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Perspectives

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Florida Supreme Court Clarifies Prisoner Indigency Statute

by Oscar Hanson

In 1996, the Florida Legislature enacted the Prisoner Indigency Statute (PIS) and codified it under section 57.085, Florida Statutes. Florida patterned the PIS on the federal Prison Litigation Reform Act of 1995 (PLRA). The intent of both acts was designed to reduce unnecessary and frivolous prisoner filings. Before the enactment of the PIS, indigent prisoners, like all other indigent persons, could file civil lawsuits without the payment of a filing fee and other court costs. However, under section 57.085, the PIS provides that while an indigent prisoner may still initiate a civil lawsuit without first paying a filing fee in full, a partial payment may be required if the prisoner has some funds in his prison account, and a lien may be placed on the prisoner's account. If the prisoner ever receives money, a portion of those funds will automatically be withdrawn and credited to the filing fee and court costs until such costs are satisfied in full.

Similar to Florida's act, the PLRA's requirement that prisoners pay at least a partial filing fee applies only to civil lawsuits. Florida's statute specifically excludes "criminal" and "collateral criminal proceedings." Since the enactment of the PLRA, the federal circuits have been contending with the issue of whether the filing fee provisions of the PLRA should be applied to petitions which seek relief traditionally available under habeas corpus or other collateral or postconviction proceedings. Because of the hybrid civil-criminal character of such actions, the federal courts have looked to the legislative history of the PLRA to determine whether Congress meant to restrict prisoners from filing such actions, and have found that Congress was principally interested in discouraging civil damage suits involving frivolous challenges to prison conditions.

The federal decisions have found no indication in the text of the PLRA or it legislative history to indicate that Congress expected its filing fee payment requirements to apply to traditional hybrid civil-criminal, habeas-type actions in which prisoners assert an entitlement to gain time and an accelerated release from prison but were not contesting their conditions of confinement.

Applying this framework to a recent challenge to Florida's Prisoner Indigency Statute, the Florida Supreme Court reviewed Florida's legislative history and found that the legislature had an intent almost identical to that of Congress when it enacted the PIS. Section 57.085 was created pursuant to Chapter 96-106, Laws of Florida. The act provided a preamble, which set forth the basis or reason for the act. Based upon the express language and a close reading of the legislative codification, the Florida Supreme Court concluded that the PIS was enacted for substantially the same reasons Congress acted at the federal level: to discourage the filing of frivolous civil

ON THE INSIDE

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FPLP is a non-profit publication focusing on the Florida prison and criminal justice systems. FPLP provides a vehicle for news, information, and resources affecting prisoners, their families, friends, loved ones and the general public of Florida.

Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement, promoting skilled court access for prisoners, and promoting accountability of prison officials are all issues FPLP is designed to address.

FPLP's non-attorney volunteer staff cannot respond to requests for legal advice. Due to the volume of mail that is received and volunteer staff limitations, all correspondence that is received cannot be responded to, but all mail does receive individual attention.

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Prisoners may pay membership dues with new unused postage stamps. Prisoners on death row or CM who cannot afford membership dues may request a waiver of dues, which will be granted as finances permit.

lawsuits, but not to prevent the filing of claims contesting the computation of criminal sentences.

Following that analysis, the Florida Supreme turned to the question in the prisoner petition represented by attorneys Robin L. Rosenberg and Wendell T. Locke of the Holland and Knight law firm. That petition argued that a petition for writ of mandamus filed by indigent prisoner Kevin Schmidt challenging a prison disciplinary proceeding where loss of gain time was imposed by the FDOC is akin to a traditional habeas corpus action or motion for postconviction relief, which have been deemed hybrid civil-criminal actions and clearly meet the PIS's and U.S. Supreme Court's definition of a "collateral criminal proceeding" that is not subject to the fees and costs provision of the PIS or PLRA.

The Court noted that it was apparent that an action affecting gain time did in fact affect the computation of a criminal defendant's sentence because the length of time the prisoner would actually spend in prison is directly affected. The Court also recognized that the U.S. Supreme Court made clear that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. *Weaver v. Graham*, 450 U.S. 24 (1981).

In Lynch v. Mathis, 519 U.S. 433 (1997), the U.S. Supreme Court rejected the FDOC's contention that the retroactive cancellation of overcrowding gain time bore no relationship to the original penalty assigned to the crime. The Supreme Court declared that to the extent that the DOC's argument rests on the notion that gain time is not in some technical sense part of the sentence, this argument was foreclosed by their precedents. The Lynce decision stated that gain time credits are one determinant of a prisoner's incarcerative term and that the sentence is altered once this determinant is changed. Thus, it is clear that the U.S. Supreme Court has refused to be bound by the variations in terminology used in the various challenges to the computation of an inmate's sentence. Instead, it has looked to the effect the challenged action had on the amount of time an inmate has to actually spend in prison.

In the instant case, Schmidt's loss of gain time effectively lengthened his sentence, since by the DOC's action he now has to serve that additional time in prison.

In accordance with the authorities discussed above, the Court held that Schmidt's gain time challenge is a "collateral criminal proceeding" and the Prisoner Indigency Statute does not apply. To hold otherwise, the Court noted, would result in an unlawful chilling of a criminal defendant's right to appeal or otherwise challenge the propriety or constitutionality of the conviction or sentence and raise a serious issue as to criminal defendants' constitutional rights to access to the courts to challenge their sentences.

It must be noted that while section 57.085 (Florida Prisoner Indigency Statute), does not apply in such cases as above, the general indigency statute (section 57.081) does. That means that if prisoners seek to proceed in forma pauperis with regard to gain time (notably, DR) challenges, they must prove their inability to pay by filing an affidavit with the information required according to section 57.081, Florida Statutes.

Specifically, section 57.081(a) requires litigants seeking an indigency waiver of fees of the courts, sheriffs, and clerks to file an affidavit that claims the applicant's financial condition, a statement that certifies no person has been paid or promised any payment of any reuneration by the applicant for services performed on behalf of the applicant in connection with the action or proceeding. Glaringly absent is the imposition of a partial filing fee before proceeding (in the event the prisoner has some funds) and the burdensome lien. *Even more important* is the absence of discretionary authority that permits the courts, upon a determination that a pleading is frivolous, to send that finding to the prisoner's institution for disciplinary action.

In light of this recent decision by the Florida Supreme Court, the questions of whether prisoners can recover the minimal funds they had collected from their inmate accounts and whether they can have court-imposed liens removed from their accounts, remains open. Since the Florida Supreme Court has construed the PIS it has essentially defined what the statute has always meant, i.e. no partial payments or liens.

In *Rivers v. Roadway Exp., Inc.*, 114 S.Ct. 1510 (1994), the U.S. Supreme Court held that it is the Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. The Court continued by saying a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. In other words, when Congress enacts a new statute, it has the power to decide when the statute will become effective. But when the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. Thus, under *Rivers*, the Florida Supreme Court's construction of the Prisoner Indigency Statute defines not only what it means to prisoners now, but what it has meant continuously since its enactment.

While it is clear that prisoners should not have been required to pay partial payments nor had liens assessed against their inmate accounts, what remains unclear is what remedies are available to right the wrong. Sound familiar? *See: Schmidt v. Crusoe,* 28 Fla. L. Weekly S367 (Fla.5/1/03).

[Note: Although not at issue in the above noted case, the same principles would apply to fees and costs on actions challenging Parole Commission decisions that result in a prisoner remaining in prison longer.] ■

Fighting the Telephone Stranglehold

FPLP has been reporting about the existence of the Families Against Inflated Rates (FAIR) Campaign. Recently, FAIR finished the design and printing of the first batch of FAIR Campaign Action Packets. The packet, available free to Florida state prisoners' families and friends, contains two informational brochures, two complaint forms, and a form to join the FAIR Family Quick Response Network.

