obtain a medical marijuana identification card to possess a prescribed amount of marijuana for medical purposes shall ensure that their assigned Parole Agent receives a copy of the identification card for placement in the parolee’s file prior to the parolee obtaining possession of the marijuana. The parolee . . . will not be subject to substance testing for marijuana while under the parole custody and supervision of the California Department of Corrections and Rehabilitation.

As for individuals in custody, the California Health and Safety Code does state that a jail, correctional facility or other penal institution in which prisoners/detainees reside may allow individuals to use marijuana for medical purposes so long as it does not endanger the health or safety of other prisoners or the security of the facility. (HS § 11362.785.)

Further, after medical marijuana was legalized under Proposition 215, former San Francisco Sheriff Mike Hennessey stated that individuals in custody who were terminally ill should be allowed to smoke marijuana for medical purposes if it eases their pain, helps their health and appetites, and allows them to live longer.

However, a spokesperson for the Marijuana Policy Project stated in 2014 that to the best of his knowledge, there are no jails or prisons in the United States that allow patients to access medical marijuana while in detention. This is different than in Canada, where prisons allow Cesamet (a man-made form of cannabis which is taken orally) for individuals with a medical marijuana prescription from a doctor.

Most state prisons and jails, including those in California, consider all forms of marijuana contraband. As a representative from the Colorado Department of Corrections explained, “Tobacco and alcohol are also legal but not permitted in our facilities or in any state building.” She went on to explain that, “Medical marijuana is like any pharmaceutical drug; in order to be dispensed it must be on our formulary. There are many other medicines which are not on our formulary and are therefore not dispensed, just as is the case when you have a prescription from a doctor that is denied coverage by your insurance company because it is not on their formulary.”

Although this statement was released prior to Colorado legalizing all marijuana, there is no indication that there has been any policy change. Therefore, it appears that marijuana continues to be prohibited in all operating prisons and jails.

As for non-operating facilities, the Coalinga City Council is currently reviewing a proposal to transform the currently vacant Claremont Custody Center into a manufacturing center for marijuana cultivation and cannabis oil production. After much debate, the city council voted 4-1 in April to prepare an ordinance to allow commercial cannabis cultivation at the former prison.

As the laws regarding medical marijuana evolve and with general legalization potentially making its way to California (something law enforcement and correctional organizations have generally opposed), it will be interesting to see if policies in the correctional setting will change.

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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. Our areas of expertise mirror California’s own vitality, with respected, proven practices in: Law Enforcement Defense, Construction Law, Education Law, Environmental, Land Use, and Natural Resources, Labor and Employment, Litigation, Public Law, Torts, and Real Estate and Business Law.
As readers of this newsletter know, many of the recent reforms in California's prisons and jails have stemmed from a federal lawsuit regarding overcrowding in state prisons. In order to prevent the courts from dictating how the state should continue to reduce overcrowding as part of federal oversight, Governor Brown has introduced this newest ballot initiative to propose his solution to reduce the prison population.

The main focus of this initiative is an overhaul of parole eligibility rules for non-violent felons. If the ballot measure passes, parole boards will be able to set aside certain sentencing enhancements if the inmate has participated in education programs. Good behavior credits will be increased. Specifically, parole boards would be able to set aside sentencing enhancements imposed under California's Three Strikes law. Other sentencing enhancements impacted by this measure include those for gang-related crimes and use of a firearm.

Thousands of inmates not currently eligible for parole could be allowed to seek an early release. One think-tank has estimated that as many as 42,000 inmates would become eligible for parole. The state puts that figure closer to 25,000.

Of course, there is no way of telling how many such inmates will actually be granted parole, should voters approve the ballot measure. The ultimate impact of this proposal remains to be seen.

Some law enforcement officials have supported the proposal. "I think this will effectively open bed space for those who richly deserve to be there," Los Angeles Police Chief Charlie Beck said.

On the other hand, the California District Attorneys Association has indicated that they would continue to fight this ballot measure. They say that like Realignment, Governor Brown’s ballot measure would also increase crime and undermine laws designed to protect crime victim’s rights.

The California District Attorneys Association also challenged the legality of the measure in court, arguing that Governor Brown improperly combined this ballot measure with an initiative on juvenile justice, in violation of the state’s election laws. However, earlier this month, the California Supreme Court ruled against this challenge. In a 6-1 decision, the state’s highest court has ruled to send the issue to voters.

ROSS V. BLAKE CONTINUED FROM PAGE 1

in turn referred the incident to Internal Affairs. Inmate Blake did not file a grievance with the prison, although it had a grievance process in place, because Blake said he thought it was unnecessary in light of the pending IA investigation.

Officer Ross, who was sued for failure to protect inmate Blake from the force used by his partner Officer Madigan, filed a motion to dismiss based on Blake’s failure to exhaust. The district court agreed that Blake failed to exhaust and granted the motion. On appeal, the Fourth Circuit overturned this decision finding that “special circumstances” excused Blake’s compliance with the grievance process because he reasonably believed it was sufficient for internal affairs to investigate (in lieu of filing an appeal). The Supreme Court granted certiorari to examine whether this judicially created exception was consistent with the PLRA.

