Florida Prison Legal Perspectives

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REPORT REVIEW
Maintaining Family Contact When A Family Member Goes to Prison
An Examination of State Policies on Mail, Visiting, and Telephone Access
(A Report By The)
Florida House of Representatives, Justice Council, Committee on Corrections

Review by Teresa Burns

During the last half of 1998 and the first months of 1999 there have been numerous meetings held with the Florida Corrections Commission, Legislative Corrections Committees, and various individual legislators by members and staff of the groups that make up the Florida Prison Action Network (FPAN). One of the outcomes of those meetings was a first of its kind random survey being conducted of 286 visiting family members of Florida prisoners, and 61 Florida Department of Corrections correctional officers, by the House Committee on Corrections. The above title was given to the final report. State Representative Allen Trovillion, Chairman of the House Corrections Committee, who I personally met with in February, was instrumental in directing the Committee staff to conduct the survey and report back with the findings, for which he is deeply thanked by our staff.

The primary focus of the survey was to examine policies of the Florida Department of Corrections (FDOC) and determine what impact those policies have on prisoners' family members in the State of Florida. The result of the survey was a 94 page report covering FDOC policies on mail to and from prisoners' family members, visiting and visiting conditions, and telephone access and telephone access problems. While it is not possible to print the entire report here, the findings and recommendations of this report are very important, and felt to be worth covering. The introduction, findings, recommendations, and conclusions of the report will be printed here in their entirety. Throughout this issue of FPLP, other facts and figures from the report will be presented.

This report contains a wealth of information that every family member or loved one of a Florida prisoner needs to know. Unfortunately, it is just not possible to print the entire report in the limited number of pages of FPLP. Personally, I feel that every prisoner and every family member or loved one of a Florida prisoner needs to read this report. The Internet address where anyone with access to a computer can read or download the complete report **is:http://www.dos.state.fl.us/fgils/fcc/reports/family/famcont.html.**

Introduction:

In the last ten years, the number of people incarcerated in Florida has almost doubled, rising from 33,681 in 1988, to 64,713 in 1997. As correctional populations increase, so do the number of people, adults and children alike, who are undergoing the experience of having a family member in prison. Thousands of families across Florida are traveling to visit their loved ones in prison, sending them money for the inmate to purchase letter writing materials, accepting collect phone calls and sending and receiving mail. This report examines the government policies which impact these families and the government services received by these family members as they seek to maintain contact with their child, sibling or parent who is incarcerated.

According to the department, at

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least 95% of Florida's prison population will at some point return to the community. In recognition of this reality, the state implements programs which prepare the offender for a successful release such as substance abuse treatment, educational programs or job training. Although substance abuse treatment, education and job skills may enhance the offender's likelihood of a successful release, probably most important is for released offenders to have someone who will give them guidance and support when they are released. For this reason, families can be a valuable community resource for assisting in an offender's successful reentry into the free world. In fact, research has shown that having a family to return to is one of the most important factors in a released inmate's success.

Although family and community contacts can play a very important role in helping released offenders avoid returning to prison, this report will show that the state has neglected this valuable resource and has in the last few years erected many impediments for families who strive to maintain meaningful contact. In addition, this report will show that there is a remarkable absence from the rehabilitation programs being offered of any large scale programs aimed at family services, improving visitor services or assisting the offender to understand and maintain positive family relationships. In contrast to the absence of visitor services or programs in Florida, this report will inventory the diverse and innovative programs operating in other states.

Finally, this report will document the burdens borne by family members with loved ones in prison and the extent to which families substantially subsidize the correctional system through their indirect contributions to the inmate welfare trust fund. In addition to having to adjust for the lost income from the inmate, families also must take on additional expenses just to keep in touch with the inmate. Families must supply the inmate with writing materials, accept collect phone calls a high rates, and travel all over the state to visit.

Hopefully, the findings and recommendations in this report will be of use to state leaders in both the executive and legislative branch of government by illuminating the complex and emotionally-laden corrections and family issues presented here. At best this research will serve as the impetus for the state to provide real customer service improvements to families and to "think outside the box" as it attempts to remove some traditional and bureaucratic constraints to family reunification and to reduce recidivism.

Findings:

Fl: Empirical research suggests that encouraging families to remain intact may help lower recidivism.

F2: Security measures imposed by the department present barriers to maintaining family contact.

F3: The use of approved calling lists and phone call time limits, although important security features, make it more difficult for families to communicate by phone.

F4: It can be very expensive to accept phone calls from a family member in prison. Under the current rate caps provided by the Public Service Commission, a ten minute phone call may cost anywhere from $2.45 to $7. Surveyed family members estimated spending an average of $69.19 a month accepting telephone call from the inmate. Additionally, some telephone service providers have a history of overcharging inmate families.

F5: Families and friends of the inmate are the primary source of income for the Inmate Welfare Trust Fund, which collected almost $49 million in revenues in FY 1997-98.

F6: Most of the Inmate Welfare Trust Fund is not spent in a way that directly benefits families. In FY 1997-98:

- $78,550, or less than 1%, was spent on visiting pavilions; and
- $28,605,777, or 59%, was spent on operating expenditures, including more than $5 million for employee salaries and $21 million for restocking the canteens.

F7: Other states with larger correctional populations, such as New York and California, are using revenue from inmate telephone commissions to provide direct services for inmate families, such as visitor centers and transportation to remote prisons.

F8: In a survey of families visiting Florida

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FPLP is a Non Profit publication focusing on the Florida prison and criminal justice systems with the goal of providing a vehicle for news, information and resources affecting prisoners, their families, friends and loved ones, and the general public of Florida and the U.S. Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement and opportunities, promoting skilled court access for prisoners, and promoting accountability of prison officials, are all issues FPLP is designed to address.

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correctional institutions, 23 respondents independently asked that the package permit policy be reinstated, stating that it was meaningful for families to be able to send "care packages" with religious materials, books, newspaper articles and family photos, especially on birthdays and holidays.

F9: The majority of state prisons are in remote locations, usually without convenient public transportation services. For example, the most remote prison, Century C.I. is approximately 700 miles from Miami. Furthermore, proximity to family members is not the primary factor in assigning an inmate to a prison. According to surveyed family members, the travel distance required to visit was the greatest burden experienced as a result of having a family member in prison.

F10: Although described as a meaningful experience for families, there has been a statewide trend to prohibit inmate families from attending chapel with the inmate. Sixteen institutions currently provide such services. Sixty-one percent of correctional officers surveyed feel such services create a serious security threat. However, this may be related to the fact that many institutions do not provide security staff for chapel services.

F11: Typically, institutions rely on the inmate to provide family members with information abut visiting. Both visitors and correctional officers expressed frustration that institutions do not provide visitors with advance information about visiting rules and procedures, or about other policies of the department.

F12: According to the survey, visiting policies, such as the dress code, are not uniform among institutions. Furthermore, both officers and family members reported that policies are often applied inconsistently or in a biased manner.

F13: Outdated processes and equipment and lack of staff cause frequent delays in processing visitors. Visitors often express frustration at the slowness of the check-in process typically complaining that they had to, stand in long lines outside the institution exposed to inclement weather.

F14: Both officers and visitors expressed mutual concern over the level of courteousness in the visiting area.

F15: According to the survey, the average visitor is a fifty-year-old mother visiting her son.

F16: Although an important and necessary security measure, the pat down search can be a degrading and humiliating experience. Ninety percent of the visitors surveyed said they undergo a pat down search every time they visit.

F17: Most visiting areas have nothing for children to do during visiting. Only five institutions provide anything for children. All five have either toys or books or both available for children inside the visiting area. One of these five, a private facility, also has a small outside playground area.

F18: When visiting areas are not modified to accommodate children, the visiting experience can be difficult for everyone involved - the child, the parents, and the correctional officers - as small children are expected- to sit quietly for up to six hours. Fifty-two percent of the officers surveyed think that it is inappropriate to even bring children to visit a family member in prison. However, 17 officers independently suggested that if children are allowed, the institution should provide some sort of activity for them, such as a VCR, toys or a playground.

F19: According to the survey, visiting area vending machines can be costly, contain unhealthy food, and are often empty before the visiting period is over. The correctional officers surveyed repeatedly reported that difficulties associated with vending machines are a major problem in the visiting area.

F20: According to the survey, correctional officers perceive the lack of assigned staff to be the biggest problem in the visiting area. Seventy-two percent of correctional officers surveyed believe that the visiting area is understaffed. (Note: No determination was made as to whether this was a result of insufficient full time employees or inappropriate post assignments.)

F21: One out of every four visiting areas does not have enough seating to accommodate the maximum capacity of visitors.

F22: Ninety-three percent of correctional officers surveyed view the property restrictions in the visiting area as effective. Although these restrictions have reportedly made controlling contraband less burdensome for correctional officers, they have also had an impact on families who complain they can no longer bring family meals or toys or coloring books for children.

Recommendations

R1: The Legislature should amend §945.215 [Florida Statutes) to require that a percentage of the inmate welfare trust funds be spent on improving family contacts.

R2: The Legislature should prioritize inmate welfare trust fund appropriations to insure visitors are not forced to be in inclement weather.

R3: The Legislature should amend §20.315, F.S., to create an Office of Family Services with the Department of Corrections. The mission of the newly created office will be, at a minimum, to advocate and facilitate policies and programs which encourage family contact and frequent family visits. The office will also be required to develop and disseminate information on visiting regulations and processes to approved visitors, provide specialized training for officers who are regularly assigned to the visiting area, periodically audit and review institutional visiting, mail, and telephone procedures and identify visiting area physical plant deficiencies which may directly impact family members, serve as a centralized communication point to receive and respond to questions from family members, and develop and operate a formal family grievance process for family members.

R4: The Legislature should require the department to study and report back to the Legislature on the feasibility of the following:

- Creating and disseminating an informal guidebook to assist families in understanding the rules and policies of the department;
- Returning to a policy of allowing families to send a limited number of packages to inmates or creating a system for standardized care packages;
- Piloting an alternative method of institutional telephone service which can shift the burden of paying from the family to the inmate or allow the paying party to chose the service provider, while maintaining the commission and not compromising security;
- Providing activities for children, especially activities that offer inmates the opportunity to interact with their own children;
- Consulting with correctional officers to consider ways to deal with children in the visiting area while still encouraging children to bond with parents;

• Addressing the staffing needs of the visiting area and consider implementing civilian positions or using temporary assignments;

• Examining the current food service methods in visiting areas;

• Using the Internet to provide visiting information;

• Providing specialized training for officers working in the visiting area; and,

• Any other propositions that may benefit the family without jeopardizing security.

Conclusions:

The department, by statute, is charged with rehabilitating offenders through work, programs, and services. Because research has shown that family contacts can play an important role in the inmate's rehabilitation, it is a logical conclusion that the department should make every attempt to utilize this resource and do what it can to encourage family contact, particularly when such contact produces an additional benefit of a sizable revenue for the state.

The agency's strategic plan for 1998-2003 recognizes that more than 95% of the offenders will be at some point released to the community, and that programs must be provided to insure public safety. Currently these rehabilitation-oriented programs target substance abuse, education deficiencies, job skills and life skills. There is little mention of using the family to assist in rehabilitation, or the importance of inmates having family contacts.

In its every day operations, the department plays a very important role in determining the nature and quality of contact that families of inmates are able to maintain. The placing of inmates, the siting of prisons, the development of programs, and the promulgation of rules are just a few of the responsibilities of the department that, while primarily intended to accomplish other purposes can have a profound effect on families. Although the department recognized in its rules that maintaining home and community contacts can lead to a reduction in recidivism, many barriers and burdens exist that prevent or lessen the value of such contacts.

Although security is the primary concern of the department, it need not be to the extent of all other considerations. Security measures that are overzealously applied, result in only a small improvement in institutional safety and which extract a huge toll in disenfranchising families, must be revisited and evaluated. For example, many institutions have eliminated joint chapel services, in spite of the importance to families, because of "problems with contraband." However, several institutions have demonstrated that total elimination of a problematic program is not always the only option available.

By adapting the needs of the family to the needs of the institution, compromises and balances can be achieved. Furthermore, while allowing families to periodically mail packages may have created security problems in the past, such packages were a very important method of continuing to act like a family and provided a personal connection that was valued by families. Rather than completely abolishing the program, the department should consider alternative means of allowing such packages while still accounting for security.

Correctional systems in other states have demonstrated that total elimination of the package system is not the only answer to the contraband problem, by allowing families to send care-packages containing pre-approved items. If family contacts are to be encouraged, rules must be developed in a manner that considers the impact on families and lessens government intrusion.

Accepting phone calls from the inmate, although important in maintaining contact, can be exceedingly expensive. Not only are the calls billed at the already higher than average collect rate, but the paying party is unable to chose the lowest cost service provider, because all calls from an institution are diverted to a single telephone company under contact with the department.

The provision of telephone services to the inmate population is so lucrative that telephone service providers are able to offer the department up to 55% of their profits as a commission. Finally, because inmates may only make collect calls, inmates bear no responsibility in budgeting and planning for the costs of such calls. When renegotiating contracts with telephone service providers, the department should consider the expenses borne by inmate families, in addition to security features and commissions. The department should also consider alternative means of providing access to telephones.

Through telephone commissions, food purchases while visiting, and deposits in the inmate's account, families and friends are the principal contributors to the Inmate Welfare Trust Fund. Yet, while almost $49 million in revenues was collected in FY 1997-98, less than $100,000 was sent on programs that directly- benefited such families. Other states with large correctional populations, such as New York and California, are using revenue derived from telephone commissions to provide direct services to inmate families, like visitor hospitality centers, toys and games for children who visit andincarcerated parent, and transportation to remote prisons.

Because most institutions rely on the inmate to inform family members about the policies and procedures associated with visiting, many family members remain uninformed. not only are family members unaware of many of the rules, but they also do not understand the security justifications behind the rules. The department should develop a handbook, providing families with information about the department and its institutions, and discussing pertinent rules and why they are important. At a minimum, institutions should be required to develop a visitor information sheet using a uniform format, to be mailed to all prospective visitors by the institution.