The first brochure is to inform prisoners' family members and friends who are affected by the Florida Department of Correction's and MCI's telephone rate stranglehold how to fight to achieve FAIR phone rates. That brochure highlights some of the successes families in other states have had in their battles against prison phone monopolies. It details how to complete the easy-to-fill-out included complaint forms and send them to the Florida Public Service Commission and Department of Agriculture and Consumer Services. It also details the importance of contacting your local state representative and senator and devotes a panel to "Talking Points" that can be emphasized to those legislators or to local newspaper editors.

The second brochure, entitled "A Plea to State Legislators," that can be sent to local legislators, outlines how the current prison phone system works in Florida and the problems with that system. It contains quotes from family members and the media to show legislators why relief from the exorbitant cost of prisoners' collect phone calls is needed by their families and friends. The brochure pushes for three viable solutions: (1) eliminate or drastically reduce the current 53% commission that the FDOC receives on the calls; (2) implement statutes or administrative rules that requires the prison phone contract to be awarded to the company that guarantees the lowest rates to families; and/or (3) allow prisoners to make calls to lower rate toll-free numbers maintained by their families.

The FAIR Family Quick Response Network form requests contact information from prisoners' loved ones who wish to be notified by FAIR Campaign staff when they can participate in an organized extra effort to send letters or emails to targeted legislators or public officials as the FAIR Campaign continues. That network will be especially important when the legislature goes into session again, if relief has not already been obtained. That form also allows family members and friends to send FAIR staff names and addresses of other people who they would like an Action Packet sent to.

The FAIR Campaign has several initial goals. The FAIR staff is sending every Florida Legislator one of the above mentioned legislative brochures. That brochure is also being sent to state officials who have the power to implement rules and policies that mandate FAIR prison collect-call phone rates for families. Most importantly, the FAIR Campaign wishes to establish contact with and organize all prisoners' loved ones into an alliance working together for lower prison phone rates. That is where the real power lies. With Florida's 75,000 state prisoners, who have an average of six telephone numbers on their authorized phone lists, that is 444,000 households of taxpayers who are being unfairly gouged by the outrageous collect-call rates.

By design, our government system is representative of the people. FPLAO Chairperson Teresa Burns Posey was once told by a state legislator that he understood a problem existed, but his office had received no complaints to justify action on his part. Legislators need to be equipped with letters, emails, complaints to read in debate to convince fellow legislators that members of the public, taxpayers and constituents, are crying out for relief. Public officials need the same to justify their taking action. FAIR needs your help and participation so that our voices are heard and acted on. Prisoners: Send FAIR the names and addresses of people on the outside who you want us to send an Action Packet to. Family members and friends: write to the below address or email us to receive your free Action Packet. You do not have to be an FPLAO member to receive a packet or participate in the FAIR Campaign, although we certainly encourage you to become a member of FPLAO, which has proven we don't just talk about problems – we take action.

The FAIR Campaign, a project of Florida Prisoners' Legal Aid Org., Inc. (FPLAO), needs financial help too. While there is no charge for the Action Packets, there are printing and postage costs associated with same. Any donations, of any amount, will be appreciated to help keep the Campaign going until relief is obtained. Donations are tax-deductible. If you can't afford a donation right now, we can always use a few postage stamps, and that's an easy way to help, especially for prisoners. Those who have already sent donations and stamps, thank you very much.

If something hasn't already been done by then, FAIR fully intends to make a big push for change at the 2004 legislative session. Let's rally our forces to make that push. Have an Action Packet sent to your family and friends today and/or have them participate in the FAIR Online Email Campaign at:
www.fplao.org/FAIRCampaign.

Alone, none of us can do much; together we can achieve lower rates for everyone. Spread the word today!

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Florida's Female Prisoners

Florida Statutes s. 944.24(3), also known as the "Corrections Equality Act," provides that:

Women inmates shall have access to programs of education, vocational training, rehabilitation, and substance abuse treatment that are equivalent to those programs which are provided for male inmates. The department shall ensure that women inmates are given opportunities for exercise, recreation, and visitation privileges according to the same standards as those privileges are provided for men. Women inmates shall be given opportunities to participate in work-release programs which are comparable to the opportunities provided for male inmates and shall be eligible for early release according to the same standards and procedures which male inmates are eligible for early release.

Because of the relatively small number of them compared to the overall number of prisoners, the female prison population receives little individualized attention. What attention that population has had focused on it, and which mostly exists only within the corrections community in the form of studies, is seldom brought to the public's attention or is clouded by the public's perception of female prisons and prisoners a stereotyped in popular culture by bad B movies. It's easy to overlook or ignore the fact that often incarceration is only the latest form of victimization for many female prisoners, many of whom have been victims for much of their lives. Although numerous studies and statistics show that women and girls caught up in the criminal justice and prison system are there, for the most part, for reasons and circumstances that are distinctly different than those of male prisoners, prison officials have only reluctantly acknowledged that fact.

Fortunately, in Florida, there has been some progress towards recognizing that female prisoners are different and have different needs and issues than their male counterparts. Yet, change has been slow in coming and has been a battle against entrenched prison officials who appear to shun any outside oversight or rehabilitive efforts that may result in prison population reductions. And disturbingly, recent statistics show a new trend to target and incarcerate more females as fuel for prison system expansion.

Since its inception in 1995, the Florida Corrections Commission has displayed a laudable interest in female prisoner issues and has been a catalyst for some needed and beneficial policy changes as affects that population. The Commission functions as an independent committee appointed to oversee and report to the Florida

Legislature on selected areas of operations of the Florida Department of Corrections. Early on the Commission apparently realized that female prisoners were unduly suffering as an almost forgotten minority.

The Corrections Commission has consistently reported on female prisoners and their conditions of confinement since 1995 and suggested (which is the limit of the Commission's authority) some rational policy changes that the Department of Corrections has not been able to completely ignore. For example, in 1997 the Commission reviewed the issue of the distance between where female prisoners were located and where they call home. That review found that 60 percent of female prisoners located at two North Florida prisons were from Central or South Florida. The Commission reported that to the Legislature, pointing out the burden the long-distance separation places on incarcerated mothers with their children and families, and suggesting that one of the North Florida female prisons be converted to a male prison and that a South Florida male prison be converted to one for females. With the support of several outside groups that suggestion was implemented by prison officials.

The Commission was also instrumental in influencing the Department to create an Advisory Committee for Female Offenders to address issues peculiar to the female prison population. However, the Department so far has resisted the Commission's recommendations that the advisory committee be expanded to include individuals not employed by the Department with expertise on sexual abuse, domestic violence, and other female issues, including representatives from other agencies like the Department of Children and Families and Department of Health. The Commission has been recommending that expansion since 1999 to no avail.

Currently there are five major female prisons in Florida: Lowell Corr. Inst., Broward Corr. Inst., Dade Corr. Inst., Hernando Corr. Inst., and Gadsden Corr. Facility which is privately operated. In addition to an annex facility at Lowell Corr. Inst., and a bootcamp for youthful female prisoners, there are three female work release centers, Hollywood WRC, Atlantic WRC, and Orlando WRC, and one work camp, Levy Forestry Camp, located around the state.

Since 1990, female prisoners in Florida have averaged between five and six percent of the total prison population. During that same period the female prison population has increased a total of 60 percent while the male prison population increased 73 percent. Disturbingly, however, statistics show that between June 30, 1999 and June 30, 2002, the female prison population increased at a rate of 21 percent while the male population only increased 6.5 percent. That staggering increase in the percentage of females imprisoned was attributable to an increase in the number of women and girls sent to prison for non-violent drug crimes.

In fact, the largest proportion of Florida's female prisoners, over 30 percent, are incarcerated for drug offenses. On June 30, 2002, the female prison population was 4,389, and as of September 2002 it was 4,472, and continues to incrementally inch upwards. The Department of Corrections projects that by 2006 there will be over 5,000 females imprisoned in Florida. Which is not surprising, considering that the recidivism rate for female prisoners is comparable to that for Florida male prisoners, approximately 45 percent of those imprisoned have a prior commitment, a deplorable indictment of the Department of Corrections' warehousing-over-rehabilitation philosophy.

