

September 18, 2018

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

In re the  
Personal Restraint Petition of  
  
SIDNEY A. POTTS,  
  
Petitioner.

No. 51868-6-II

ORDER DISMISSING PETITION

Sidney A. Potts seeks relief from personal restraint imposed following his convictions for five counts of violating the uniform controlled substances act and one count of leading organized crime.<sup>1</sup> Potts contends that the conditions and manner of his restraint violate his Eighth Amendment right to be free from cruel and unusual punishment. He argues that his treating physician, Dr. Seth M. Thaler, should be prescribing Potts Epogen, a drug to treat chronic kidney disease.

To obtain relief, Potts must show that he is under unlawful restraint. *In re Pers. Restraint of Stuhr*, 186 Wn.2d 49, 52, 375 P.3d 1031 (2016); RAP 16.4(a). Restraint is unlawful if the conditions or manner of restraint are in violation of the state or federal constitutions. RAP 16.4(c)(6). The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishments. Deliberate indifference to a prisoner's serious

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<sup>1</sup> Potts originally filed his petition with the Supreme Court. That court transferred the matter to this court under RAP 16.5.

medical needs violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). This is true whether prison doctors manifested indifference in their response to the prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. *Estelle*, 429 U.S. at 104-05. It does not follow, however, that every claim by a prisoner that he has not received adequate medical treatment demonstrates an Eighth Amendment violation. *Estelle*, 429 U.S. at 105. In order to state a cognizable Eighth Amendment claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle*, 429 U.S. at 106.

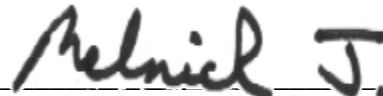
Potts argues that he should be receiving Epogen from Dr. Thaler to target a hemoglobin level of 13.5 g/dL, or more. However, the Food and Drug Administration (FDA) strongly cautions against the use of Epogen for hemoglobin levels above 11 g/dL noting that in controlled studies "patients experienced greater risks for death, serious adverse cardiovascular reactions, and stroke when administered erythropoiesis-stimulating agents (ESAs) to target a hemoglobin level of greater than 11 g/dL." Decl. of Dr. Seth M. Thaler at 2 (Br. of Respondent Exhibit 1) The FDA further noted that use of Epogen for hemoglobin levels higher than 11 g/dL "has not been shown to improve quality of life, fatigue, or patient well-being." Decl. of Dr. Seth M. Thaler at 2 (Br. of Respondent Exhibit 1). Dr. Thaler's treatment decisions regarding the use of Epogen for Potts are consistent with the FDA recommendations. Accordingly, Potts fails to demonstrate an act or omission sufficiently harmful to show deliberate indifference to serious medical needs to support a cognizable Eighth Amendment claim,

Because Potts fails to state a cognizable Eighth Amendment claim, his petition is frivolous. *See In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 135, 385 P.3d 135 (2016)

(a PRP is “frivolous” if the petition fails to present an arguable basis for relief).

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

A handwritten signature in black ink, appearing to read "Melnick J.", written over a horizontal line.

Acting Chief Judge, Pro Tem

cc: Sidney A. Potts  
Department of Corrections  
County Cause No. 12-1-00876-8  
Candie M. Dibble, Assistant Attorney General