Visiting presents many challenges for families. Many prisons are located in remote parts of the state, requiring long drives at very early hours. Upon arrival at the institution, visitors must stand in long lines with no shelter from inclement weather. Visitors often arrive uninformed about the rules of the visiting park, and their lack of information is compounded by the often inconsistent application of the rules. Once inside, vending machines are often broken or even empty. Children, although a consistent presence, are generally allowed nothing to keep them occupied for the six-hour visiting period.

Such visiting conditions strain both the visitors and the correctional officers working the visiting area, creating hostile

and negative relations in some cases. For the above reasons, the Legislature should designate an office of family services within the department. Such office would be responsible for insuring that visitation is provided in a manner that encouraged family contact and development, especially for the inmate's children, without compromising valid security concerns. The office could develop means of informing families about the rules and policies of the department in a manner that not only prepares them for future interaction, but educates them as to the purpose of such requirements. The office could also develop information and training to assist officers to be better prepared for the requirements of the post and provide better customer service to visitors.

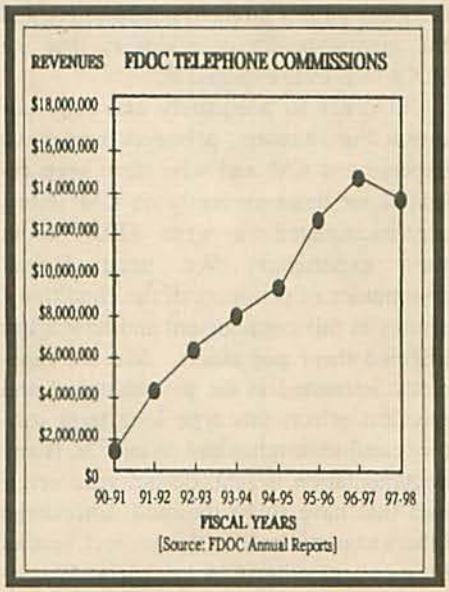
If the Legislature chooses to create an office of family services, then this will be the final and necessary step of a collaborative three-prong partnership with victims of crimes, communities of faith, and inmate families. The first partnership began about a decade ago when the Legislature began to address the needs of victims of crime. Through extensive legislation, victims have gained rights in the criminal justice system and access to special programs and services Furthermore, the department's Victim Services Office serves as a focal point for victims who need services and information. The second partnership was initiated just two years ago when the Legislature squarely addressed the importance of inmates accepting personal responsibility for their crimes. In §944.803, F.S., the Legislature required the department to develop partnerships with faith-based institutions in the community in order to assist inmates in recognizing their accountability.

After addressing the needs of the offender's victim, and the importance of the offender's acceptance of personal responsibility while incarcerated, the final step is to address the importance of the offender's situation upon release. Now is the time for the third component to be put into place.

While overall conclusions and recommendations of this report suggest that significant improvements are needed, such changes will not come about unless agency leadership embraces pro-family policies. Families are, by their very nature, a relatively powerless constituency. And, the Legislature has traditionally delegated to the executive branch these types of prison management decisions.

Even if the Legislature seeks to micro manage the prison system and impose certain pro-family services through mandate, it will most likely curtail its policy interference when it is warned that such change may threaten prison security, increase legal liability, or remove vital funding from mainstream rehabilitation programs. For these reasons, the bulk of the recommendations listed in this report are directed to the corrections professionals who are first and foremost charged with the protection of public safety and the best equipped to balance the needs of security with the needs of family unification.

The challenge for corrections professionals prompted by this report will be to become a partner to families and view them not as a burden but as a new constituency. While the promise to our citizens is to be tough on criminals and maintain tight custody and control of inmates during their incarceration, the citizens are also demanding a decrease in crime and relief from its impact. By restoring fundamental family relationships which are consistent with lawful living, the inmate may be less likely to return to society with the clear intent to commit another crime. This vision has the potential to save millions of dollars through reduced recidivism and may also spare some of our communities and families from the hardships of crime. ■



From the Editor...

Recently I watched as the final touches were placed on a Close Management Unit (CM) that formerly had been an open population two-man cell dormitory. Even though the prison, Columbia C.I., already had a specially built "T-Building" CM Confinement Unit that holds 250-plus, the powers that be had decided that the two open population housing units that have cells would also be converted to CM units. This will result in approximately 800 people at this prison alone eventually being in solitary, sensory-depriving confinement for years at a time in many cases. What really astonished me however was the final touch on one of these converted confinement units.

On the outside of the windows were placed boxes constructed out of brightly polished galvanized corrugated roofing tin, ostensibly so that the prisoners inside the cells cannot see outside the small high-security type windows that face the open compound of the prison. The tops and bottoms of the boxes were left open to provide some measure of ventilation, but the sides were enclosed with the tin to prevent "side-views" out the windows.

At first the ramifications of these boxes did not register on me, having seen similar boxes constructed out of fiberglass corrugated panels on almost all Close Management Confinement Units around the state; its part of the "program" to deprive as much sensory input as possible in these confinement units. Yet later that day the West-facing side of the unit was baked by the full afternoon sun. The temperature was an early-summer 90 degrees. The corrugated roofing tin over the windows of the CM Unit began reflecting like giant spotlights so blinding you could not look directly at them, there was no doubt the metal was radiating a tremendous amount of heat.

I had been in one of those cells when they were open population. I knew that in the summer months the small amount of air that was drawn in through the louver-type vent on the window was barely adequate to ventilate the cell as it was. I had suffered days and nights in the sweltering summer heat of these cells. Any air drawn in the window was hot air. But I knew that I had never experienced anything like the CM prisoners in these cells are going to experience with the metal boxes fastened over

the window, baking and superheating any air that might make it in the window vent. Nor was I the only one who realized the seriousness of what is going to happen.

That evening, as open population prisoners walk past the confinement unit going to supper, all eyes were on the metal boxes installed that day over the windows. From hardened prisoners, many of whom have themselves been in confinement at one point or another, I heard gasps of disbelief, comments on how any prisoner in one of those cells was going to "fry" this summer, how the boxes will act like giant "radiators" cooking and suffocating the cell inhabitants. A modern form of the "hot box" from Florida's past a la "Cool Hand Luke," history repeating itself.

Imagine, if you can, being confined in a 8' x 10' cell. The only fixtures being a metal bunk, metal sink and toilet combination, a florescent light. The door is steel with a thick Plexiglas window that you will be punished for looking out of. There is no television, no radio, no diversions. Any reading material is strictly regulated. You never leave the cell except for five minutes three times a week for a shower, or for one two-hour outdoor exercise period a week in a small chainlink wire "DOG run" type cage built onto the confinement unit. You never speak to another person unless your keeper speaks to you first. In the cell there is a window with a built-in louver vent for ventilation, but on the outside of the window has been placed a metal box so that nothing can be seen out the window and the incoming air is superheated in the summer so that you constantly sweat.

Now imagine, being in that cell for years at a time. Imagine your attitude towards your keepers, towards other people. Imagine the depression, the loneliness, the alienation, the mental gymnastics that you will go through. Imagine a hate that builds and builds: towards your keepers, towards a society that allows this to happen, towards yourself, and finally in many cases, towards anything that moves or that is alive. Regardless if the rage is rational or not, it's almost inevitable. But you must not show the anger, if your keepers see it your stay will be extended. Now, imagine keeping all this inside, unable to express it. Imagine what might happen when you are finally released.

The citizens of Florida will increasingly be able to experience what the above type confinement does to people as the Florida Department of Corrections (FDOC) continues to increase its use of sensory depriving confinement on thousands of state prisoners. Even though the FDOC knows that 95 percent of prisoners will be released back into the community one day as sentences are served, the department is in the midst of creating confinement conditions so harsh that many of those released will be walking time bombs.

In 1995 the FDOC began the construction of 45 T-building type CM Units, each holding approximately 250 prisoners in 24 hours a day lockdown conditions. Those units are complete now, housing potentially 11,250 prisoners. Now the FDOC is converting existing population units to confinement units. Besides Columbia C.I., in the past couple of months conversion of the open population cell-type housing units at Liberty and Taylor C.I.s to confinement units has been verified. Many of the prisons in the Southern part of the state are converting their open population units to confinement units. It is clear that the FDOC is preparing to lock down a large percentage of Florida's prisoners.

In coming issues of FPLP readers will find more coverage on the effects and conditions of confinement that Florida prisoners are being subjected to. I personally, and many of the staff, feel that CM confinement, as practiced by the FDOC and its employees, has the potential to be the most serious threat to public safety and the mental health of prisoners that the FDOC has ever engaged in.

In order to adequately and fully address this situation, prisoners who have experienced CM and who have been released, or those currently on CM status, are encouraged to write FPLP about the experience. We need factual testimonies of prisoners of the conditions/abuses in this confinement and how it has affected them and others. We are especially interested in the psychological and physical effects this type long term solitary confinement has had on people. If any documentation is sent, do not send originals that have to be returned. Encourage others to participate in this project, spread the news to other CM prisoners. We intend to compile this information for a report to national and international human and civil rights groups.

In May, Florida prisoners were notified that the case challenging the FDOC's personal property restrictions, *Tungate, et al. v. FDOC,* had been lost in the state courts, and the injunction prohibiting the FDOC from forcing prisoners to dispose of personal property had been dissolved. Actually that injunction had been dissolved in October, 1998, when summary judgment was granted the FDOC, but attempts at rehearings and an appeal stretched the case out until May. Certification of that case as a class action saved the FDOC from thousands of individual challenges all across the state, in every circuit court and, consequently, from potentially adverse decisions.

The new FDOC Secretary, Michael Moore, has determined that Florida prisons will now have "wardens" instead of "superintendents." Sounds "tough" to me. FPLP has also been informed, but not yet verified, that Moore intends changes to the regional director positions, something that has been needed for years.

FPLP continues to grow with the support of its readers. Everyone is asked to continue encouraging others to get involved by subscribing and supporting FPLP. Prisoners are asked to share their issues with others and to encourage their families and friends to subscribe, the outside network is crucial to FPLP's continued effectiveness. Thank you, to all those faithful supporters who have made extra donations or got others to subscribe. Between now and the next legislative session there is a lot of work that must be done, we can do it if we all just keep working together. - BOB POSEY, Editor. ■

UPDATES

• In the *Gomez v. Singletary* case (substitution of control release for statutory overcrowding programs ex posto facto violation), on May 20, 1999, (after the last issue of *FPLP* had been sent to the printer) the Florida Supreme Court denied the states motion for rehearing, but issued a revised opinion in the case. See: Gomez v. Singletary, 24 FLW S254 (May 20, 1999). The revised opinion provides charts of how the early release credits that were illegally withhheld would be distributed if the deci-

sion stands. The court also issued a stay until June 21, 1999, to allow the state time to decide whether to seek certiorari review but the U.S. Supreme Court. Governor Jeb Bush publicly stated that they would take the case to the U.S. S. Ct. For the current status of this case, speak with an informed law clerk.

• In Volume 5, Issue 1, of *FPLP,* in the "AROUND THE NATION" section, it was reported that a class action lawsuit brought by Utah prisoners against a ban on receiving written or printed materials that contain nudity or partial nudity had been settled with the UT DOC withdrawing the policy and paying the prisoners' attorney, Brian Barnard of the Utah Legal Clinic, $15,000 in attorney fees. Unpublished Case: *Perry v. McCotter,* USDC Utah 97-C"'-0475C. On October 28, 1998, another class action lawsuit represented by Mr. Barnard was settled against the Davis County Jail in Utah that challenged similar censorship rules at that jail, rules that purported to ban not only materials depicting any type nudity, but also books and newspaper clippings. The one hundred named jail prisoner plaintiffs in the suit split $11,682, or $1 dollar for each day that the ban was in effect against them while in jail. Attorney Brian Barnard received $ 57,000 in attorney fees and costs in the settlement. This is another unpublished settlement case and not a decision on the merits. *Ayala v. Davis Co, Utah,* USDC Utah, Case No: 1:96-CV-00030C. [Source: *Prison Legal* News, 5/99]

• In Volume 5, Issue 1, of *FPLP* in the "AROUND THE NATION" section it was reported that on July 2, 1998, the federal 9th Circuit Court of Appeals, ruling on a case out of Maricopa Co., AZ, had struck down a county prison's regulations banning sexually explicit materials/publications depicting "frontal nudity" as overbroad and unconstitutional. See: Mauro V. *Arpalo,* 147 F.3d 1137 (9th Cir. 1998). However, on December 2, 1998, that decision was withdrawn for an en banc rehearing by the full court of the 9th Circuit. See: *Mauro v. Arpaio,* 162 F.3d 547 (9th Cir. 1998). ■

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PERSONAL PACKAGES TO PRISONERS

From 1983 until 1995 Florida prisoners' families and friends could send them packages of personal items like shoes, underwear, writing materials, radios, watches. In 1995 the rules allowing families and friends to send packages were repealed as the FDOC realized that millions of dollars were being spent on prisoners by families and friends that the FDOC was not receiving any part of. Now Florida prisoners must purchase any personal items through the FDOC, which contracts with an outside vender for wholesale prices and then inflates the cost to prisoners 50 and even 100%.

Of course, the money to purchase such items - that are mostly poor quality so that they must be replaced frequently - comes from families and friends. Many prisoner's families are unable or unwilling to send money to purchase the shoddy goods at the inflated prices, which forces prisoners to obtain shoes, underwear, belts, socks, etc., from the state, at taxpayer expense. It is estimated that taxpayers are paying millions of dollars more in shoes and under clothing for prisoners than before 1995 when packages were allowed.

Out of the twelve states with the largest prison populations, Texas and Florida are the only two that do not have some system where families and friends can directly chose and purchase themselves personal items for their family member in prison. Four of those twelve states still allow packages to be sent directly from the family to the prisoner. Six of those states allow families to purchase pre-approved items from a designated vender approved by the department, and then the vender mails the items to the prisoner.