[Sources: Fla. Corrections Commission Annual Reports, 1995, 1997, 1999, 2000 and 2002; FDOC data and statistics.] ■

Don't Always Believe What You Think You See

The believeability of an eyewitness in identifying a criminal suspect is enhanced by how confident the eyewitness is that the right suspect has been picked. But new evidence about how impressionable people's memories really are has some experts questioning just how reliable eyewitnesses really are.

In a recent study conducted at Iowa State University 253 participants watched a staged crime video and then were asked to pick the crime suspect out of a six-man lineup, although the suspect in the video was not one of the six in the lineup. Not aware they were mistaken, those who pick a suspect out of the lineup were then told, "Good, you identified the suspect," which tended to cause the eyewitnesses to further overstate their confidence, remember even more details, including the picked suspect's facial features. Their false certainty held whether they heard the confirmation immediately after the lineup or a full 48 hours later.

Researchers in the study concluded the eyewitnesses' confidence in picking a suspect from a lineup can be tainted by comments made to them by the police conducting the lineup. The Iowa researchers suggested that comments about the suspect should not be made to the identifying witness to avoid tainting their future testimony.

The report appears in the March 2003 *Journal of Experimental Psychology: Applied.* ■

Death Row Appeals Office Receives The Death Penalty

During the recent budget fracas, Gov. Jeb Bush pitched his plan to eliminate the Capital Collateral Regional Counsel, an office paid by the state to defend death row inmates in their post-conviction appeals, as a way to cut costs and speed appeals. The CCRC, as it's known, has three offices in the state: Tallahassee, Tampa and Ft. Lauderdale.

Not long after Bush's plan was announced, the Tallahassee office received a lethal injection by the Florida Legislature, and it doors were closed. The Tampa and Ft. Lauderdale offices will surely be next.

The CCRC employs about 50 lawyers whose sole purpose is death row appeals. If those lawyers are overloaded or there are conflicts, cases are filtered to a state run registry of private attorneys. Gov. Bush believes death row inmates will receive more competent and prompt attention from registry lawyers; Lawyers, judges and legislative evaluators disagree. They cite errors made by private lawyers unfamiliar with death penalty litigation, the lousy pay that leads them to do a minimum of work and the effective job done by CCRC.

In the past few years, serious questions have surfaced about the number of innocent people on death row. Florida has more constitutional challenges to the death penalty than any other state, resulting in 25 death sentences reversed in the last 30 years.

The CCRC was first established in 1985 by Mark Olive, a principal architect, and Palm Beach Public Defender Steve Malone. It became a national model, replicated in California and Tennessee. Now it has became a victim of it's own success.

In a state that is so determined to put prisoners to death, they should be just as committed to making sure they have good representation. They won't be able to ensure that if they dismantle the CCRC, according to attorney Jo Ann B. Kotzen of West Palm Beach.

[Source: *Tampa Tribune*, 6/2/03] ■

If You Put Me In There, I'll Die!

Another Florida prisoner has died as a result of brutality by corrections officers, but like the past, it was "accidental." The latest prisoner, Larry Germonprez, was pinned down on his bed so hard by detention deputies in Pinellas County his ribs were broken in 17 places. According to the State Attorney's Office, he died of asphyxiation.

It took detention guards seven minutes to determine that Germonprez had stopped breathing. Pasco-Pinellas Medical Examiner Jon Thogmartin, whose office conducted an autopsy on Germonprez, said resuscitating anyone who has gone without oxygen for four minutes or longer is "very difficult," and that the brain at that point is badly damaged.

Despite the apparent unusually extreme use of force and obvious physical damage and a lack of attentiveness, the guards were cleared of any charges.

In two other cases since December, Pinellas County's top prosecutor has cleared law enforcement officers in a suspect's death that an autopsy says was caused by a struggle with the guards entrusted with the care, custody and control of the suspects.

While in jail Germonprez began suffering from alcohol withdrawal according to a jail nurse. He was placed in a small cell for isolation and observation and he became claustrophobic. The nurse in charge decided to move Germonprez to a larger cell. When the door was opened to move him, he rushed the door and was taken to the floor by jail guards and handcuffed.

Germonprez calmed down momentarily according to officials, but suddenly grabbed the door handle to a jail cell when guards again pinned him down. Before he was forced inside, a paramedic overheard Germonprez say, "If you put me in there, I'll die."

[Source, *Tampa Tribune*, 5/20/03] ■

Supreme Court Suspends Five Florida Lawyers

The Florida Supreme Court suspended five Tampa-area lawyers for violations that include pocketing thousands of dollars in illegal fees, keeping a clients money without providing agreed upon legal services and providing poor representation.

Throughout the state 15 lawyers were disciplined: 11 were suspended, three disbarred and one reprimanded.

Lawyers Nathaniel Tindall of Tampa, Mygnon Champion Evans of Lakeland, and George Kicklliter of Clearwater were each suspended for 30 days. Wayne Phillips of Clearwater was suspended from practice indefinitely, and Gerald Tavares of Tarpon Springs was suspended for 91 days.

[Source: *Tampa Tribune*, 4/30/03] ■

Female Prison Guard Killed

A female prison guard supervising five male prisoners as they worked on renovating a dormitory at Charlotte Correctional Institution was attacked and killed during an escape attempt by three of the prisoners June 11, 2003, according to state officials.

Killed was Darla Lathrem, 38, a rookie prison guard who had worked for the Florida Department of Corrections (FDOC) for only a year and had not yet fully completed a probation period towards becoming a

correctional officer. Two other prisoners, who apparently were present when Lathrem was killed, were themselves injured and hospitalized in critical condition following the incident that happened on a Wednesday night.

FDOC officials refused to release much information following the incident as the Department's spokespeople went into spin control mode trying to divert attention away from questions why a lone female rookie officer was in charge of five prisoners, at night, in a dormitory where no other guards or prisoners were present.

According to prison officials, no one knew anything until guards spotted prisoner Dwight Eaglin, 27, scaling a fence at the prison with a makeshift ladder about 10 p.m. the night of June 11. Eaglin, once a professional boxer who won the state welterweight title in 1996, and who is serving a life sentence for the fatal stabbing of a man in Pinellas Park in 1998, was caught between the two razorwire-encrusted fences of the prison. Lathrem's body was found a short while later, but officials refused to say where she was found, who found her or how she died. Gov. Jeb Bush commenting on the incident to the media the next day said that Lathrem "was brutally murdered with a sledgehammer." The Florida Department of Law Enforcement was called in to investigate the apparent murder.

Two other prisoners suspected of being in on the escape plot, and who were among the five under Lathrem's supervision, were found in a dormitory. The FDOC did not release their names or the names of the other two prisoners who were apparently beaten for not going along with the escape.

Details were scarce as investigators from the FDLE and state attorney's office tried to piece together the links between the attempted escape and Lathrem's death. Prison officials admitted Lathrem was left alone with the five prisoners, including Eaglin, who were working on renovations to a closed dormitory. The prisoners apparently had access to tools, like hammers and screwdrivers. However, in media reports released to the public, FDOC spokesman Sterling Ivey claimed that it's routine for prisoners to work at night on work crews. According to *FPLP* sources that is not true, and in fact FDOC policies prohibit prisoners with high security ratings, like Eaglin with a murder conviction, from being out of their assigned housing dormitory at night without being handcuffed and shackled.

The South Florida prison, often cited by prison activists as being one of the worst in the state for guard-on-prisoner and prisoner-on-prisoner violence, was locked down, with all prisoners confined to their cells for several days following Lathrem's death. The three prisoners, who officials claim were in on the escape plan, were transferred the next day to Sumter Correctional Institution, according to *FPLP* sources, although law enforcement officials would not reveal their location to the mainsteam media.

At the time of this report, prosecutors are expected to be filing charges against the three prisoners. FDLE spokesman Larry Long commented, "What you're looking at is a homicide in the commission of a crime, escape from a corrections facility. That alone is enough for a capital case."