Although the Supreme Court rejected the Fourth Circuit’s special circumstances exception, and reiterated that the PLRA exhaustion requirement is mandatory, it spent significant time noting that the appeal process may not have been “available” to Blake.

Although the Supreme Court rejected the Fourth Circuit’s special circumstances exception, and reiterated that the PLRA exhaustion requirement is mandatory, it spent significant time noting that the appeal process may not have been “available” to Blake. Thus, although the Court would not sanction a new exception, it explained that the appeal process might not be available if the process is (a) a dead end, (b) opaque and confusing, or (c) obstructed or thwarted. The Court remanded the case to the lower court to determine if the appeal process was “available” to inmate Blake. If, for example, appeals are routinely cancelled in Illinois when IA is already investigating, then the grievance process is not really available.

In the end, although Ross emphasizes that exhaustion is mandatory and no judicial discretion or exceptions are allowed, the Court gave direction to inmate plaintiffs looking to evade the process by showing it is not “available.” While the Court rejected a new exception as inconsistent with the plain language of the PLRA statute, it highlighted the path for obtaining exemptions under the statute. It is expected that the Ninth Circuit will continue to use the availability clause to carve out exceptions to swallow the rule.

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 and Employment issues.
mall claims litigation creates few monetary problems for public entities but it does raise many questions. When a public entity or a law enforcement officer is served with a small claims lawsuit, civil litigation coordinators, in-house attorneys, and law enforcement personnel often wonder – what now?

The good news is that a plaintiff’s recovery in a small claims lawsuit is limited to $10,000, which means that small claims lawsuits are unlikely to have a significant impact on an agency’s bottom-line. The bad news is that the process for defending a small claims lawsuit is not as simple as sending the complaint to your litigation counsel and doing nothing more.

As you are probably aware, small claims proceedings are not governed by the standard rules of civil procedure that apply to state or federal court litigation. In a normal civil lawsuit, each side has the opportunity to obtain written discovery and depositions in advance of the trial. Each side also has the opportunity to file motions seeking to dismiss the case in advance of trial. Those options are not available in a small claims proceeding.

A small claims lawsuit typically has up to three stages. First, in most jurisdictions, the defense can attempt to obtain the dismissal of the case with a letter to the Court. As with nearly every other aspect of the small claims lawsuits, this is done informally. For example, if a plaintiff fails to submit a Government Claim in advance of filing a small claims action, a public entity can send a letter to the Court seeking the dismissal of the case on that basis. Some courts will address these attempts to obtain a dismissal in advance of the small claims trial; other courts will not. Consulting with an attorney after receiving the small claims suit will ensure that the appropriate defenses to the lawsuit are asserted in advance.

The second stage is the small claims trial itself. A small claims “trial” is a very informal hearing in which each side has a few minutes to argue their case to a judge. Testimony of witnesses can also be provided, as well as/or written documents including declarations, photos, and other records. The biggest difference between a small claims suit and a normal civil lawsuit is that no party can be represented by an attorney during the hearing. If the public entity is named as a defendant, a risk manager or civil litigation coordinator will typically act on behalf of the entity. If the law enforcement officer is the only named defendant, the officer must represent himself at the hearing, which is why preparation for a small claims trial is important.

In advance of a small claims trial, it is recommended that the involved officers and anyone who will be representing the entity at the small claims trial meet with their litigation counsel to prepare for the hearing. The presence of an attorney in this meeting ensures that the officers understand the small claims process and are prepared to testify and represent themselves, and the presence of an attorney also ensures that the discussions are protected from disclosure via the attorney-client privilege.

Even in situations where the officers and the entity have a rock-solid legal defense, such as a failure to submit a Government Claim, the officers should prepare as though the small claims judge will address the merits of the case. Because small claims judges do not regularly address the legal or Constitutional issues that may be raised in the defense of the suit, the small claims judge may allow a hearing on the merits to proceed. Preparation, therefore, is important. A few hours of time with your litigation counsel can pay dividends and provide officers with the confidence to proceed at the hearing.

Following the small claims hearing, the Court can either find for the plaintiff and award damages of up to $10,000 or the Court can find for the defense. If the Court finds for the plaintiff, the case is over; the plaintiff has no right to appeal. The defense, however, does have a right to a small claims appeal should the plaintiff prevail at the small claims trial.

The third stage, if necessary, is a small claims appeal hearing. At this stage of the case, either side may be represented by an attorney. A small claims appeal hearing is another informal hearing, before a different judge, in which each side argues the factual and legal merits of its case. At this point of the process, each side can call witnesses and submit additional briefing. There are two possible outcomes – the Court could rule in favor of the defense or the Court could uphold the award of damages of up to $10,000. This is the final stage. No further appeals are permitted in a small claims proceeding.

The good news for the defense is that a plaintiff must win both the small claims trial AND the small claims appeal to prevail. If the defense prevails at either hearing, the defense wins.

Your best practice when receiving a small claims lawsuit is to consult with an experienced law enforcement defense attorney who can provide you with guidance on any legal issues that should be raised and assist in preparing the involved officers for the hearing. This minimal effort increases the likelihood of prevailing and ensures that officers are happy with how their employer has assisted them during the process.