	Families May Send Packages From Home	Families May Only Send Packages from Specified Venders
Texas	No	No
California	Yes	-
New York	Yes	-
Florida	**No**	**No**
Ohio	No	Yes
Michigan	No	Yes
Illinois	Yes	-
Georgia	Yes	-
Pennsylvania	No	Yes
North Carolina	No	Yes
Virginia	No	Yes
Missouri	No	Yes

[Source: FL House Corrections Committee telephone survey conducted between July and September 1998.]

MOVING ON

During the latter part of May, 1999, Glen M. Boecher, Esq., announced that he was leaving Florida Institutional Legal Services (FILS). Glen Boecher held the executive director position at *FILS* since August of 1993. FILS is a non-profit law firm located in Gainesville, Florida, with the mission of providing legal assistance to people incarcerated in Florida's state prisons, county jails and mental health facilities.

Over the last few years Glen assisted *FPLP* in several areas. He became good friends with some of our staff and worked hard to keep *FILS* effective for prisoners in these times of cuts in legal assistance for all disenfranchised groups. Glen was always available to advise *FFLP* staff as we pursued our goals and took the time to attend most of the rallies, meetings and events that have been organized by *FPLP* and the *Florida Prison Action Network (FPAN)* of groups.

We will miss Glen at *FILS.* All of the *FPLP* staff wishes him the best in future pursuits and thanks him deeply for all his help and his care, concern and honest compassion for others. ■

AROUND THE NATION

by Mark Sherwood

Arkansas- A $300 million class action suit has been filed on behalf of victims who received tainted blood from the Arkansas DOC. Arkansas state prison board awarded a hefty contract to a Little Rock company called Health Management Associates (HMA). The company received $3 million a year to furnish medical services to prisoners within Arkansas prison system. In addition to the health care services, HMA initiated a "blood mining" venture in which prisoners were offered $7 a pint for their blood. This fee is approximately half the fee paid to skid row donors. The company then- sold the blood on the international market for $50 a pint, half the profits going to Arkansas DOC. This practice continued until American drug companies stopped buying prisoner's blood because HMA failed to screen the blood for viruses such as hepatitis and HIV. The company then sold the prisoners blood on the international market, selling to companies in Italy, Spain, Canada. A Canadian firm, Continental Pharma Cryosan Ltd., was the prime buyer of blood from (HMA) and- is now named by the recipients of "tainted blood" in the $300 million suit as the

defendant. HMA is also being sued by prisoners because of unsafe practices in drawing blood, often drawing blood from multiple patients with the same needle, causing the transmission of the AIDS virus and other communicable diseases. Several times throughout the years HMA came under attack for contract violations and allegations of negligent prisoner patient care, however, during President Clinton's entire administration as Governor of Arkansas, the company was allowed to operate unimpeded. It is suspected that these suits are only the tip of the iceburg in what appears to be a major health scam promoted by Arkansas DOC.

- Law suits filed by Bobby Franklin Simmons and Ricky Lee Marshall, two paraplegic Arkansas state prisoners, alleging that Arkansas DOC officials placed them in solitary confinement without adequate facilities to allow them to eat meals or use toilet facilities, were successful. After a bench trial the court entered a judgment against the guards and assistant warden, awarding plaintiffs two thousand dollars ($2,000) each. The defendants appealed, however, the findings and award of the lower court were upheld by the Eighth Circuit. See: *Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998)

- Arkansas Law to Permit Life Sentences for Youths. Arkansas youngsters convicted of murder can now be sentenced to life in prison pursuant to a measure that was signed into law by Gov. Mike Huckabee. State law previously prevented children under the age of 14 from facing adult punishment. The Governor was moved to institute the measure after two boys, Mitchell Johnson, age 13 and Andrew Golden, age 11, were found guilty of shooting and killing four students and a teacher in March of 1998. However, because of the laws protecting children under the age of 14, the youths were sentenced to a juvenile detention home where they will be released when they turn 21.

Arizona- Arizona, the first state to begin treating all its nonviolent drug offenders rather than locking them up, says its new policy of diverting addicts from prison into treatment has already saved the taxpayers money. The Arizona Supreme Court issued a report recently that estimates the new program saved over $2.5 million in its first fiscal year ending in June of 1998, and looks likely to reap greater savings in the future. The Arizona S.Ct. report said it cost $16.06 a day for intense supervision under the new program as opposed to $50 a day to keep an inmate in prison. Of the 2,622 people on the program, the report said 77.5 percent tested drug free. Judge Gerber, an AZ jurist for over 25 years said: "Many of us came to the conclusion that we were parading them through the courts and prisons without solving the root problem."

California- The Prison Litigation Reform Act of 1996, was held to not apply retroactively by the Ninth Circuit Court of Appeals in *Swann v. Banks*, 160 F.3d 1258 (9th Cir. 1998). Swan filed suit in 1994, claiming that a guard had announced over a loud speaker that unless other prisoners "did something" to Swan, they would not receive a fan. No injury was apparent as required by 42 U.S.C. section 1997e (e), and the district court dismissed the suit. However, the Ninth Circuit's holding overturned that finding, stating that PLRA cannot be applied retroactively.

- Michael Wayne Riggs, age 47, is serving a 25 year term in the California Department of Corrections after being convicted of stealing a bottle of vitamins from a grocery store. Because Michael had prior felony offenses, the theft, that is normally a misdemeanor in California, was enhanced to a felony because of his prior record. This conviction in turn made Michael eligible for California's "three strikes" law which was approved in 1994.

- Francisco "Paco" Gavaldon, a CA-prison guard, was arrested on charges of conspiracy and solicitation of murder. Gavaldon was video taped by authorities while arranging to pay another man $1,000 and a car to murder his estranged wife. Prison sources identified Gavaldon as a violent guard who frequently assaulted prisoners, and who was brought before the legislature in 1998 where he refused to answer questions about his role in a 1995 beating of a CA prisoner. A week after his arrest Gavaldon was still employed as a guard, said prison officials, yet was on leave while awaiting trial in Tulare County Jail on $1 million bail.

Colorado- The CO DOC banned smoking in all of its facilities on March 1, 1999. Tobacco sales were stopped in December of 1998.

Connecticut- The legislature has taken measures to treat non-violent drug offenders rather than imprisoning them. A bill passed by the legislature drastically cuts prison time for non--violent drug offenders on the condition that they undergo frequent testing for drug use. Housing a prisoner in Connecticut costs approximately $25,000/yr., while the drug testing program is estimated to cost just over $3,000/yr. One legislator said: "Our old policy has been a huge failure. We need to measure its effectiveness rather than its sexiness at election time."

- Former state probation officer, Richard Straub, 63 who threatened to send young male parolees back to prison unless they had sex with him, was sentenced to 15 years in prison. He was convicted of sexually assaulting young men from 1986 to 1996.

Delaware- Superior Court Judge Susan DelPesco has proposed allowing female prisoners to keep their newborns with them in jail. She said the United States is among the few countries who seperate women who are jailed from their babies. Woman who are housed in prison seem to be more likely to find success if they can care for their infants,- she said.

Florida- A service known as VINE - Victim Information Notification Everyday- has recently been created in Palm Beach County, and has been operating in five other Florida counties. Victims of crimes, or anyone interested in a criminal being released, can register with VINE to be called when a specific inmate is released, however, victims of crime will automatically be informed by the system when an inmate is released that was involved in their specific crime. There is also a toll-free number for round-the-clock updates on inmates status. VINE was developed in 1993, after the slaying of Mary Byron in Jefferson County, Ky. She didn't know a man who had sexually assaulted her was released

(Continued on page 12)

NOTABLE CASES
by Sherri Johnson and Brian Morris

Fourth DCA Finds H.F.O. Sentence Illegal

Glen Donald Freshman collaterally challenged his habitual offender sentences. In doing so, Freshman successfully argued that his H.F.O. sentences failed to conform with certain requirements of the H.F.O. statute in effect on the date his offenses were committed. Freshman's victory did not come easy. Initially, the Honorable Ilona M. Holmes, Judge of the Circuit Court, in and for Broward County, Florida, denied relief. Freshman appealed. On appeal, citing *State v. Mancino*, 714 So.2d 429 (Fla.1998), and *Hopping v. State*, 708 So.2d 263 (Fla.1998), for the proposition that "a sentence that fails to comport with the statutory or constitutional limitations is by definition 'illegal,'" the Fourth DCA reversed and remanded with directions.

In reaching its decision in this case, the DCA recognized that at the time Judge Holmes denied Freshman's motion, strict interpretations of the decision entered in "*Davis v. State*, 661 So.2d 1193 (Fla.1995), [erroneously] appeared to limit the definition of an 'illegal sentence' to one that exceeds the statutory maximum for the crime at issue." From the decisions entered in *Mancino and Hopping*, however, the DCA concluded that the Florida Supreme Court has rejected the State's strict, narrow, and erroneous interpretation of the Davis Court's decision.

In this case, the Fourth DCA found that Freshman's offenses were committed between October 1, 1989, and May 2, 1991, and that, in order to qualify for H.F.O. treatment during that time frame, the H.F.O. statute required the defendant to have "previously been convicted of two or more felonies in this state." § 775.084(1)(a)1, Florida Statutes (Supp.1988) (emphasis added); see also, *Baxter v. State*, 616 So.2d 47 (Fla.1993); *Parrish v. State*, 571 So.2d 97 (Fla. 1st DCA 1990) ("1988 habitual offender statute necessitates an initial finding that the defendant has previously been convicted of two or more felonies in this state."). The Fourth DCA also found that "[t]he order declaring Freshman a habitual offender shows that Freshman's predicate offenses were out-of-state convictions." Ultimately, the Fourth DCA found Freshman's H.F.O. sentences "illegal" because the "record ... affirmatively shows a failure to comport with the statutory requirements of the habitual offender statute...." See: *Freshman v. State*, ___ So.2d ___, 24 FLW D707 (Fla. 4th DCA, 3-17-99).

[Comment: Although not mentioned above, the Fourth DCA also noted that, in *State v. Johnson*, 616 So.2d 1 (Fla.1993), the Florida Supreme Court found that the 1989 amendments to the habitual offender statute violated the single subject requirement of the Florida Constitution. Rather than focusing on the unconstitutional single subject violation, suffice it to say that the 1988 version of the habitual offender statute, which became effective October 1, 1988, and remained in effect until May 2, 1991, did not authorize H.F.O. treatment based on out-of-state convictions. Because Freshman's offenses were committed during the relevant window period and the State relied on out-of-state convictions to qualify him as an H.F.O., the Fourth DCA found that the H.F.O. sentences failed to comport with the requirements of the H.F.O. statute and that the sentences are, therefore, "illegal." However, in *Speight v. State*, 711 So.2d 167 (Fla. 1st DCA 1998), *review pending* (Fla. S.Ct. Case No. 93,207), relying on the strict narrow definition of an "illegal sentence" that followed the decision entered in *Davis*, the First DCA held that "reliance on an improper predicate offense does not render the sentence 'illegal' for purposes of determining whether the error may be raised for the first time on appeal." *Speights*, at 169; *see also, Bover v. State*, 24 FLW D1033 (Fla. 3d DCA, 4-28-99) (adjudication of defendant as an habitual offender is not cognizable under motion to correct illegal sentence). Unfortunately, the Bover Court's recent analysis could very easily influence the way the Florida Supreme Court's handles *Speights*.-bm]

H.F.O. Adjudication Cannot Be Challenged Under Rule 3.800(a)

Pursuant to Rule 3.800(a), Fla.R.Crim.P., Jesus Bover argued that he was entitled to relief because the predicate offenses introduced at his H.F.O. sentencing hearing failed to satisfy the statutory sequential conviction requirement. Robert M. Pineiro, Judge of the Circuit Court, in and for Dade County, Florida, denied the motion and Bover appealed.

On appeal, the issue addressed by the Third DCA was "whether a defendant may use Florida Rule of Criminal Procedure 3.800(a) to challenge [an] habitual offender adjudication." In resolving the issue, the Court's analysis found that:

Habitualization is a two-step process. In the first step, the defendant is adjudicated to be a habitual offender. Once that is done, the trial court knows what the permissible legal maximum may be. In the second step, the court imposes sentence.

For Rule 3.800(a) purposes, the difference between the two steps is important. Rule 3.800(a) is by its terms confined to challenging an "illegal" sentence. Imposition of sentence occurs in the second step of the habitualization process. The defendant's real target in this case is not the second step but the first: the adjudication of the defendant as an habitual offender.

The Court notes that although "the viability of predicate offenses used for habitualization can frequently be determined from the face of the record," circumstances do exists where an evidentiary hearing would be necessary. Ultimately, the Third DCA concluded that "an attack on the habitual offender adjudication is one which must be brought under Rule 3.850 and may not be brought under Rule 3.800(a)." In reaching its decision in this case, the Court certified direct conflict with the decisions entered in *Judge v. State*, 596 So.2d 73 (Fla. 2d DCA 1991) (en banc); *Freshman v. State*, 24 FLW D707 (Fla. 4th DCA, 3-17-99); *Bell v. State*, 693 So.2d 700 (Fla. 2d DCA 1997); and, *Botelho v. State*, 691 So.2d 648 (Fla. 2d DCA 1997). The Third DCA affirmed the order denying Bover's Rule 3.800(a) motion. See: *Bover v. State*, 24 FLW D1033 (Fla. 3d DCA, 4-28-99).

What Happened To Discretionary Jurisdiction?

William Gary Harvard filed a writ petition seeking to invoke the discretionary jurisdiction of the Florida Supreme Court. Harvard, submitting numerous factual allegations in support of his claim, alleged that the FDOC incorrectly assigned him to Close Management status. The Fla. S.Ct., noting, among other things, that its action "should not be construed as an adjudication or comment on the merits of the petition," declined to exercise its discretionary jurisdiction and transferred the case to the Nineteenth Judicial Circuit Court. Significantly, the Fla. S.Ct. announced that:

[I]n the future, we will likewise decline jurisdiction and transfer or dismiss writ petitions which, like the present one, raise substantial issues of fact or present individualized issues that do not require immediate resolution by this Court, or are not the type of case in which an opinion from this Court would provide important guiding principles for the other courts of this State.