Media reports highlighted the FDOC's noting that Lathrem was the first guard killed on duty in a Florida prison in 16 years. No mainsteam media outlet compared that to the significant number of state prisoners who are killed every year in Florida prisons by guard-on-prisoner violence or through medical neglect.

According to some prisoners from around the state, tensions are increasing inside the prisons. They cite a wide range of reasons for that, including an increase in verbal and physical abuse by guards, increasing frustration over restricted movement and rules designed only to harass prisoners at many prisons, increasing efforts to restrict their ability to communicate with their families, and an increasing number of women and persons not suited to be prison guards being hired by the FDOC to work in the prisons. Unfortunately, while violence is the worst solution, many prisoners say it may be the only solution where their access to the courts for relief is now largely obstructed by laws pushed for, or policies implemented, by prison officials, added to Florida's naturally prisoner-biased state and federal court systems.

[Sources: *Sarasota Herald-Tribune*, 6/13/03; AP reports; *FPLP* sources.] ■

Update: Guard Killed

One of the two inmates who were also beaten during the June 11 escape attempt at Charlotte Correctional Inst. when prison guard Darla Lathrem was killed has also died. Inmate Charlie Fuston, 36, who suffered major head injuries during the botched escape attempt, died June 13 at Lee Memorial Hospital. Fuston was serving a 30- year sentence for burglary and aggravated battery with a deadly weapon. Fuston's family has expressed upset at prison officials who have refused to publicly admit that those prisoners attempting to escape injured Fuston while trying to help Lathrem fend off an attack. "The warden said to me: 'Your brother was a victim in this and was trying to help one of ours,'" Fuston's sister, Rosie Fuston, said. "It upsets me that they are not telling people what my brother did." (See article in this issue of *FPLP* for full story on the attempted escape and guard killing.)

[Sources: Fort Myers *News Press*, 6/23; *St. Petersburg Times*, 6/23/03] ■

FAIR Campaign Update

The Families Against Inflated Rates, FAIR, Campaign is getting off to a good start. FPLAO staff have mailed or distributed hundreds of the Action Packets that outline and provide the materials for prisoners' family members and friends to participate in the campaign to obtain lower, fair prison collect-call phone rates.

We are aware that people who have filed the complaint forms included in the Action Packets to the Florida Public Service Commission and Dept. of Agriculture and Consumer Services are receiving letters back from those agencies claiming they have no power to do anything about the phone rate monopoly and advising people to contact the Department of Corrections about the problem. Of course, the DOC has no intention of reducing the rates. And the Public Service Commission and Consumer Services are being less than honest about not being able to do anything; they are simply passing the buck right now.

Actually, the Dept. of Agriculture and Consumer Services has authority to protect consumers from monopolistic gouging, whether a company or state agency is doing that gouging. Of course, they will not want to go against another agency, but we believe they will when they get enough complaints from family members.

The Public Service Commission has, by law, "exclusive" authority to regulate telephone services and contracts between state agencies and phone companies in Florida. Sections 364.01(2) and 364.19, Florida Statutes. The PSC also has a statutory responsibility to ensure all consumers in Florida have access to reasonably and affordably priced telephone services, that any monopoly phone services are fairly priced, and to protect the public by eliminating any policies that create an unfair monopoly. Section 364.01(4), Florida Statutes. With such exclusive power and responsibilities it is obvious the PSC has the authority to make the DOC ensure fair, reasonable rates to prisoners' families.

Additionally, many family members who have contacted their legislators about the DOC's phone rate scam are receiving copies of letters sent from the DOC to those legislators claiming the rates must be high to cover the "high" costs of the security features on the prison phone system. That is simply a lie. The cost for the security features are covered in the 47% of the rates charged and kept by MCI, which has the contract for the prison phone system in Florida. Security features are not paid for out of the DOC's 53% cut on the rates. The DOC is collecting millions, almost $19 million last year, as its cut on the calls, and none of that is spent on the claimed security features.

We need to keep the complaints flowing to the PSC, Consumer Services, and legislators. To get a FAIR Campaign Action Packet see the notice in this issue about the campaign. ■

Feds Incarcerate Most Prisoners

Two years ago the federal Bureau of Prisons (BOP) had the third largest number of prisoners incarcerated in the U.S., with 142,530 prisoners. The Texas prison system was the largest at that time with 167,000 prisoners, and California had the second largest system then with 162,000 prisoners. The feds, however, in just two years has now become the largest prison system in the nation.

In Nov. 2002, it was reported that the BOP had 164,011 people imprisoned. At the same time, with recent reductions in their prison populations, the Texas system fell to second place with 161,387, and California fell to third place with 146,496.

According to Eli Gage, publisher of *Corrections News*, there's an explanation for the surge in federal prisoners. "While individual states have been suspending prison construction, scaling back mandatory sentencing laws, and exploring alternative sentencing, the BOP has continued to build and quickly," wrote Gage.

In Fiscal Year 2001 the BOP received $883 million for federal facilities nationwide. In 2002 the administration proposed spending $1 billion for BOP construction and an additional $31 million for new Immigration and Naturalization (INS) detention facility construction. ■

Inmate Population Record High

The U.S. prison population has topped 2 million for the first time. The federal Bureau of Justice Statistics an arm of the U.S. Department of Justice, estimated that state and federal jails and prisons held 2,015,475 prisoners as of June 30, 2002. That's a 2 percent increase over the first six months of the previous year.

The record numbers were driven by a 5.4 percent increase in local jail prisoners and a 2.8 percent increase in the federal prison population. State prisons, which account for the bulk of the nation's prison population with about 1.2 million prisoners, increased about 1 percent.

At the same time states such as California and Texas showed declines, as new parole policies designed to ease overcrowding permitted thousands to be released.

The rate of incarceration in America – 702 prisoners per 100,000 residents – continues to be the highest in the world. In 2001, Florida had 72,007 prisoners. In 2002, that number rose 2.1 percent to 73,553. Currently, Florida has over 75,000 prisoners.

[Source: **USA Today**, 4/7/03; FDOC records] ■

Population of state prisons

State	6/30/01	6/30/02	% change
Ala.	27,286	27,495	0.8%
Alaska	4,197	4,205	0.2%
Ariz.	27,136	29,103	7.2%
Ark.	12,332	12,655	2.6%
Calif.	163,965	160,315	-2.2%
Colo.	17,122	18,320	7.0%
Conn.	18,875	20,243	7.2%
Del.	7,122	6,957	-2.3%
D.C.	5,388	3,023	-43.9%[1]
Fla.	72,007	73,553	2.1%
Ga.	45,363	46,417	2.3%
Hawaii	5,412	5,541	2.4%
Idaho	5,688	5,802	2.0%
Ill.	45,629	43,142	-5.5%
Ind.	20,576	21,425	4.1%
Iowa	8,101	8,172	0.9%
Kan.	8,543	8,758	2.5%
Ky.	15,400	16,172	5.0%
La.	35,494	36,171	1.9%
Maine	1,693	1,841	8.7%
Md.	23,970	24,329	1.5%
Mass.	10,734	10,620	-1.1%
Mich.	48,371	49,961	3.3%
Minn.	6,514	6,958	6.8%
Miss.	20,672	22,001	6.4%
Mo.	28,167	30,034	6.6%
Mont.	3,250	3,515	8.2%
Neb.	3,944	4,031	2.2%
Nev.	10,291	10,426	1.3%
N.H.	2,323	2,476	6.6%
N.J.	28,108	28,054	-0.2%
N.M.	5,288	5,875	11.1%
N.Y.	69,158	67,131	-2.9%
N.C.	31,142	32,755	5.2%
N.D.	1,080	1,168	8.1%
Ohio	45,684	45,349	-0.7%
Okla.	23,139	23,435	1.3%
Ore.	11,077	11,812	6.6%
Penn.	37,105	39,275	5.8%
R.I.	3,147	3,694	17.4%
S.C.	22,267	23,017	3.4%
S.D.	2,673	2,900	8.5%
Tenn.	23,168	24,277	4.8%
Texas	164,465	158,131	-3.9%
Utah	5,440	5,353	-1.6%
Vt.	1,782	1,784	0.1%
Va.	30,473	32,739	7.4%
Wash.	15,242	15,829	3.9%
W.Va.	4,130	4,488	8.7%
Wis.	20,931	21,978	5.0%
Wyo.	1,679	1,732	3.2%

Note: Alaska, Delaware, Connecticut, Hawaii, Rhode Island and Vermont figures include inmates held in local city and county jails.
1 - A large number of prisoners were transferred to federal facilities in 2002.

Source: Associated Press

JUST THE FACTS

Hepatitis C

Hepatitis literally means "swollen liver." Hepatitis C (HCV) is one of five (A, B, C, D, and E) viruses that cause the condition, which can also result from nonviral causes such as alcoholism. HCV attacks the liver, the organ that detoxifies drugs, alcohol, and environmental poisons, disposes of worn-out blood cells, and aids in digestion.

HCV was first recognized as a distinct form of hepatitis in the late 1960s. At that time, scientists lacked a sophisticated method to identify the causative agent and referred to the disease as "non-A, non-B" hepatitis. It was identified in 1989 using techniques developed in HIV research to clone portions of the virus's RNA. The virus itself has still never been seen.

More than 4 times as many people are infected with HCV than HIV—there are an estimated 170 million HCV sufferers worldwide.

HCV infection is the leading reason for liver transplants. As many as 70 percent of victims develop chronic liver disease.

Symptoms can take 10 years to appear, and include fatigue, jaundice, dark urine, abdominal pain, loss of appetite, and nausea—but most infected people exhibit no symptoms. Transmission is through blood and blood products. Intravenous drug use causes 60 percent of all new cases.

Despite increases in the number of people being diagnosed with HCV, new infections have actually decreased by more than 80 percent since the virus was identified. Blood screening tests and procedures used to kill the virus have helped to reduce new infections.

The virus mutates. By varying its structure, it has evolved into six known genotypes and more than 50 subtypes.

Although there is no vaccine for HCV, a combination of the drugs interferon and ribavirin administered for 6 months to a year is the treatment of choice. Interferon enhances the immune system and ribavirin stops HCV's replication.

With treatment, the virus can be eradicated from the body—but treatment is effective in just 30 to 50 percent of patients. The side effects—fatigue, flu-like symptoms, and depression—can be so severe many patients cease treatment.

By attaching a substance known as polyethylene glycol (PEG) to the interferon molecule, researchers have modified and improved interferon. The new version, called pegylated interferon, is better at fighting the virus because it stays in the body longer than standard interferon.

Researchers are developing new treatments for HCV—protease, helicase, and polymerase inhibitors. Similar to HIV antiviral agents, they will work to block enzymes involved in HCV replication.

—COMPILED BY EMILY BERGERON ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

When one facing criminal charges is making a decision about going to trial, an important consideration is whether any type of plea offer has been extended by the prosecution. Sometimes defense attorneys do not effectively represent their clients in this aspect of the representation. A plea may not have been relayed to a client because the attorney assumed the client would not accept the offer. Other times the attorney may relay the plea but either not inform, or misinform, his client about crucial aspects of said plea. In either case, such a defendant does have recourse via a Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief. A guilty plea is not voluntary or intelligent if advice given by defense counsel, and on which a defendant relies in entering a plea, falls below a level of reasonable competence such that the defendant does not receive effective assistance of counsel. U.S. v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990).

To effectively represent a client in a criminal matter, an attorney has the duty to adequately counsel his client as to the advisability of accepting or rejecting a plea offer from the State. Failure to fully advise a client of the ramifications of accepting or rejecting a plea offer can constitute ineffective assistance of counsel. See Young v. State, 625 So.2d 906 (Fla. 2d DCA, 1993); Wilson v. State, 647 So.2d 185 (Fla. 1st DCA, 1994). Courts appear uniformly to hold that the failure of trial counsel to communicate or to communicate correctly the facts and merits of a plea bargain offered by the State may warrant post conviction relief to a criminal defendant. Young v. State, 608 So.2d 111 (Fla. 5th DCA, 1992).

The misadvice of an attorney, in the plea context, as to how long the defendant will have to actually serve on a sentence can constitute ineffective assistance of counsel. Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991). A defendant's guilty plea is considered involuntary if it is induced by a defense counsel's promise which is not kept, and a defendant may withdraw his plea if he was misled and induced to plead by his counsel's mistaken advice. Ricardo v. State, 647 So.2d 287 (Fla. 2nd DCA 1994).

Whether or not defense counsel believes his client will accept any given plea offer, said counsel still has a duty to inform his client of any plea offers. *See* Fla. R.Crim. P. 3.171(c)(2). Counsel's misadvice, or lack of advice, in regards to acceptance of a plea offer can constitute ineffective assistance of counsel. Boria v. Keane, 99 F.3d 492 (2d Cir. 1996). And, the failure to timely relay a plea offer to a client can constitute ineffective assistance of counsel. See Cottle v. State, 733 so.2d 963 (1999). In order to prove that an attorney was ineffective for failing to convey a plea offer to a client, the following must be shown: (1) counsel failed to communicate a plea offer; (2) the defendant would have accepted the plea offer had he been properly advised; and, (3) that the acceptance of the plea offer would have resulted in a lesser sentence. Id.

In Garcia v. State, 736 So.2d 89 (Fla. 4th DCA 1999), the Fourth District Court of Appeal for Florida dealt specifically with the issue of ineffective assistance of counsel for failure to properly relay a plea offer. Francisco Garcia was charged with shooting into an occupied dwelling and second degree murder. Id. Subsequent to his conviction, Mr. Garcia filed a 3.850 which alleged, inter alia, that his attorney failed to properly inform him of the consequences of pleading guilty and, thereby, improperly induced Garcia not to accept the State's plea offer. Id. The trial court summarily denied Garcia's 3.850. Id.

Prior to trial the State made an offer to Garcia whereby Mr. Garcia would receive a sentence of five and one half years in exchange for a guilty plea. Id. Mr. Garcia acknowledged that his attorney did relay the plea offer to him, but, only at the last minute. Id. Garcia further alleged that his attorney: failed to discuss with Garcia the details and the strength t of the State's case; urged Garcia not to take the deal because he would succeed at trial; erroneously advised Garcia that he would get one-third knocked off of any sentence he did receive; and, failed to advise Garcia that he was subject to a three year minimum mandatory for the use of a firearm. Id. Mr. Garcja further alleged in his 3.850 that had he been properly advised by his attorney, he would have taken the plea deal offered by the State prior to trial, and, that he would have served far less time in prison. Id.

On appeal of the summary denial of his 3.850, the Fourth DCA held that Mr. Garcia did present a facially sufficient claim for ineffectiveness of counsel for failure to relay a plea offer. Id. at 90. The Garcia Court further noted that in Cottle v. State, 733 so.2d 963 (1999), the Florida Supreme Court did not provide what the appropriate remedy would be where counsel failed to timely relay a plea offer to a client. The Garcia Court decided that if a defendant does establish ineffectiveness of counsel for failure to relay a plea offer, it should be left to the trial court to "fashion a remedy that 'is tailored to the injury suffered and [does] not unnecessarily infringe on competing interests.'" Id. at 90, quoting United States v. Morrison, 449 U.S. 361 (1981).

Therefore, some sort of relief may be due if a plea was not relayed by defense counsel or if counsel failed to properly explain the plea. In either case, it may be possible to obtain a better result via a Rule 3.850 Motion. If the plea was never relayed, it may be possible to obtain the original plea offer if it can be demonstrated that counsel failed to relay the plea and the defendant would have accepted said plea. Such a result might be obtained by seeking relief under Garcia whereby the trial court would fashion a remedy tailored to the injury suffered, i.e., the denial of the ability to accept the original plea. If the benefit of the original plea offer cannot be obtained, it may still be possible to withdraw the plea entirely and return to a pretrial posture.