After the majority of the Court finished with its feeble attempt at justifying its actions, the Honorable Ben F. Overton, Senior Justice, dissented with what appears to be a cold hard fact of Florida justice. That is, Justice Overton notes that "the majority has substantially reduced the access to th[e] Court for habeas petitioners. It has, by [its] opinion, rewritten article V, section (3)(b)(9), Florida Constitution." Justice Overton apparently remembered his oath to protect the rights of the citizens of this State. See: *Harvard v. State*, 24 FLW s209 (Fla., 5-6-99).

Court Record Encompasses Jail Record

In 1990, pursuant to a plea of no contest to two counts of aggravated battery, the Eleventh Judicial Circuit Court, in and for Dade County, Florida, placed Manuel Hidalgo on probation. Subsequently, in 1993, Hidalgo violated that probation and was sentenced to a four-and-one-half year prison term. The court, however, in sentencing upon the revocation of the probation, only granted credit for the time that Hidalgo had served immediately prior to the revocation of his probation. In other words, the court failed to grant Hidalgo any credit for the time he served incarcerated prior to actually being placed on probation.

In 1998, Hidalgo, who is incarcerated at Mayo Correctional Institution, filed a pro se motion seeking, among other things, credit for the time he served incarcerated prior to being placed on probation. The Honorable Ellen Leesfield, Judge of the Circuit Court, denied the motion and Hidalgo appealed. On appeal, the Third DCA treated Hidalgo's motion as a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a).

In *State v. Mancino*, the Florida Supreme Court held that "credit time issues are cognizable in a rule 3.800 motion when it is affirmatively alleged that the court records demonstrate on their face an entitlement to relief." 714 So.2d 429, at 433 (Fla.1998). In this case, the Third DCA, noting that "[t]he *Mancino* decision makes a strong policy statement that a defendant should be granted credit for all time served," firmly rejected the States request for "a narrow reading of the *Mancino* decision."

The Third DCA found that "in some parts of Florida, the jail record of a defendant's incarceration is physically incorporated into the court file, while in other parts of the State it is not." The court, however, concluded that "entitlement to [jail] credit should not depend on the vagaries of the local record-keeping system." Ultimately, the *Hidalgo* Court announced that "a defendant's jail card [reflecting in and out dates of incarceration] should be treated as a court record, whether or not the jail card has physically been incorporated into the court file." See: *Hidalgo v. State*, ___ So.2d ___ 24 FLW D776 (Fla. 3d DCA, 3-24-99).

FL Supreme Court Restricts Its Habeas Corpus Jurisdiction For Pro Se Prisoners

On May 6, 1999, the Florida Supreme Court issued a six to one decision informing Florida prisoners that no longer will that Court entertain pro se indigent prisoners' petitions for extraordinary writs that contain substantial issues of fact, present individualized issues that do not require immediate resolution, or are not the type of cases in which an opinion of that Court would provide important guiding principles for other state courts. In other words, the Supreme Court has specifically announced that it will no longer accept discretionary jurisdiction in habeas corpus petitions that do not require "immediate resolution" by that Court; if another lower court, appellate or circuit, can hear the case, the FL S.Ct. will not.

This decision was rendered in a case where Florida prisoner William Harvard filed an "Emergency Petition for Writ of Habeas Corpus" directly to the FL S.Ct. trying to challenge his placement on Close Management at Martin CI. The petition set out numerous factual allegations. The Court noted that Harvard alleged to have exhausted all administrative remedies before filing the petition, which if he had not the Court would have simply dismissed the petition for failure to exhaust. But, Harvard had not even attempted to file the petition in the circuit court where he was incarcerated before filing with the Supreme Court. This, the Court found unacceptable.

The Supreme Court noted that in the last year alone over 500 petitions for extraordinary relief have been filed with that Court, with the overwhelming majority of those cases being from prisoners seeking to invoke the Court's discretionary jurisdiction Many of those cases, however, would require fact-finding, which the Supreme Court is not in a position to handle. Such cases should be handled by the circuit court which is in the best position to resolve fact-finding issues, stated the S.Ct.

One justice, Overton, filed a dissent to the majority decision. Justice Overton' s main concern was that the majority's decision will be to deny habeas corpus jurisdiction to individual petitioners who file such petitions without the help of a lawyer. "By this opinion, the majority has substantially reduced the access to this Court for habeas corpus petitioners. .. It appears to me that from now on the only habeas corpus petitions this Court will consider will be those filed by attorneys for their clients. . It will have the effect of denying access to this Court," Overton stated in his dissent.

The majority transferred Harvard's petition to the circuit court for Martin County. Further, and significantly, the Court noted that upon the circuit court receiving the case, "if it is determined that a filing fee is applicable to this petition, and if the petitioner wishes to proceed in forma pauperis in the transferee court, an affidavit of indigency and accompanying documentation shall be filed by the petitioner in the transferee court." That clearly was an instruction to the circuit court that the petition filed by Harvard probably should not be treated as one for habeas corpus, but for mandamus, in that Harvard was only seeking release from a more restrictive type confinement, and not from prison itself. See: *Harvard v. Singletary*, _____So.2d ____, 24 FLW S209 (Fla. 5/6/99).

FL Supreme Court Extends Self Defense Nonretreat Privilege

On March 11, 1999, the Florida Supreme Court recognized that the law does not impose a duty on people to retreat from their home before resorting to deadly force in self-defense against a co-occupant of the home or invitee into the home, if that force is necessary to prevent death or great bodily harm. The court decided that there is only a limited duty to retreat within the residence to the extent reasonably possible, but only that far before resorting to deadly force to protect against death or great bodily harm. That decision was a result of a case brought by a woman, Kathleen Weiand, who had been convicted of killing her husband who she had claimed had abused her. Weiand had been released from prison after being granted executive clemency from the governor on December 23, 1998, before her appeal came before the high court, but the Supreme Court retained jurisdiction over the case to decide whether the jury in her case should have been read instructions presenting the nonretreat privilege as stated above which had not been done. The court decided after much discussion of current understanding of battered women s (or spouse, or co-habitants) syndrome that such instructions should be offered for the jury to consider when self-defense is raised claiming a justifiable use of force.

In so ruling, the Supreme Court receded from its previous holding in *State v. Bobbitt*, 415 So.2d 724 (Fla. 1982), that had held that no such instruction must be given to a jury. The court also partially retreated from *Hedges v. State*, 172 So.2d 824 (Fla. 1965), on the same issue. The court, however, specifically held that this new ruling will only apply to future cases and cases pending direct review on the date of its decision and that it will not apply retroactively to cases that have already become final. That part of this change in the law will leave many, and mostly female, prisoners without benefit from this decision, which is unconscionable. See: *Weiand v. State*, ___ So.2d ___, 24 FLW S124 (Fla. 3/11/99).

Application of § 57.085, F.S., Requiring Indigent Prisoner to Meet Certain Requirements Not Ex Post Facto Violation

Otis Mack Vickson, notorious for developing outrageous and frivolous legal theories that he tries and gets other prisoners to try, author of the infamous "did" argument that has resulted in numerous prisoners having their cases procedurally barred, was slapped by the Florida Supreme Court for wasting their time with another bogus legal theory. In this case, Vickson filed a petition for writ of mandamus in the Florida Supreme Court against Harry Singletary, former FDOC Secretary.

Vickson did not send the required filing fee for the filing. The court ordered him to file an affidavit of indigency, which Vickson did. On review of the affidavit, however, it was noted that Vickson had failed to comply with § 57.085(7), F.S., which requires a prisoner seeking to proceed as an indigent and who has been adjudicated indigent twice in the past three years to list and attach a copy of all judicial proceedings that commence or dispose of legal action filed by the prisoner in the past five years. The court ordered Vickson to comply with that requirement, since he has filed numerous pro se indigent actions in the past three years.

Vickson filed an objection to that order, claiming that § 57.085(7) violates the Ex Post Facto Clause because his crime was committed before the enactment of that statute. The Supreme Court noted that claim was without any merit, the statute does not in any manner directly increase a prisoner's criminal sentence, nor does it constitute punishment.

The court, patiently, explains that the purpose of that statute was to reduce frivolous, excessive lawsuits by prisoners such as Vickson. In a footnote the court lists at least 20 legal actions that Vickson has filed in the Florida Supreme Court alone in the past five years.

Withholding more serious sanctions at this time, the court determined that Vickson from this point forward must either strictly comply with §57.085(7), or pay the required filing fee for any further actions that he files in any court. If Vickson does not comply, any actions he files will be immediately dismissed. See: *Vickson v. Singletary*,____ So.2d ____, 24 FLW S175 (Fla. 4/6/99).

New Entry for Appeal Allowed Where Prisoner Claimed Confinement Situation Delayed Notice of Appeal Filing

Florida prisoner Leo Hollingsworth had his appeal of an order denying a petition for writ of mandamus dismissed for being untimely filed but received directions from the appeal court in how he

might be able to obtain a new opportunity to file a new notice of appeal in his particular circumstances.

Hollingsworth had a petition for a writ of mandamus denied by the circuit court on December 3, 1998. He did not file a notice of appeal until January 11, 1999, several days over the 30 day limitation period for filing a notice of appeal. The appeal court ordered that he show cause why the appeal should not be dismissed as untimely filed and Hollingsworth responded that the notice of appeal was not handed over to prison officials until January 7th, but that his inability to timely mail the notice was due to being in confinement "he was unable to obtain necessary postage to mail the notice of appeal despite his repeated efforts to do so.'

The appeal court decided that it lacked the authority to grant a belated appeal because "the proceedings below were civil in nature." But the court suggested that Hollingsworth could still file a 1.540, F.R.Civ.P., relief from judgment motion in the circuit court explaining his circumstances, and if that court vacated the order of denial and entered a new order of denial then a new entry would be created where Hollingsworth could file a timely petition for certiorari, rather than appeal, pursuant to *Sheley v. Florida* Parole *Commission*, 720 S.2d 216 (Fla. 1998). See: *Hollingsworth v. Szczecina*, Moore, ___ S.2d ___ 24 FLW D1011 (1st DCA 4/20/99).

Medical Malpractice Presuit Requirements Not Waived for Prisoners

Florida prisoner Kevin O'Hanrahan found out the hard way that litigating medical malpractice suits in state court is not a simple procedure, and that in most instances, because of certain presuit requirements in Florida law, is impossible.

O'Hanrahan filed something called a "Petition for Professional Malpractice of a Medical Nature Seeking Relief for Damages et. el. and Professional Negligence," (such incompetent drafting immediately placed the court on notice that O'Hanrahan had absolutely no idea what he was doing), against several FDOC employees, mainly medical staff. Despite the title of his "petition," O'Hanrahan also claimed in addition to malpractice that his Eighth Amendment rights were violated. In an attempt to satisfy the state presuit requirement of § 766.202(5), F.S., which requires a verified, corroborating medical expert opinion that medical malpractice has occurred to accompany any action for malpractice in order to substantiate medical malpractice claims, O'Hanrahan filed an unverified letter written by a former doctor who no longer practiced medicine. The circuit court dismissed the "petition" with prejudice based on the failure to comply with the presuit requirement.

O'Hanrahan appealed, claiming that not only was it error for the circuit court to dismiss the case on the presuit requirement issue, but the dismissal with prejudice was error, and that Chapter 766, F.S., as applied to him, an incarcerated, pro se claimant was unconstitutional as denying access to the court. The appeal court affirmed the dismissal as concerned the failure to satisfy the presuit requirement of producing a verified, corroborating medical expert's opinion as to the viability of the action, but held that the action should not have been dismissed without giving O'Hanrahan an opportunity to amend, if he could and satisfy that requirement. And even though O'Hanrahan apparently did not appeal on the dismissal of the Eighth Amendment claims, which would not require such state mandated presuit requirements, the appeal court determined that those claims may still be viable, while noting the "confusing nature" of O'Hanrahan's pleadings. The appeal court flatly rejected the challenge of the constitutionality of the presuit statute to incarcerated, pro se, prisoners.

The appeal court AFFIRMED in part, and REVERSED and REMANDED in part, to allow O'Hanrahan a chance to amend his "petition" if he can. See: *O'Hanrahan v. Moore*, et *al.*, ___ So.2d ___, 24 FLW D954 (4th DCA 4/14/99).

[Comment This case is not included in Notable Cases because of its precedential value, nor because it will affect any significant number of prisoners. This is included in hopes that Florida prisoners who may contemplate a state action for medical malpractice will be aware of the serious presuit requirements that exist. If they cannot produce a verified, corroborating medical experts opinion to support their complaint, then the action will be dismissed. And they could possibly be sanctioned for filing a frivolous lawsuit, receive a DR, and have to do time in confinement and suffer loss of gain time for same. In most cases prisoners will not be able to obtain such an expert opinion before filing suit' which is when it has to be obtained, certainly FDOC doctors are not going to provide same against one of their own. Be aware of, research, and comply with all legal requirements before filing suits nowadays, or you may have to suffer serious consequences-sj]

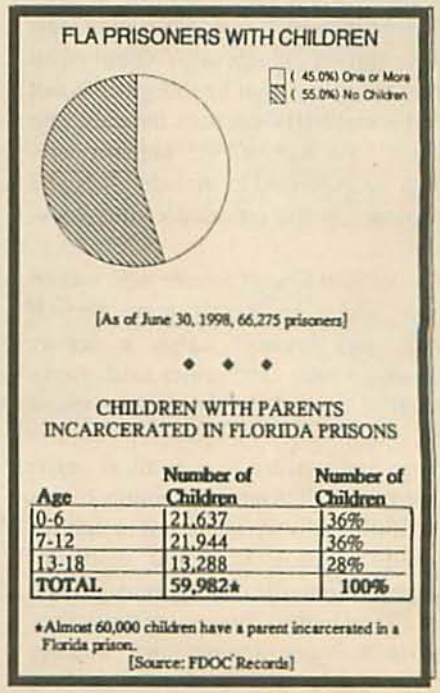
Deprivation of Visitation With Minor Child Action Not Moot, Action May Be Amended to State § 1983 Claim

Florida prisoner Randy Spencer filed a petition for declaratory judgment pursuant to Chapter 86, F.S., against a FDOC classification officer for unlawfully depriving him of his visitation with his children by a misapplication of the minor child visitation restrictions adopted into law during 1996 that only applies to those prisoners who have been convicted of a sex crime on a child under 16 years old. Spencer's declaratory judgment petition named classification officer D. Gonzalez as having wrongfully applied that law to him in July of 1996 and restricted his visitation with his children for almost the next two years. Spencer initially sought a declaration for the circuit court that Gonzalez in his official capacity had wrongfully applied the law to him and sought injunctive relief enjoining Gonzalez from such wrongful action.

On March 25, 1997, however, Spencer sought to amend his petition to allege the deprivation of federal constitutional rights under 42 U.S.C. §1983 and request compensatory damages from Gonzalez in his individual capacity. Spencer filed a motion to amend with a copy of his proposed amended petition attached. The circuit court did not take any action for almost a year, until Gonzalez filed a motion to dismiss in May of 1998 claiming the suspension of visitation privileges had finally been lifted and Gonzalez had been transferred to another institution, thus mooting the action. The circuit court then moved on Gonzalez's motion and dismissed the action as moot finding that there was no longer a bona fide, actual, or present need for declaratory relief and no longer a bona fide dispute between the parties (these elements must exist to seek declaratory judgment).

Spencer appealed the circuit court's dismissal alleging that the circuit court erred in dismissing the petition without having provided Spencer leave to amend the petition to add the § 1983 claim. The appeal court noted that Spencer had properly applied for the leave to amend, that he had not abused the privilege to amend, and that, "If, as Mr. Spencer alleges, Mr. Gonzalez deprived him of visitation with his children for over a year under color of state law in violation of federal constitutional rights, the question of entitlement to compensatory damages under 42 U.S.C. § 1983 is not moot." The appeal court REVERSED and REMANDED the case with directions that on remand Spencer be allowed to amend his petition to raise the § 1983 civil rights violation claim. See: *Spencer V. Gonzalez*, ____ So.2d ____, 24 FLW D1005 (1st DCA 4/16/99).

[Comment: It is refreshing to see a Florida prisoner correctly use the very useful and often overlooked or ignored judicial vehicle of declaratory judgement The advantages of declaratory judgment actions over strict extraordinary relief petitions are enormous, if a properly drafted petition in compliance with Chapter 86, F.S., is filed And, pursuant to the declaratory judgment statutes, any extraordinary relief may still be sought in the same action if a favorable declaration is obtained. Spencer also demonstrates that § 1983 actions may be filed in state courts, which provides many advantages in many instances, but which most prisoners seem to be totally unaware of. It is also refreshing to see someone go at these classification officers who have been applying the child visitation restriction to many prisoners to whom it does not apply. Ever since that law, § 944.09(l)(n), F.S., was adopted it has caused nothing but problems and misapplications. The misapplications are not surprising, however, as soon as the law went into effect the FDOC rather than making a case-by-case individual determination whether the law applied to a prisoner simply applied it to all prisoners with any kind of sexual offense and left largely untrained or overloaded classification officers to try to sort it out. Perhaps following this serious challenge by Randy Spencer the consequences of the incompetent handling of this very important issue to many prisoners will cause more careful review and application of this law that is questionable itself-sj]



(Continued from page 8)
from custody; he fatally shot her. The VINE system is operating in 31 states and in Monroe, Collier, Dade, Hillsborough and Duval counties in Florida.

• On April 15, 1999, the Florida Supreme Court accepted jurisdiction in the legal challenge to Constitutional Amendment No 2, titled "PRESERVATION OF THE DEATH PENALTY", which passed into law in last November's election. Allegations were that Amendment 2 was merely a ploy by FL lawmakers to block the S.Ct.'s efforts to do away with FL electric chair, deeming it cruel and unusual punishment and appointing lethal injections as the proper method. The Amendment changed the language of the FL Constitutional definition of cruel or unusual punishment to be in accord with the US Supreme Court's jurisprudence. Thus, ensuring that any future finding of what is cruel and unusual punishment must be determined in accordance with the US S.Ct. The Amendment enshrined not only capitol punishment, but the electric chair as the method of administering it in FL.

Georgia- Fulton County Jail authorities were told to provide adequate treatment for its inmates who have tested positive with HIV, a federal judge ruled on April 16, 1999. Fulton County Jail is presently without any form of system to stock and-administer drugs and treatment to HIV positive inmates. U.S District Court Judge Marvin Shoob, also commented during his ruling, that he thought the suit filed by eight HIV-positive inmates who claim to have received substandard care-should be expanded to include all health care issues at the crowded county lock-up.

• A Baldwin County inmate who was on suicide watch apparently hung himself about five minutes after a deputy checked on him, authorities said. Kerry Shiflett, 33, of Dahlonega, was found dead. Authorities said Shiflett used a garbage bag attached to a sprinkler outlet to hang himself from the ceiling of his cell. Shiflett was arrested last month for allegedly stealing $260,000 worth of equipment from the county water department. The Georgia Bureau of Investigations is now questioning other inmates about Shiflett's death.

Illinois- The Illinois House Judiciary Committee has taken steps to discover why, since 1977, Illinois has executed 11 prisoners while another 12 were removed from death row after they were found to be innocent. The Judiciary Committee has voted for a measure halting executions for one year to study the problem. Moratoriums also have been discussed in Indiana and Pennsylvania.

• The Illinois legislature's package which included a law requiring murderers to serve full sentences and select violent offenders to serve 85% of their sentences, was struck down by the Illinois Supreme Court. The so called "Truth in Sentencing" legislation was found to be violative of the constitution because it mixed unrelated subjects. The Supreme Court's ruling freed the first 18 of 2,570 people sentenced under the overturned law who were eligible for "good time" credits, which reduced their sentences.

Louisiana State prison officials at Angola were found by Legislative Auditor Dan Kyle to have tapped an inmate fund for $41,559 in food and household items. Some of the money was used to pay for banquets and barbeques for 28 events. Among the events were a Chamber of Commerce gathering and meetings of prison executives.

New York- Peter Farace, 25, died of an asthma attack in February 1986, at the Auburn Correctional Facility. Farace had requested a refill of an asthma inhaler, however, prison guards ensured his request never reached prison medical staff. While locked in his cell Farace had an asthma attack and slowly died while his lung filled with fluid and his blood vessels ruptured. On November 23, 1998, a New York court of claims judge, Nicholas Midley Jr.; awarded the family of Farace $350,000 in damages for Faraces death and $50,000 in interest.

North Carolina- Johnston County Sheriff Steve Bizzel wants to charge inmates $5 a night to stay in his jail. Bizzel said that a 34 year old state statute permits counties to charge inmates $5 a night. "The way I look at it is it's cheap rent for lodging, three meals and a guard to look at," Bizzel said.

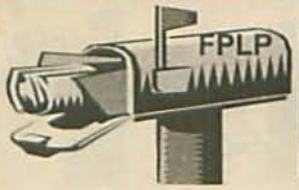
Oklahoma- On March 15, 1999 inmates- and employees of the Oklahoma State Penitentiary had to snuff out their cigarettes for good. Prisoners were given two weeks to rid themselves of tobacco products before prison officials deemed it contraband. The prison holds approximately 1,500 nervous inmates.

Tennessee- "It doesn't pay to do wrong", reads the sign above the door to the Morgan County Jail, a brick fortress painted battleship gray. Sewage dripped from the ceilings, inmates were not allowed to shower for days, and some nights the guards just locked the door and left. The U.S. Justice Department took action in 1997 after a female inmate, Shelly Massey, hanged herself with a sheet and her mother demanded an investigation. A lengthy inspection was performed by the Justice Department in which deplorable conditions were found, including unsanitary food preparation, bug infestation, and a lack of training for guards left in control of prisoners. Under the new Sheriff, Bob Gibson, the conditions in the jail promise to greatly improve, along with the supervision of the Justice Department.

Texas- On December 19, 1998, a female guard working at the French Robertson unit, Texas DOC, was raped by an inmate while conducting a bed check at 2:40am in one of the maximum security sections of the prison. Jessie Trevino Cortez, 22, a convicted rapist, opened his cell door, grabbed the guard and held her hostage for 2 hours, prison officials said. Twenty-four hours after the incident 80 state prisons were locked down during a state-wide "shake down". Prison officials said the lock down was not related to the assault at the French Robertson unit. Ironically, the unit was awarded the "prestigious prison accreditation" of the American Correctional Association on December 1, 1998, just two weeks prior to the assault.

• Texas Department of Criminal Justice (TDCJ), has put plans into action for the

(Continued on page 16)



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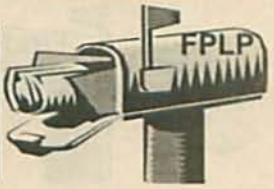

Dear FPLP, My bunky has let me read the last couple of issues and I find myself anxiously waiting on her to finish the latest. So, I must have my own copy.

I am very impressed with your efforts to help us, and extremely appreciative of the results! Thank you! B K LFC

Dear FPLP, You will find 19 stamps with this note to renew my order. Sorry I can't send more. You are all doing a fine job bringing the truth to the forgotten in DOC.

Your Legal Perspectives has helped myself and many others in ways only a reader could understand, from court to confinement to the free world, the truth is out all anyone has to do is read FPLP.

Every library in FOC should order and every family who would like to understand the truth about DOC should read FPLP.I for one have no income and I have to save up stamps each year just to reorder FPLP, but there are many people who can send $6 and don't. They try to get other inmates copies, when if they would just give up a few cups of coffee or cookies they would be helping us all and themselves. Be a part of the family that brings the truth to all. With out FPLP we inmates would still be in chains and the free world people would be in the dark ages. So I ask all to open up your heart and send your book of stamps or $6.

And thank you FPLP for all the help you have given me. Gary Bishop SRCI

Dear Staff: What I want to sound off about is the food service within the DOC and at Charlotte CI. When I came into the system in 1980, the DOC master menus provided and the inmates were served three substantial, nutritious, wholesome meals per day. We could select clean food trays from the dirty ones and see the food items being put on our trays. Some of the items were self-served. Food service back then was not really an issue as evidenced by the majority of the class action lawsuits filed by Florida prisoners over the past 19 years But now although it's still not an issue, the food service at many of the prisons within the DOC is, in my opinion, bad if not sickening. At just about every institution that contracts with a food catering company, there is a problem with the food service. Either the portions are small the preparations are poor, or the food items served are of the poorest quality. The rolling doors are sown on many of the serving lines, and this prevents the observation of unsanitary food service that someone else may not recognize and complain about. At some prisons, inmates are no longer allowed to select their own food trays, and at Charlotte, I have received many meals served on defective, stained, or dirty food trays. To better the food service conditions at CCI, I have filed many grievances at the institutional and Central Office level, however, to no avail. I have filed so many legitimate grievances, which were denied, until I have stopped complaining. Out of all the grievances that I have filed, the only one I recall being approved was the grievance I filed about the use of food trays with sharp jagged edges. I have filed about the preparation and cooking of foods by inmates who don't know how to cook, the poor quality of the foods served, the insufficient portions served, the dirty food trays, and many other food service problems that present a hazard to an inmate's health; however, to no avail. On one occasion I filed and was told that I was not at McDonalds. However, although I am not at McDonalds where you "have it your way", I am not even getting it the way it is supposed to be. For the health of all the prisoners incarcerated, I hope the new Secretary of DOC puts a boot in the companies that cater food service to the DOC, kick them out of the door, and employ certified chefs and dieticians at every major prison. For the same reason, I hope the Inspector General discovers the other problems mentioned above and takes corrective action. Until then, the food service at many prisons is going to stay the same—bad. GS CCI

Dear Sirs, I have read your newsletter for many years and have decided to get my own subscription so as to let you know that your price increase will not erode your reader base and that you have thousands more readers than what your actual subscription list shows.

Keep up the good work and consider myself to be one of your ardent fans and supporters. BVL GCI

Dear FPLP, I have been a subscriber now for 4 years and I must admit that your newsletter is the best one I have ever come across for Florida Inmates. I would like to tell you about some of the things that are going on here at CCI. The conditions here are very bad, especially in the Close Management units. Being on C.M. here is like doing time in a Nazi concentration camp. They allow us to clean our rooms once a week (and half the times they don't do it at all) A lot of guys here are being assulted and chemically maced for no other reason but talking on the door. The use of grievances is nothing but a red flag to the officers to retaliate on you by writing false D.R.s and verbal and physical abuse upon you. Right now this Institution has 2 dorms holding 400 inmates on C.M. they also are converting another dorm for C.M. (another 224 beds for use for C.M.) and they are building an 800 man annex for nothing but C.M. inmates. Slowly but surely the FDOC is locking down the system so that they will have more control and be able to do what they want to us. Inmates need to wake up and see that we are heading for some really hard times unless we help stop it. I urge all inmates to unite and stop being sheep and start trying to help. There are many non violent ways help. From boycotting the canteen to not using the telephone system to filing

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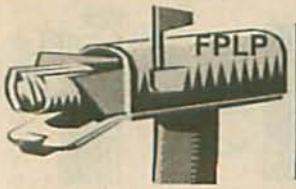

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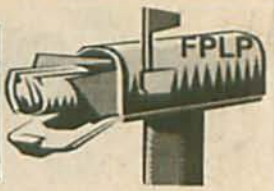

grievances to having our loved ones get involved. If we don't stop this soon it will become another instance of horror and torture in our history. When you treat a man like and animal he will become an animal over time. Stop the madness before its to late. Thank you for all that you are doing for us in here. Keep safe, stay strong and always be in the light! RW CCI

Dear FPLP, This is just a little hello and a book of stamps enclosed to renew my subscription. I see no problem with the subscription rate increase, it's money well spent.