Of course, as with any postconviction venture, I would advise anybody looking into such a course of action to seriously consider if he or she will be better off with a withdrawal of the plea. Often pleas are given in exchange for a reduced sentence or a waiver of the State's right to pursue sentence enhancements (such as habitual offender, prison releasee reoffender, or minimum mandatory sentences). Therefore, before any attempt to withdraw a plea is made, I strongly advise any such person to consider if they will actually be better off if they do pursue a withdrawal of the plea. If the dangers of withdrawal of the plea are not great, or if you are willing to gamble with your potential sentence, then it may be advisable to pursue a withdrawal of the plea. But, such a decision should only be made after fully investigating the potential sentence that you are subject to upon withdrawal of the plea.

Loren Rhoton is a member in good standing with the Florida Bar *and a member of the Florida Bar Appellate Practice Section. Mr. Rhoton practices almost exclusively in the postconviction/appellate area of the law, both at the State and Federal Level. He has assisted hundreds of incarcerated persons with their cases and has numerous written appellate opinions.*

NEWS BRIEFS

NEWS BRIEFS

CT – Last year MCI WorldCom and the state of Connecticut raked in $13.3 million by charging the families of the states' prisoners high rates to accept collect phone calls from their incarcerated loved ones. CT prisoners have been allowed to make only collect calls, with their families paying two to three times what a typical collect call costs the public to accept.

The state, by giving the prison phone contract to the company that guarantees the largest commission on revenue to the state, instead of the lowest rate to consumer families, is receiving 45 percent of the money gouged out of the families, or about $6 million last year. That contract is about to expire and complaints by prisoners' families about the high rates has the state looking at ways to lower the rates. This year the state plans to introduce debit calling at one prison as a pilot project to see how it works.
[Source: *Hartford Courant*, 10/4/02]

FL – On May 7, 2003, prisoner Delvan . Barnes, 20, was fatally stabbed during a fight with prisoner Videl Santiago, 20, at Brevard Correctional Institution. Barnes, who suffered a large wound to the abdomen, went into cardiac arrest at the scene which occurred near the prison's dormitory area. Barnes was serving a four-year sentence for robbery with a firearm or deadly weapon and burglary out of Miami-Dade County. Santiago is serving a 30-year sentence for second-degree murder from Duval County. The incident was being investigated by the Fla. Dept. of Law Enforcement.
[Source: *Charlotte Sun*, 5/8/03]

FL – During May two prisoners attacked five prison guards with horseshoes and wooden baseball bats on the recreation yard at Washington Correctional Institution, which is located in the panhandle region of North Florida. One of the guards was critically injured, but listed in stable condition after being hospitalized at Bay Medical Center in Panama City. The other four guards were treated for injuries and released. The two prisoners, Tracey B. Wright, 31, and Darrell A. Jenkins, 35, apparently attacked the guards thinking it would get them transferred to a South Florida prison, according to prison officials. Other prisoners who know Wright and Jenkins, however, claim they were upset about recently being transferred to Washington CI, which currently has the worst reputation in the state for prison guard abuse of prisoners. FDOC officials claim that some inmates who tried to help the guards as they were being beaten were transferred to protect them from reprisal from other prisoners. Wright and Jenkins were transferred to Florida State Prison, the states maximum security prison in Northeast Florida.
[Sources: AP reports; FPLP sources.]

LA – During Feb. 03, Louisiana State District Court Judge Michael Caldwell ordered LA State Penitentiary officials to remove a block that prevented a prisoner from making collect calls to his wife's cell phone. The dispute arose when Diane King Smith, who doesn't have home-based telephone service and since cell phones don't allow collect calls to be accepted, set up with BellSouth Corp. to "remote call forward" collect calls from her prison husband to her cell phone. The service also allowed her to take advantage of cheaper long-distance rates than those charged by MCI WorldCom, which has the monopolistic prison phone contract in LA. When prison officials learned Smith was avoiding the high rates they had a phone block placed on Smith's remote call forwarding number, prompting Smith to file suit. The judge found that a rule adopted by prison officials to prohibit prisoners from using call-forwarding numbers was invalidly adopted, and thus was invalid to block calls to Smith. However, LA prison officials restarted the rule making process to validly adopt the rule, scheduled to be effective March 22, meaning Smith's victory may have been short-lived. Prison officials claimed they need such a rule for security reasons so that they know the address where prisoners' calls are going. With remote call forwarding, the person outside can change the number to which calls are forwarded to any location and the prison would never know. The same is true, however, with regular call forwarding or when a person moves but keeps the same phone number. In LA, under the MCI WorldCom contract, good until 2007, the state gets a 55 percent commission on revenues generated by prisoners' collect calls.
[Source: AP, 2/21/03]

USA – During June '03 some prisoners in three California prisons were put on "fiscally driven lockdown" because staffing levels in the state's prisons are so low. In Virginia prisoners now receive only two meals a day on weekends and holidays, while the Texas prison system has reduced the daily calorie intake for prisoners from 2,700 to 2,500 as cost saving measures.
[Source: *Newsweek*, 6/23/03, pg. 54]
■

NOTABLE CASES

BY OSCAR HANSON & ANTHONY STUART

The following are summaries of recent state and federal cases that may be useful to or have a significant impact on Florida prisoners. Readers should always read the full opinion as published in the Florida Law Weekly (Fla.L.Weekly); Florida Law Weekly Federal (Fla.L.Weekly Federal); Southern Reporter 2d Series (So.2d); Federal Supplement 2d Series (F.Supp.2d); Federal Reporter 3d Series (F.3d); or the Supreme Court Reporter (S.Ct.), since these summaries are for general information only.

FEDERAL DISTRICT COURT

Cottone v. Jenne, 16 Fla. L. Weekly Fed. C511 (11th Cir. 4/11/03)

Richard Cottone, as personal representative of the Estate of Peter Anthony Cottone, Jr. and Peter Cottone, Sr. (Plaintiffs/Appellees), sued Kenneth C. Jenne, II, Sheriff of Broward County, Florida along with Deputies D'Elia and Williams, Executive Director Tighe and other directors and/or Supervisors namely, St. Claire, Watson, and Law all in their official capacity at the North Broward Detention Center (Defendants/Appellants).

In this case the Defendants appealed to the 11th Circuit Court of Appeals from their denial in the U.S. District Court for the Southern District of Florida of a motion to dismiss filed pursuant to Fed. R. Civ. P. Rule 12(b)(6) raising qualified immunity.

After review and oral argument, the 11th Circuit Court affirmed the district court's denial of qualified immunity for Defendants D'Elia and Williams, but reversed its denial of qualified immunity for Defendants Tighe, St. Claire, Watson, and Law.

The background of this appeal involved the death of Peter Cottone, Jr. (Cottone) while he was detained in the North Broward Detention Center with his assailant Widnel Charles (Charles).

The complaint in the Appellee's action, filed pursuant to 42 U.S.C. section 1983, was that Defendants D'Elia and Williams, the guards of the detention facility, were recklessly indifferent toward him which created a substantial risk of serious bodily harm which led to Cottone's death. This action served as an Eight Amendment Violation of the United States Constitution prohibiting cruel and unusual punishment. Plaintiffs' further claimed that Defendants Tighe, St. Claire, Watson, and Law had supervisory liability for Cottone's death due the their failure to train and supervise deputies and correction officers under their control.

In their complaint, the Plaintiffs alleged and pointed to evidence that, at the time of the incident, Defendants D'Elia and Williams were observed by cameras in the control room, (where they were stationed to monitor surveillance cameras mounted in the unit housing inmates with mental conditions where Cottone and Charles were being held), playing and/or watching computer games. This evidence combined with the Defendants' knowledge of Charles' history of violence, mental instability, and schizophrenic outrages was placed where he could have contact with Cottone through unlocked, open cell doors. While the Defendants played/watched computer games, Charles attacked Cottone by strangling him with shoelaces.