I will say in closing that some of the officers here also find your publication enlightening informative and it does add a drop of insight into their struggle with professionalism in a world of madness. That's refreshing. BP

Dear FPLP, I've been getting FPLP for the past couple of years. And I can't believe it could happen, but each issue gets better. The FPLP has done so much to keep the prisoners informed and aware in the past and also it's finally making the public aware, I'm sure that your aware of the purposed rules change for Close Management. Another move by the FDOC to add further punishment to it's prisoners. They purpose to cut our canteen items to 5 no food items monthly. If you order two pens, that's two of your items gone. They want you to have nothing in the FDOC. No self respect, no spirit, oh well, I wish there were more like the FPLP staff in Florida. Thank you for what your trying to accomplish. PY UCI

FPLP is great! It has helped me with my case, and it has also helped me to help other's with their cases. I am a Law clerk trainee waiting to go to the FDOC legal research class at Orlando (CFRC).

FPLP has also "opened up my eyes" to what is really going on at some of these "concentration camps" in this state. I have just transferred farther south from one of those "camps". Keep up the good work! Thank you for helping "us". SK APCI

Dear FPLP, As many other institutions have their secrets in their operating methods. We here at Lawtey have experienced some frivolous times.

Example: When work squads leave for work on weekday mornings, some inmates are pulled out of line and searched; leaving them standing in nothing but boxers and T-shirts.

We (inmates) are told that we are carrying controlled substances (namely marijuana) in our boxers. It becomes even more hectic when the temperature exceeds below 32 degrees outside. As in 19, 22, and 28 degrees in temperature.

Grievances are written but many are returned within a day or two stating that these matters will be looked into but nothing stops the searches. We have a female officer who consistently pushes issues that in turn arouses the sergeant of the shift and then later the inmate is locked-up in confinement.

Things at this camp are changing daily but never for the better. It almost seems impossible considering I'm only one individual because others here are too scared to challenge any discrepancies of theirs.

The IOP (chapter 33) is totally overlooked to suit the institutions need. I'm very sorry to here about the deaths of two female inmates at Jefferson C it goes to show that more (inmates) need to quit hiding and make (help) make changes before it gets worse.

I want to thank and to encourage all of you to keep pressing on with what is obvious a positive outcome (newsletter). Thank you for your time to listen. M.N. LCI

Dear FPLP: Being an FPLP subscriber I'm greatly impressed with all the time and work put into this newsletter by Ms. Burns and the staff. My hat's off to ya! I need to cry out to all the folks who read FPLP, especially those who might be considering applying for clemency with the use of counsel or a paralegal. Ronald Rhue (of the Rhue Group, a paralegal association, last known address, 1096 Fay Ave., Largo, FL 33771, PH. 727-524-2859) took my wife's money over a year ago and has not as of yet showed my wife or myself anything towards preparation for my clemency package. Rhue will not accept my phone calls or answer my letters. None of his promises have been realized. My wife contacted the governor's clemency office and the attorney general and was informed that there have been other complaints against Rhue. My wife is currently working with the attorney general and the Florida Bar in an attempt to at least have Rhue return all the paperwork that I had sent him, and hopefully our money. I personally believe that Ron Rhue, an ex-con himself, still has some "con" in his life. All persons who have or may be considering a business relationship with Mr. Rhue should be wary and look elsewhere for like services from a qualified and reputable provider. C.H. "Monty" Montgomery, Col CI

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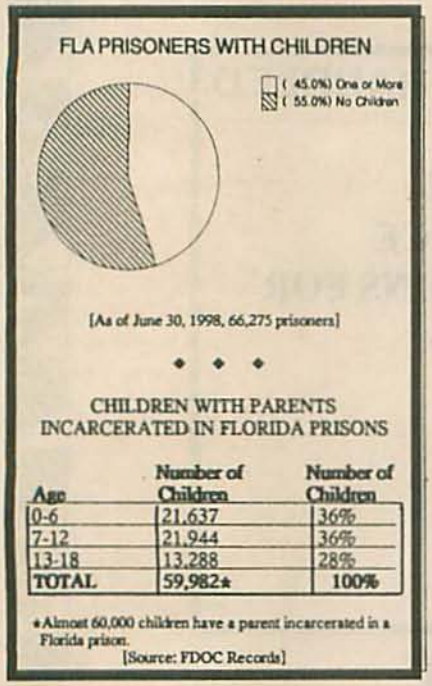
building of segregation units in Texas prisons. These units are said to be used only to house violent prisoners, and will include cells with shower and toilet facilities. These facilities enable prisons to keep a prisoner closed in a single cell for long periods with minimum man power use. A computer prompts the guards to turn on showers to the cells for 5 minutes each day, and the food is slid through a slot in the door. Prisoners are kept in total isolation with minimal movement depriving them of any outlet from the oppressive environment.



Virginia- Virginia's first super-maximum prison, Red Onion State Prison, has become the focus of the Human Rights Watch, after reports that inmates at the unit have been fired upon with shotguns, shocked with electronic stun devices, and locked in cells for 20 hours a day. Since its opening in August of 1998, staff members at the Red Onion unit have fired shotguns at least 63 times and hit inmates at least 10 times with so-called "stinger rounds" that consist of rubber pellets. Most of the injuries have been slight, however, one inmate had to be brought to the hospital with pellets imbedded in his face. The extraordinarily harsh and restrictive conditions at the unit were designed for extremely violent inmates, however, unable to find enough "worst of the worst", the Virginia DOC is simply sending men to the prison who do not fit the criteria and could be safely confined elsewhere.

INFORMATION NEEDED FROM WOMEN PRISONERS

Bonnie Kerness, of the American Friends Service Committee (AFSC), is seeking testimonials from women prisoners relating experiences with extended isolation and/or the use of torture devices. The testimonies will be used in reports to international organizations that monitor U.S. human rights violations. The receipt of testimonies will be acknowledge. If you wish to provide such information, please contact: Bonnie Kerness, AFSC, 972 Broad St., Newark ,NJ 07102.■

FDOC DISCIPLINARY PROCEEDINGS: SYSTEMATIC DENIAL OF LIVE WITNESS TESTIMONY

The Supreme Court, in *Wolff v. McDonnell*, addressed the constitutionally required due process protections that should be afforded to prisoners who are subject to in-prison disciplinary proceedings that may result in the loss of gain time that has been authorized by state statutes or regulations.[1] Besides establishing several other minimal due process requirements that prison officials must afford prisoners in such proceedings, the Court also stated:

> We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.[2]

The right to call witnesses to appear in person at a disciplinary hearing, however, is not absolute, and is subject to certain qualifications. As noted above, witnesses do not have to be allowed if it would "be unduly hazardous to institutional safety or correctional goals." The Court also identified a couple of other situations where prison officials may properly refuse to allow witnesses to testify at a disciplinary hearing:

> Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution.... [W]e must balance the inmate's interest in avoiding the loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority.... Although we do not prescribe it, it would be useful for the [disciplinary] Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.[3]

Thus, the Court identified that the authorized reasons for refusing to call witnesses to testify in person at the hearing are: (1) an individualized hazard to institutional safety or correctional goals; (2) irrelevant (e.g., a nonmaterial witnesses); or, (3) lack of necessity (e.g., witness testimony repetitious of other witnesses, testimony that will obviously not contribute to the defense, etc.). But the Wolff Court only "suggested" that prison officials should have to state their reason for refusing to allow a witness to testify at the disciplinary hearing.

Approximately ten years later, in 1985, the Supreme Court expounded on its holding in Wolff in *Ponte v. Real*,[4] and held (as had not been specifically done in Wolff) that federal due process **does** require prison officials to state one or more of the authorized reasons whenever a request to call a witness to testify at the hearing is denied by prison officials. In this context, the Ponte Court held that:

> [P]rison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but they may do so either by making the explanation part of the "administrative record" in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a "liberty" interest is challenged because of the claimed defect [witness denial]. In other words, the prison officials may chose to explain their decision [to refuse to call the witness] at the hearing, or they may chose to explain it "later." Explaining the decision at the hearing will of course not immunize officials from a subsequent court challenge to their decision, but as long as the reasons are logically related to preventing undue hazards to "institutional safety or correctional goals," the explanation should meet the due process requirements as outlined in Wolff.[5]

Thus, while prison officials have fairly broad discretion, within the authorized reasons, for refusing to call a requested witness to testify at the disciplinary hearing, they do not have unlimited discretion to refuse to allow such witnesses.

The reasons outlined by the Wolff and Ponte decisions are the only valid and authorized reasons for refusing to allow witnesses to testify in person.

If other reasons are used for denial of live witness testimony, then arguably, federal due process (and possibly the prison officials' own rules) is violated. Also, as stated in Wolff, the reasons must be applied in an individualized manner. In other words, prison officials must determine that each individual witness requested either presents an undue hazard to institutional safety or correctional goals if allowed to testify, or is irrelevant, or is unnecessary for the defense. And their decision is judicially reviewable for abuse of discretion according to the above quote from the Fonte decision.

Live Witness Testimony in FDOC

In response to the decision in *Wolff v. McDonnell* (that prisoners facing disciplinary proceedings "should" be allowed to "call" witnesses to testify at the hearing unless certain conditions exist) the Florida Department of Corrections (FDOC) adopted administrative rules that incorporated and complied with Wolff. In 1977, three years after Wolff was decided, the department's rules stated in pertinent part:

[33-22.08(13) (i)]

(i) The inmate or the Disciplinary Team may request material witnesses. The chairman will call those witnesses (staff or inmates) who are available and who are determined to be necessary for an appreciation of the circumstances. Repetitive witnesses will not be called Unavailable witnesses may submit written statements. Witnesses will not be called if doing so would create a risk of reprisal or would undermine authority. The inmate witness must be willing to testify. An inmate witness may elect to offer an oral or written statement to the investigating officer in lieu of a personal appearance before the Disciplinary Team. The chairman should note in the report the reasons for declining to call requested witnesses.[6]

That rule fairly complied with Wolff. The routine procedure was to call requested witnesses before the hearing team, if available, to testify in person, if their testimony was relevant, not repetitious, and would not create a risk of reprisal or undermine authority. There was also a provision that if any requested witness was not called before the disciplinary team to testify in person (whether because of an authorized reason for exclusion existed or because the prisoner witness "elected" to submit a written statement instead of appearing in person) then the team chairman was required to note in the report the reasons for not calling the witness to the hearing to testify in person.

During 1979, in a Florida case, where prison officials failed to note one or more of the authorized reasons for not calling a requested witness to appear at a disciplinary hearing to testify, the First District Court of Appeals held that prison officials must provide such reason(s). The prisoner had been charged with refusing to work. He claimed that he was not refusing, he was medically unable to work, which could be verified by medical staff. He requested one of the prison 5 medical staff to be a witness. The disciplinary team determined the witness was "not necessary," because the only issue was whether the prisoner had worked or not. The circuit court upheld the prison officials, but the appeal court disagreed. The appeal court held that under the circumstances the prison officials' claim that the witness was "not necessary" was an insufficient reason for not allowing the witness to testify at the hearing.[7]

FDOC Witness Rules Evolve

In 1987 a Florida prisoner brought a challenge in state court against the FDOC claiming, in part, that he was denied constitutionally required due process where he was not allowed to call witnesses at several disciplinary hearings, and that a "blanket ban" on calling witnesses at FDOC disciplinary hearings existed generally. The First District Court of Appeal determined that if the prisoner's allegations were true they "would constitute violations of Wolff and Ponte." The Court directed that an evidentiary hearing be held in the circuit court to determine the truth of the prisoner's claims.[8]

Following that case, in January of 1988 the FDOC changed its rules regarding the calling of requested witnesses to appear in person at disciplinary hearings. But the rule changes still fairly complied with the decisions in Wolff and Ponte. Those changed rules provided in pertinent part, that:

[33-22.07(1)(a) and (b)1. and 5.]

(a) The Hearing Officer or the Chairman of the Disciplinary Team may call inmate or employee witnesses. Subject to the provisions of paragraph (b) below, any witness whose testimony is necessary for a proper evaluation of the circumstances, or whose' testimony is requested by the inmate, shall be called to testify at the hearing.

(b)1. No witness shall be called if it is clear that his testimony would be irrelevant, immaterial or repetitive.

5. The Hearing Officer or the Chairman of the Disciplinary Team may determine that certain witnesses should not be called or that certain information shall not be disclosed because to do so would create a risk of reprisal, undermine authority, or otherwise present a threat to the security or order of the institution. The reason for any restriction shall be frlly explained in the record of the hearing, but information that should not be disclosed shall be withheld from the inmate.[9]

Those rules properly provided that requested witnesses will appear to testify in person at the hearing, if requested by the Hearing Officer, Chairman of the Disciplinary Team, or the charged prisoner The rules set out the Wolff authorized reasons for refusing to call a requested witness to testify in person, and provided that the reasons for any restrictions on calling requested witnesses must be explained in the record of the hearing, except when there was a valid security risk reason for not doing so.

The Florida First District Court of Appeals had a chance to review those rules when a prisoner judicially challenged the failure of a disciplinary team to include in its report of the hearing any reason(s) for not calling an eyewitness to testify at his disciplinary hearing.[10] The appeal court determined that such failure to state authorized reasons for not calling the witness was a violation of the department's own rules. The Court also found that there were no valid reasons apparent in the record for not complying with the instructions set forth in Wolff v. McDonnell - i.e., that witnesses should be called to appear at hearings absent hazards to security, correctional goals, irrelevancy, etc.[11]

Further Evolution

Within three months of the above decision by the District Court of Appeals, the FDOC again changed its rules regarding witnesses appearing at disciplinary hearings. Those changes were significant, and were the first step the FDOC took to have its rules make live witness testimony the exception rather than the routine. During April of 1988 the FDOC rules were changed to provide different witness provisions for "minor" and "major" disciplinary proceedings, and to add provisions for written statements to be used instead of live appearances at disciplinary hearings. The changed rules read in pertinent part:

[33-22.005(4) (b))

(b) (If) names of witnesses are given, the investigating officer shall then interview both inmate and staff witnesses and, appropriate, have the Witness Statement Form D4-856 completed.

(Minor proceedings)
[33-22.006(1) (h)]

(h) (If) the inmate pleads "not guilty," evidence is to be presented, including statements from appropriate inmate and staff witnesses.

(Major proceedings)
[33-22.006(2) (g)]

(g) [I]f the inmate pleads "not guilty," evidence is to be presented, including appropriate inmate and staff witness.

(All proceedings)
[33-22.007(2)(b)-(e)]

(b) The inmate, Hearing Officer or Disciplinary Team may request material witnesses. Witnesses, staff or inmate, found to be necessary to the proceedings shall be called or their written statements provided.

(c) Witnesses shall not be called or certain information disclosed if doing so would create a risk of reprisal, undermine authority or otherwise present a threat to the security or order of the institution. The inmate witnesses must be willing to testify but may alter an oral or written statement to the invesdgating officer in lieu of a personal appearance. Notations shall be made in the report with reasons for declining to call witnesses or for restricting any information.

(d) No witness shall be called if it is clear that his testimony would be irrelevant, immaterial or repetitive.

(e) if a witness is unavailable to testify at the hearing, his signed written statement may be accepted as evidence. Signed statements used as evidence shall be read to the inmate defendant except as provided in paragraphs (a) and (c) ahove.[12]

In the above rules it is notable that the FDOC changed its rules to provide that before the disciplinary hearing is held, the investigating officer would interview requested witnesses, and if s/he feels it is "appropriate," then Witness Statement Forms will be completed. In the case of "minor" disciplinary proceedings (that still could have resulted in the loss of gain time), if the charged prisoner pled "not guilty," then those written "statements from appropriate inmate and staff witnesses," would be presented as evidence.

In the case of "major" disciplinary proceedings, however, if the charged prisoner pled "not guilty," then "appropriate inmate and staff witnesses" would be presented. However, although the changes to the rules appeared to distinguish between "minor" and "major" disciplinary proceedings, the rules also stated that in all cases: "[w]itnesses, staff or inmate, found to be necessary to the proceedings shall be called or their written statement provided." That rule created the appearance that live witness testimony and written witness statements were the same and interchangeable in all situations. And that was the way it was interpreted by disciplinary teams after that rule was adopted, i.e. written witness statements could take the place of live witness testimony as long as the "investigating officer" determined that statements, instead of live appearances, were "appropriate."

Systematic Denial of Live Witness Testimony

During 1992 the FDOC was again challenged in state court by a prisoner claiming that he had been denied the opportunity to have his requested witnesses give live testimony at a disciplinary hearing. The circuit court in that case found that the prisoner had not submitted any evidence to support his claim and "remanded" the case to allow the prisoner 30 days to furnish such evidence. The FDOC requested a clarification of that order to which the circuit court responded that the order was to give the prisoner "the opportunity to present evidence, by affidavit or other documentary presentation to establish that he in fact requested that witnesses appear live and give testimony at any of the disciplinary hearings." The prisoner, however, failed to provide such evidence within the time allowed by the court and his challenge was denied. The prisoner appealed and the appeal court affirmed the denial of relief without prejudice to the filing of a new petition in the circuit court to plead specific facts that had not been in the first petition.[13]

The following year, in 1993, another prisoner challenged the FDOC in state court claiming that the reasons given for refusing to call his requested witness to a disciplinary hearing were not valid reasons under the department's own rules. The reasons for refusing to call the witness to appear at the hearing were because "it would do no good" and "the witness' written statement was read during the hearing." The circuit court found these were not valid reasons according to the department's own rules and granted the prisoner relief. The FDOC appealed. On appeal the FDOC argued that its rules allowed written witness statements to take the place of live witness testimony at disciplinary hearings. The appeal court disagreed, and found that neither of the reasons for refusing to allow the witnesses to testify at the hearing were authorized reasons for witness denial under the department's own rules. The appeal court also noted that even though in Ponte v. Real it had been held that prison officials do not have to sate their reasons for not allowing a witness to testify at the hearing at the time of the hearing, FDOC rules required the reasons to be documented in the record of the disciplinary hearing. The appeal court held that the prisoner had a clear legal right to call his witness to appear at the hearing, barring a legitimate reason why the witness could or should not have been called.[14]

On October 1, 1995, the FDOC again changed its rules concerning witnesses testifying in disciplinary proceedings (among numerous other changes to all the disciplinary proceeding rules). Those changed rules remain in effect today. They deleted the difference between "minor" and "major" disciplinary hearings concerning whether witnesses could make a live appearance or submit a written statement. In fact, the current

rules make written witness statements the routine and live appearances at disciplinary hearings the extreme exception in all cases. The current rules provide:

[33-22.006(1) (g)]

(g) [I]f the inmate pleads "not guilty." evidence is to be presented, including witness statement forms obtained from witnesses.

[33-22.006(2) (d)]

(2) The hearing officer or chairman of the disciplinary team has the authority to require the following actions:

(d) That any witness(es) appear at the hearing.

[33-22.006(3)]

(3) The inmate may request that witnesses appear at the hearing, but inmate witnesses shall not be routinely called before' the disciplinary team or hearing officer to provide live testimony for the following reasons:

(a) Multiple hearings are routinely scheduled at one time and the presence of witnesses during these hearings presents a potential risk for the facility and the safety of staff and inmates as well as a diversion of additional security staff from assigned posts.

(b) The routine presence of inmate witnesses during hearings would cause a disruption in the orderly operation of the facility, as it removes inmates from routine work assignments and programs.

(c) The testimony of witness requested by the charged inmate shall be presented through written Witness Statement, Form DC4-804c, unless the inmate:

1. Has completed and signed the witness request form during the investigation;

2. Makes a request at the hearing for a witness to appear to provide live testimony; and

3. The disciplinary team or hearing officer determines that the reason provided by the charged inmate for requesting live testimony overcomes the burden on institutional staff caused by the retrieval and escort of live witnesses as well as the diversion of security staff from assigned posts due to the potential security risk that may result from the appearance of live inmate witnesses and the disruption to the assignments and activities of inmate witnesses.

[(d) and (e) omitted]

(f) In no case shall a witness be called live or by written statement if his testimony would be irrelevant, immaterial or repetitive.

(g)Witnesses shall not be called or certain information disclosed if doing so would create a risk of reprisal, undermine authority or otherwise present a threat to the security or order of the institution. The inmate witnesses must be willing to testify by means of an oral or written statement provided to the investigating officer, hearing officer, or the disciplinary team.

(h) [W]here a witness statement is not read or the inmate witness does not appear at the hearing as requested, the reason shall be recorded in the witness disposition form.

(i) The charged inmate will not be permitted to question or cross examine witnesses during the hearing.

[Emphasis added to above rules]

The result of the above current rules is system-wide denial of all requests for live witness testimony during disciplinary proceedings. The disciplinary teams or hearing officers are never determining that the reason provided by the charged prisoner for live witness testimony overcomes "the burden on institutional staff caused by the retrival and escort of live witnesses as well as the diversion of security staff from assigned posts due to the potential security risk that may result from the appearance of live inmate witnesses and the disruption to the assignments and activities of inmate witnesses."[15]

If there is any doubt of the department's intention that absolutely no witnesses will be allowed to present live testimony at disciplinary hearings, it is dispelled by simply reading the back of the Disciplinary Report that is delivered to charged prisoners. It clearly states: "The testimony of witnesses shall be presented by written statements. See Rule 33-22.006(3) for complete information regarding witnesses."[16]

Systematic/Categorical Denial of Live Witness Testimony Violates Due Process

Following the adoption of the above rules, in 1996, another Florida prisoner took the FDOC to task in state court for failing to state valid reasons for refusing to allow his requested witness to give live testimony at a disciplinary hearing. Apparently the disciplinary hearing had been held before October 1, 1995, before the above rules went into effect, as the prisoner claimed that the FDOC was required to note in the report of the hearing the reasons for refusing to allow his witness to appear at the hearing. The circuit court denied the prisoner's petition for relief and he appealed. The appeal court noted that there was nothing in the record to indicate "the prison official's reasons for denying [the prisoner's] request to produce [the witness] in person." The appeal court also noted, "[there is no transcript of the hearing or notation in the record documenting the reason for relying on the witness's [written] statement alone. However, rather than simply overturn the circuit court's denial of the prisoner's petition, the appeal court remanded the case for the FDOC to either expunge the disciplinary report or hold another hearing.[17]

At least six federal circuit courts have interpreted Wolff v. McDonnell to require a case-by-case determination by prison officials in the correctness of denying a prisoner's request for witness. Those courts have found that blanket policies that categorically prevent witnesses from actually appearing at disciplinary hearings violate the Wolff due process principles.[18]

In the most recent federal case the Seventh Circuit Court of Appeals, in Whitlock v. Johnson, [19] struck down as unconstitutional Illinois DOC rules that provided that instead of actually bringing requested witness to testify at disciplinary hearings, officials simply interviewed the proposed witnesses and presented the disciplinary committee with a unsworn report summarizing the witnesses testimony. That Court, as have several others, held that determinations to exclude live witness testimony must be made on a case-by case basis, or due process is violated.

In a situation very similar to the one currently existing in the FDOC, in 1996 the Ninth Circuit Court of Appeals struck down as unconstitutional a jail policy that was used to prevent all requested witnesses from giving live testimony at disciplinary hearings.[20]

Challenging FDOC's Policy

Whenever a Florida prisoner is charged with a disciplinary infraction and there are witnesses that s/he can request, the witnesses should be listed with the investigator. The investigator is also required to allow the charged prisoner to make a written statement at that time. That written statement should include (or only state) that ALL witnesses are requested to appear in person before the disciplinary team to present live testimony. Additionally, when the investigator interviews the requested witnesses they should document

(Continued on page 21)

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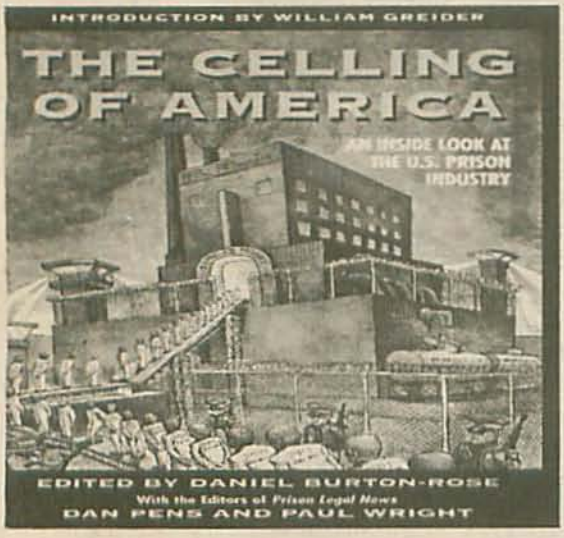
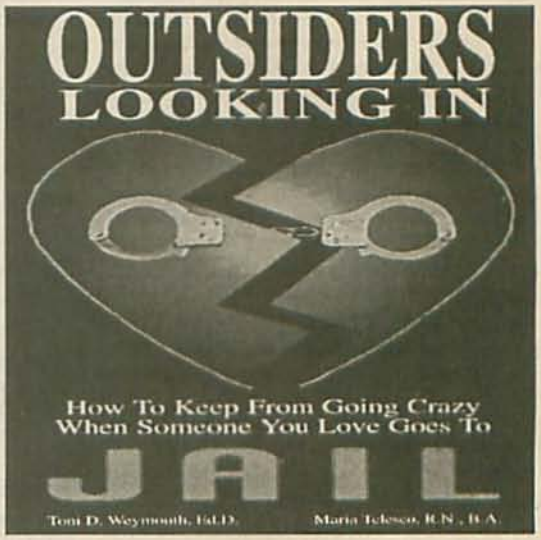


The Celling of America: An Inside Look at the U.S. Prison Industry by Daniel Burton Rose, Dan Pens and Paul Wright. Common Courage Press, 1998. Paper Back, 264 Pages. $19.95

The Celling of America is the critically acclaimed *Prison Legal News* anthology that is already in its second printing. In eight chapters this book presents an inside look at the workings of the American criminal justice system today. The book examines the death penalty, control units, the politics of prisoner-bashing, the role of the media in the current anti-prisoner climate, prisoner struggles, prison slave labor, racism, brutality, and corruption among prison employees, the role of the gun lobby and the guards unions in formulating criminal justice policy, the downward spiral of prison conditions, private prisons and much, much more. The perfect introduction into the reality and politics of modern American justice, at all levels.

OUTSIDERS LOOKING IN: How to Keep from Going Crazy When Someone You Love Goes to Jail. by Toni Weymouth, Ed.D., and Maria Telesco, R.N., B.A.. OLINC Publishing, 1998. Paperback, 351 Pages. $19.95

When someone is accused or convicted of a crime, the invisible and forgotten victims are his or her family, friends, and loved ones. While the family members of the accused have committed no crime themselves, they are often shunned by relatives, ostracized by neighbors, fired from their jobs, even "disfellowshipped" from their churches. Many have no where to turn. A few have become suicidal. *Outsiders Looking In* is an aid to those who love someone in jail or prison, and a caution to those who thought it could never happen to them. It's everything you never wanted to know about the Big House, but didn't now who or what to ask: arrest, lawyers, court, sentencing, prison rules and regulations, pitfalls and how to avoid them, death row, stress and stress reduction techniques, support groups and organizations. An invaluable resource.



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(Continued from page 19)

on their witness statement forms that they have additional testimony that they wish to present in person at the disciplinary hearing (this is often very true as only about four inches is available on the witness statement forms for the witness to write in).

It is important that the charged prisoner repeat his request for the witnesses to appear in person at the hearing.[21] Since Florida prison disciplinary hearings are not recorded, to avoid disciplinary team members later "not being able to remember" that you requested the witnesses to appear live, it would be the best practice to present the hearing team with a written statement (keep a copy for yourself, of course) of your own, setting out your defense in numbered paragraphs and restating that you request that the witnesses appear in person.