Cottone was taken to North Broward Medical Center, where he died.

Mahone v. Ray, 16 Fla. L. Weekly Fed. C476 (11th Cir. 4/2/03)

In this case Thomas James Mahone (Appellant) filed motions pursuant to Fed. R. Civ. P. Rule 60(b) and Rule 11 in the district court while his appeal (from the denial of his civil rights complaint), was pending in the 11th Circuit. The district court had dismissed those motions based on the lack of subject matter jurisdiction to consider the motions while Mahone's appeal was pending.

Mahone appealed this ruling and the 11th Circuit ruled that the district court was in error.

As a general matter, the filing of a notice of appeal does deprive the district court from jurisdiction over all issues involved in the appeal. However, it does not prevent the district court from taking action in furtherance of the appeal nor does it prevent the court from entertaining motions on matters collateral to those at issue on appeal.

The 11th Circuit has held that a district court does retain jurisdiction after a notice of appeal has been filed to entertain and deny a Rule 60(b) motion because the court's action is in furtherance of the appeal. However, the courts do not posses jurisdiction to grant a Rule 60(b) motion. When a Rule 60(b) motion has been filed during the pending of an appeal the district court should consider the motion and assess its merits then deny the motion or indicate its belief that the arguments raised are meritorious. Then the movant may petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion.

The Sixth Circuit has described this procedure in *Bovee v. Coopers and Lybrand, C.P.A.*, 272 F.3d 356, 359, note 1 (6th Cir. 2001).

The district court also had jurisdiction over Mahone's Rule 11 motion because motion under this rule raise issues that are collateral to the merits of an appeal, and as such, may be filed even after the court no longer has jurisdiction over the substance of the case. The decision was based on the U.S. Supreme Court opinion in *Cooter and Gell v. Hartmarx Corp.*

Pate v. Peel, 16 Fla. L. Weekly Fed. D279 (N.D. Fla. 3/31/03)

In this case Walter Lamar Pate (Plaintiff) filed an action pursuant to 42 U.S.C. section 1983 against Apalachee Correctional Institution's (ACI) nurse practitioner Michael Peel (Defendant) asserting two claims: (1) that Defendant retaliated against him for grieving his denial of a medical pass for bashful bladder syndrome (BBS) by removing his existing medical pass for no - prolonged - standing and clearing him for assignment to field work; and (2) that Defendant's actions constituted deliberate indifference to his known serious medical conditions. Plaintiff sought compensatory and punitive damages for the First and Eight Amendment violations.

Pate, who suffers from Human Immunodeficiency virus (HIV), Hepatitis C, and BBS, alleged that he requested Peel for a BBS medical pass and Peel denied the request. Pate filed a grievance on the matter, which was also denied. Later, Pate reported for therapy at the Chronic Illness Clinic (CIC) of the Department of Corrections (DOC) where Peel asked Pate if he planned to continue the grievance. Pate responded in the affirmative and Peel became short in response and conveyed a serious attitude.

Subsequently, Pate was notified of his job change to field force work that involved digging up five hundred pound tree stumps, bagging potatoes, and throwing the filled hundred pound bags into the back of a truck. Pate confronted classification with his no-prolonged-standing medical pass and inquired about the job change. He was informed that Peel canceled the pass and cleared Pate for field force duty.

Later, Pate complained of severe abdominal pain and swelling the region of the liver, claimed a medical emergency and was admitted to ACI infirmary where he was transported to two different hospitals for testing. After being returned and discharged from ACI infirmary he was issued medical passes for no-prolonged-standing and no lifting or pulling over twenty pounds and was informed that the tests showed serious elevated liver enzymes.

In response to Pate's claims and allegations Peel filed a special report. The court advised the parties it would treat the report as a motion for summary judgment under Fed. R. Civ. P. Rule 56 and advised them of the importance of the rule and its ramifications if considered.

In the report Peel basically argued and pointed out evidence in the records that showed Pate's claims were frivolous, unfactual, and failed to bring forth any evidence to show even a colorable suspicion of retaliation or a disregarded and serious risk of harm. That, at most, it simply demonstrated a difference of medical opinion. Peel also asserted his entitlement to the Eleventh Amendment immunity and qualified immunity with regard to both claims and that Pate is not entitled to compensatory or punitive damages.

Pate filed a reply to the report, but it failed because as the court noted the events he described in it were not relevant to the claims in his action.

The court discussed the legal standards for both Summary Judgment and Qualified Immunity at length. As to Pate's action, he failed to identify with any specificity the allegedly false or misleading statements in the Defendant's report or the medical records he claimed Peel did not provide but should have. He failed to explain how the statements or omissions of medical records misrepresented the facts of the case. Furthermore, the court had specifically advised all parties that the special report would be treated as a motion for summary judgment under Rule 56, which provided them with the opportunity to file motions for discovery if they wished; the Plaintiff failed to do so.

The court considered and addressed at great length the Plaintiff's claims for monetary damages and of the constitutional violations. In conclusion, the court ruled that because there was no evidence from which a jury could reasonably conclude that the Defendant violated Plaintiff's First or Eight Amendment rights by approving him for field force duty, the court granted qualified immunity and summary judgment in favor of the Defendant.

[Editor's Note: The court went into great detail citing many authorities and legal standards used in making their final decision in this case. A careful reading of this opinion will provide great insight for prisoners filing 1983 actions. The above federal cases were summarized for *FPLP* by Anthony Stuart.]

STATE SUPREME COURT

State v. McBride, 28 Fla. L. Weekly S401 (Fla. 5/15/03)

Florida prisoner Antoine McBride was sentenced pursuant to a plea agreement to charges of attempted first-degree murder with a firearm, possession of a firearm by a convicted felon, and robbery with a firearm. The trial court sentenced him as a habitual felony offender to concurrent thirty-year terms of imprisonment on each of the three charges. McBride committed the attempted first-degree murder offense in May 1990, during which

time life felonies were not subject to sentence enhancement under the habitual offender statute.

In 2000, McBride filed a motion pursuant to Fla. R. Crim. P. 3.800(a) to correct the illegality of the habitual sentence imposed on his life felony offense. The Court denied the motion, and McBride did not appeal. The following year, McBride filed another motion under the same rule asserting the same argument. Not the successive nature, and this time McBride appealed. The Fifth DCA reversed, holding that the law of the case doctrine did not bar review by an appellate court and that the illegal sentence should be corrected. While the DCA did reverse and remand, the Court also certified a question of great public importance – a question answered by the Supreme Court, which quashed the Fifth DCA opinion.

The Supreme Court held that McBride was not entitled to relief pursuant to successive rule 3.800(a) motion because he raised the same issue in a prior unsuccessful motion and failed to appeal. The Court also noted that the law of the case doctrine and the principles of res judicata did not apply in this case. However, the doctrine of collateral estoppel did act to preclude McBride from rearguing in a successive rule 3.800 motion the same issue argued in his prior motion where its application would not result in a manifest injustice. Based on the facts of this case, the Court held that collateral estoppel would not result in a manifest injustice.

STATE APPEAL COURTS

Tedder v. Florida Parole Commission, 28 Fla. L. Weekly D1005 (Fla. 1st DCA 4/22/03)

In this very intriguing case, the First District Court of Appeal addressed the issue whether the Florida Parole Commission could disregard the finding of a parole examiner that was based on competent, substantial evidence in favor of its own.

In 1997, Florida prisoner Robert Tedder was placed on conditional release for a term of four years and 11 months following his release from prison. In 2001, Tedder's conditional release supervisor signed a violation report alleging that Tedder had moved without first obtaining permission. Tedder was placed in custody pending a revocation hearing. Following the hearing, the parole examiner found that the evidence failed to prove that Tedder had, in fact, moved. Based on that finding, the examiner recommended that Tedder be reinstated to conditional release supervision. Notwithstanding the examiner's recommendation, the Parole Commission revoked Tedder's conditional release. It did so after reweighing the same evidence considered by the examiner, and found that evidence sufficient to establish guilt as to the violation alleged.