If the disciplinary team fails to document a valid reason (as set out in Wolff v. McDonnell and Ponte v. Real) why witnesses were not allowed to testify at the hearing in person, or simply documents that "witness statements read," as most often is done, and that fails to explain how an individualized determination was made on each requested witness to justify excluding them from giving live testimony, then you will have an excellent issue for appeal and for any subsequent judicial review.[23] You, of course, would need to raise this issue on all of your administrative appeals to fully exhaust the administrative remedies before seeking review by a court.[24] Failure to exhaust each alleged violation through the administrative appeals process will prevent any unexhausted claims from being raised later in court for the first time. It is important to realize that violations of federal due process and mandatory administrative rules may be separated into two claims. You may claim in such a case that your due process rights under federal law was violated and that the department failed to follow its own rules.

This article is not intended to be all inclusive. It is intended to stimulate further research and pressure on the FDOC to comply with the law. Prisoners who are interested in this subject should actually read the cases cited in this article and in the end notes. -Bob Posey

End Notes

1. Wolff v. McDonnell, 94 S.Ct 2963 (1974). See also, Sandin v. Conner, 115 S.Ct 2293 (1995) (reaffirming Wolff, but establishing a new method of determining whether a state-created liberty interest exist).
2. Wolff, Id, at 2979.
3. Wolff, Id, at 2979 (emphasis added).
4. Pointe v Real, 105 S.Ct 2192 (1985).
5. Id, at 2196 (emphasis added).
6. Rule 33-22.08 (13)(i), FA.C. (1979). See also: Roberts v. Brierton, 368 So.2d 117, 118 (Fla. 1st DCA 1979) (quoting that rule); and Piccrillo v. Wainwright, 382 So.2:1 743,746, n.1.(Fla. 1st DCA 1980) (quoting that rule).
7. Roberts v. Brierton Id.
8. Adams v. Wainwright, 512 So.2d 1077 (Fla. 1st DCA 1987) ("permitting an inmate the limited right to call witnesses is a mandatory prison official duty under the United States Constitution.").
9. Rule 33-22.07(1)(a),(b)1. and 5., F.A.C. (1988) (emphasis added). See: Sims v. Dugger, 519 So.2d 1080, 1082 (Fla. 1st DCA 1988) (quoting rule).
10. Sims v. Dugger, Id.
11. Id.
12. Rules 33-22.005(4)(b); 33-22.006(1)(h) and (2)(g); 33-22.007(2)(b)-(e), FA.C. (eff. Apr.1988) (emphasis added). See:Holcomb v. DOC, 609 So.2d 751, 755 (Fla. 1st DCA 1992) (quoting these rules in part).
13. Holcomb v. DOC, Id.
14. DOC v. Marshall, 618 So.2d 777 (Fla 1st DCA 1993).
15. Rule 33-22.006(3)(c)3., F.A.C. (1995).
16. DC4-804, Disciplinary Report Form, (eff. 101-95). Some institutions are beginning to use computer-generated Disciplinary Report Forms, eventually all institutions will. However, those computer-generated DR forms also state that: "The testimony of witnesses shall be presented by written statement"
17. Williams v. James, 684 So.2d 869 (Fla. 2nd DCA 1996).
18. E.g., Whitlock v. Johnson, 153 F.3d 380, 385-389 (7th Cir. 1998); Forbes v. Trigg, 976 F.2d 308, 317 (7th Cir. 1992); Ramer v. Kirby, 936 F.2d, 1102, 1105 (10th Cir. 1991); Grandison v. Cuyler, 774 F.2d 598,604 (3d Cir. 1985); King v. Wells, 760 F.2d 89, 93 (6th Cir. 1985); Dalton V. Hutto, 713 F.2d 75,78(4th Cir. 1983); Bartholomew v. Watson, 665 F.2d 915,918 (9th Cir. 1982). But See: McGuinness V. Dupois, 75 F.3d 794 (1st Cir. 1996) (Due process not violated by not calling requested witnesses from general prison population when disciplinary hearings held in confinement unit. Reasons for exclusion included legitimate security concerns and prisoner's claim that witnesses would only have been able to "explain" what they saw much better" than in their written statements.)
19. Whitlock v. Johnson, Id.
20. Mitchell v. Dupoik, 75 F.3d 517,525-26 (9th Cir. 1996).
21. Rule 33-22.006(3)(c)2., FAC. (eff. 10-1-95).
22. Rule 33-22.006(1)(g), FA.C. (eff. 10-1-95) ("The inmate may make any closing statement, written or verbal, concerning the infraction for consideration by the hearing officer or disciplinary' team.")
23. See: DOC v. Marshall, 618 So. 777, 778-79 (Fla. 1st DCA 1993) (FDOC officials simply stating in record that "witness statements read" is not a valid reason for refusing to call witnesses to testify in person at hearing).
24. A prisoner alleging that his right to have witnesses appear at a disciplinary hearing was violated under a "blanket ban" on live witness testimony, or that the reasons given by prison officials for the exclusion of the witnesses were not a valid reasons according to Wolff and Ponte, or not valid under the department's own rules, must set out "detailed factual allegations" in the petition or complaint that is filed with the court. Those "detailed factual allegations" must include: (1) that the prisoner requested to call witnesses but was denied; (2) that the witnesses were material as evidenced by a list of specific witnesses requested and a brief statement of what their testimony would have been; and (3) that either the department made no notation in the record giving valid reasons for not calling the witnesses to the hearing or that the reasons given were invalid (per Wolff and Ponte and/or the department's own rules). See: Holcomb v. *DOC*, 609 So.2d 751, at 755 (Fla. 1st DCA 1992).■

PAST ABUSE REPORTED BY PRISONERS

According to a new report from the U.S. Justice Department released during April, more than a third of the women in state prisons and jails say that they were sexually or physically abused as children. That is more than twice the reported rate of child abuse for women generally. Male prisoners who claim to have suffered abuse as children was much smaller, with about 14 percent of male prisoners saying they were abused as children, but that figure is still twice the national rate of 5 to 8 percent for men generally.

The survey of prisoners in both state prisons and jails was conducted in 1996-97. The Justice Department report documents that more than 36 percent of women prisoners say they had been sexually or physically abused at age 17 or younger.

Not surprising, the survey also found alcohol and drug abuse higher among prisoner who reported suffering child abuse, with 80 percent of abused female prisoners and 76 percent of abused male prisoners saying they had used illegal drugs regularly as compared to 65 percent of female and 68 percent of male prisoners who reported regular drug use and who had not been abused.

The survey found that a third of women in state prisons and a quarter of

those in jails reported having been raped before incarceration. Almost half of all women prisoners surveyed said they had been physically or sexually abused at some age before their incarceration.

Among state prisoners, those reporting child abuse were more likely to be incarcerated for a violent crime than those reporting not to have been abused.

The report's findings show that prisoners who grew up at least partially in foster care, or if their parents were heavy alcohol or drug users themselves or if a family member had been imprisoned, reported higher levels of prior abuse. ■

(Another Notable Case) Close Management Exercise Suspension List Constitutional

The U.S. 11th Circuit Court of Appeals has determined that Florida prisoners who are in Close Management confinement status have a state-created liberty interest in outdoor exercise and that the deprivation of same requires due process protections, but that two Florida prisoners at Florida State prison had received all the process that they were due prior to having their access to outdoor exercise suspended and that the minimal and post-deprivation procedures used for implementing the deprivation comply with the Due Process Clause. The court also found that a complete denial of outdoor exercise in this particular case did not amount to cruel and unusual punishment violative of the Eighth Amendment, nor was the Equal Protection Clause violated where prisoners on death row receive four hours per week outdoor exercise but those prisoners placed on a "yard suspension list" receive no outdoor exercise.

This case was filed by Florida prisoners Frank Bass and Leonard Bean, who are both incarcerated at Florida State Prison (FSP). For most, if not all, of their stay at FSP both these guys have been on Close Management confinement. Prisoners on Close Management normally receive only two hours of outdoor exercise each week. However, according to Florida Department of Corrections (FDOC) rules "if clear and compelling facts can document [that] such exercise periods should *not* be granted" then a prisoner may be placed on what is called a "yard suspension list (YSL)," and his outdoor exercise is suspended for an indefinite period.

Both Bass and Bean had been placed on such a suspension list several times for various reasons. Those reasons included attempting to escape together from FSP during a previous outdoor exercise period by scaling a fence, pulling a guard out of a dump truck at knife point, and attempting to ram the dump truck through a fence. Other charges included being in possession of weapons and escape contraband and having stabbed another prisoner in Bass's case, and having murdered a correctional officer and having escape contraband in Bean's case. Because of the outdoor exercise deprivation, however, they filed a § 1983 action challenging the outdoor exercise policies and procedures used to implement such deprivation. They claimed that the deprivation of outdoor exercise for prolonged periods is both cruel and unusual punishment, a discriminatory violation of equal protection where even prisoners on death row receive outdoor exercise, and that the procedures used to deprive the outdoor exercise does not prvide due process protection. The federal district court granted summary judgment for the prison officials and Bass and Bean appealed. In a fairly concise opinion, the 11th Circuit Court of Appeals affirmed the summary judgment.

First, the 11th Circuit court discussed the Eighth Amendment claim. In a brief history lesson, the court noted that when the first "modern" prison opened in 1790, prisoners convicted of serious offenses were kept in solitary confinement and never allowed out of their cells. Those conditions (according to a single cited source) were not considered cruel and unusual punishment. But the court admitted that contemporary standards of decency should be considered in whether punishment is cruel and unusual, with the standard of review in the context of a prisoner 5 conditions of confinement after incarceration being "the unnecessary and wanton infliction of pain." (Cite omitted). While no outdoor exercise would qualify as involving "infliction of pain," the court explained, in this case and with the violent history of Bass and Bean, such pain was not inflicted without penological justification."

Nor was the placement on the YSL wanton, as the record before the court was "filled with evidence indicating prison officials were very concerned about the potential harm to inmates from placement on the YSL, and took ... steps to ensure that the plaintiffs were not harmed," including daily sickcall opportunities, weekly psychological evaluations, and booklets on how to exercise inside the (very small) cells. Thus, the court concluded that the outdoor exercise deprivation suffered by Bass and Bean did not violate the Eighth Amendment.

Second, the court considered the denial of constitutional due process claim. Due process under the U.S. Constitution is only required where a life, liberty or property interest exists. The court noted that life or property was not an issue in this case, therefore it must determine if a liberty interest existed giving rise to due process requirements. The court discussed that after *Sandin v. Conner,* 115 S.Ct. 2293 (1995), only two circumstances give rise to a liberty interest in the prison context, (1) when a change in conditions of confinement are so severe that it exceeds the sentence imposed by a court, or (2) when the state creates by law a benefit and the deprivation of same amounts to an "atypical and significant hardship in relation to the ordinary incidents of prison life." (Citing Sandin). The court found the second circumstance to exist in this case. Citing FDOC rules, the court held that a state-created protected liberty interest exists in outdoor exercise for Close Management prisoners, thus requiring some measure of due process.

The court opined that the minimum requirements of due process for prisoners facing disciplinary action (involving the deprivation of a liberty interest) (in this case placement on the YSL) are: (1) advance written notice of the charges; (2) a written statement of the reasons for the disciplinary action taken; and (3) an opportunity to call witnesses and present evidence, when consistent with institutional safety and correctional goals.

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Subsequent to his 1975 graduation from America's oldest law school at the College of William & Mary, **Thomas E. Smolka** was admitted to the Virginia State Bar and became a member of the National Association of Criminal Defense Lawyers. Tom's legal experience includes service as an Assistant City Attorney of Norfolk, Virginia followed by many years in private law practice. Most importantly, **Tom Smolka's** direct understanding of the American judiciary came when he confronted the criminal justice system, won his direct appeal and was exonerated. *See Smolka v. State*, 662 So.2d 1255 (Fla. 5th DCA 1995), *rev. denied*, *State v. Smolka*, 668 So.2d 603 (Fla. 1996).

(Citing *Young v. Jones,* 37 F.3d 1457, 1459-60 (11th Cir. 1994).

But having set out those minimum requirements, the court then embarked on justifying why none of them were required in this case. Bass and Bean were given written notice of the intent to place them on the YLS *after* they were placed on same. The court held, however that the failure to provide advance notice was irrelevant. Citing to a prior 11th Circuit case, *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), that had held that, essentially, where a later procedural remedy is available to cure any prior procedural defect then the prior procedural deprivation is immaterial. Bass and Bean, the court noted, where able to and did file several grievances *after* being placed on the YSL, so strict compliance with the "advance notice requirement" was not necessary.

The second due process requirement, i.e., that written reasons for the disciplinary action be provided, was provided, the court decided, when Bass and Bean received the responses to their (post-deprivation) grievances. Thus, they received written reasons, the court held.

On the third due process requirement, i.e., the qualified right to call witnesses and present evidence, the court cited two reasons why this was unnecessary in this case. The first reason the court said was the threat that Bass and Bean had historically been to the safety of the prison, thus prison officials had the discretion to limit those rights. The second reasons given by the court was that there was no need for Bass or Bean to present any evidence because, under the circumstances, the facts underlying the misbehavior which caused the placement on the YSL (i.e., the attempted escape, escape contraband, assaults, murder, etc.) "were not in dispute." (In other words, the court implied that they had already been found guilty of those charges, or at least had not challenged that they had occurred). Therefore, the minimal due process that Bass and Bean received *after placement on the YSL* was sufficient to satisfy the Due Process Clause, according to the court.

Next, on the Equal Protection claim, the court briefly determined that even though death row prisoners may receive four hours per week of outdoor exercise and the prisoners on the YSL none, that there was a rational basis for any discrimination. "Death row prisoners have not necessarily shown themselves a threat to the internal operations of the prison, while persons on the YSL have," stated the court. Thus, the court rejected that claim also.

The court also determined that the district court did not abuse its discretion in denying Bass and Beans motions for appointment of an expert witness or counsel, basically because the outcome would have been the same anyway. See: *Bass v.* Perrin, 170 F.3d 1312, 12 FLW Fed. C634 (11th Cir. 4/1/99).

THE NEW SOLUTION

In 1966, there were 27,000 people in California's mental hospitals and 27,000 in the state's prisons and jails. Today, there are just 4,500 mental hospital beds in California, and the number of people in the state's prisons has exploded to 160,000.
[Source: National Alliance for the Mentally Ill] ■

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