The DCA recognized the basic tenet of administrative law (subject to limited exceptions not pertinent here) that an agency may not reject a hearing officer's finding of fact that is supported by competent, substantial evidence. Based on this principle, the DCA quashed the trial court's order denying mandamus relief.

Lindsay v. State, 28 Fla. L. Weekly D1027 (Fla. 4th DCA 4/23/03)

The Fourth DCA ruled that it was error for the trial court to dismiss motion for post conviction relief for lack of jurisdiction due to pending appeal from probation revocation, where issues raised in motion dealt with original plea and resentencing based on that plea. Further, the issues raised in the motion were unrelated to the issues on appeal from probation revocation and therefore did not divest trial court of jurisdiction.

McArthur v. State, 28 Fla. L. Weekly D1089 (Fla. 5th DCA 5/2/03)

The Fifth DCA reaffirmed its prior ruling in *McBride v. State*, 810 So.2d 1019 (Fla. 5th DCA), review granted, 825 So.2d 935 (Fla. 2002), that the law of the case doctrine does not prohibit successive motions pursuant to rule 3.800(a) if the issue raised had not previously been ruled upon by an appellate court. The Court noted that the decision in *McBride* should not be read to allow a criminal defendant to file successive motions to abuse the process and the judicial system.

Wesley v. State, 28 Fla. L. Weekly D1119 (Fla. 2d DCA 5/7/03)

Florida prisoner Kenneth Wesley appealed the summary denial of his motion to correct an illegal sentence. He argued that upon his imminent release from incarceration, he would be placed on conditional release because the DOC had improperly calculated his sentence. Wesley also suggested that placement on conditional release forces him to serve his sentence in "bits and pieces," thus altering his original sentence making it illegal and excessive.

Wesley was incarcerated on concurrent sentences, one for a crime committed in 1990, the other for a crime committed in 1999. The 1990 sentence is "conditional release eligible,: as determined by the Florida Parole Commission, but the 1990 sentence is not. In April 2001, Wesley was notified that the had reached the end of the incarcerative portion of his 1990 sentence, based on accrued gain time, and that upon his actual release from prison in April 2003, upon the total expiration of the 1999 sentence, he would be placed on conditional release to serve out the remainder of his 1990 sentence.

In *Evans v. Singletary*, 737 So.2d 505 (Fla. 1999), the Supreme Court held that the state may use an unexpired eligible sentence to determine the length of the

conditional release supervision and then toll the beginning of the supervisory period until the prisoner's ultimate release from prison. The Supreme Court found that the legislature instituted the conditional release program based on its belief that some prisoners remained at risk upon release and would therefore need a special, post-incarceration supervisory period. Requiring that they serve their conditional release while in prison would not serve this purpose. Therefore, the Court created the magical "tolling mechanism," which tolls the period of supervision until the prisoner's ultimate release. Applying this rationale to Wesley's case the 2 DCA denied relief.

Johnson v. Florida Parole Commission, 28 Fla. L. Weekly D886 (Fla. 1st DCA 4/3/03)

Florida prisoner Fannings Johnson sought a writ of certiorari to review an order of the circuit court that denied his petition for a writ of habeas corpus.

The Florida Parole Commission (FPC) revoked Johnson's parole on August 23, 2000. On April 12, 2001, the FPC established Johnson's presumptive parole release date (PPRD). On September 6, 2001, Johnson challenged the PPRD by filing a petition for writ of mandamus. The petition was denied by the Second Judicial Circuit Court in Leon County and affirmed on appeal. Then on December 10, 2001, Johnson filed a petition for writ of habeas corpus in the county where he was incarcerated to challenge the factual basis of his parole revocation. The Gulf County Circuit Court denied the petition finding it was a successive petition to the petition for writ of mandamus filed in Leon County and that habeas corpus could not be used as a substitute for appeal.

The First DCA held that the Gulf County Circuit Court was correct in denying the successive petition because the jurisdiction of the DCA's to entertain direct appeals by parolees from final orders of the Florida Parole Commission has been eliminated, prisoners and parolees must seek their remedy in the circuit court by way of a petition for an extraordinary writ. Since Johnson has previously sought relief in Leon County, he could not seek a successive one in Gulf County.

Mosley v. State, 28 Fla. L. Weekly D105 (Fla. 1st DCA 12/31/02)

In this case, the DCA was faced with the issue of whether the "remaining in" theory of the burglary statute was applicable when there is an unlawful entry and whether legislation can nullify a judicial decision retroactively.

Christopher Mosley unlawfully entered an automobile in Orange County, and forty-two days later was apprehended while driving the vehicle in Columbia County following a high-speed chase from an armed robbery that occurred in Alachua County. Mosley was charged with aggravated assault on a law enforcement officer with a deadly weapon, armed burglary of a conveyance, and grand theft auto while armed. The case was tried in Columbia County. The DCA reversed the burglary conviction.

Mosley argued that the only burglary theory applicable in his case is unlawful entry, and that venue was not proper in Columbia County, because the unlawful entry occurred in Orange County. In rejecting Mosley's position, the trial court was persuaded by the state's argument, based on *State v. Stephens*, 608 So2d 905 (Fla. 5th DCA 1992) that the burglary occurred in Columbia County, because Mosley "remained in" the vehicle while in that county. In *Stephens*, the Fifth DCA concluded that their review of cases addressing the "remaining in" theory did not address the question of whether burglary can also be proved under this statute by alleging and proving that a defendant not only unlawfully entered a conveyance, but also unlawfully remained there, with the unlawful intent to steal it. In concluding that "remaining in" is a continuing act for venue purposes, the Fifth DCA affirmed the defendant's conviction.

Altieri v. State, 28 Fla. L. Weekly D112 (Fla. 4th DCA 12/26/02)

In this case, the Fourth District Court of Appeal said it was error for the trial court to impose a twenty-year mandatory minimum sentence under section 775.087(2)(a)(2), Fla. Stat. (1999) based on discharge of a firearm where the charging information alleged that defendant "used a deadly weapon, to wit: a firearm," but did not contain an allegation that defendant "discharged" a firearm or destructive device. Moreover, the jury's finding that defendant discharged firearm during course of aggravated assault did not cure defect in the information. In regard to the three-year mandatory minimum under 775.087(2), Fla. Stat. (1997), the information that defendant "used" a firearm during commission of aggravated assault was sufficient to place defendant on notice that he was subject to the three-year mandatory minimum provision for possession of a firearm.

Cairl v. State, 28 Fla. L. Weekly D172 (Fla. 2d DCA 1/3/03)

In an en banc decision, the Second DCA has held where a defendant is charged with offenses that occur during a period that straddles three different guidelines time frames, and neither the evidence nor the verdict pinpoint that date of offenses, the trial court errs in sentencing the defendant under the guidelines in effect on the end date alleged in the information rather than under the most lenient guidelines in effect during the time frame alleged in the information.

Bolden v. State, 28 Fla. L. Weekly D187 (Fla. 1st DCA 1/8/03)

On rehearing, the First DCA held that were an inmate is serving concurrent sentences for related crimes arising from the same incident, it was improper to toll prisoner's conditional release supervision on one charge while he continued serving the incarcerative sentences on the other charges. The Court held that neither the statute nor caselaw mandate that days a prisoner remains in prison on one charge while pending release on other charges be added to calculation of release date. The DCA did certify the following question to the Florida Supreme Court: "When an inmate who is serving several related sentences subject to conditional release supervision for multiple crimes occurring in the same criminal episode has violated conditional release supervision, should the Department of Corrections, in calculating the new release date, consider time served following the expiration of the incarcerative portion of one sentence, while awaiting expiration of the incarcerative portion of the other related sentences, as tolled, pursuant to *Evans v. Singletary*, 737 So.2d 505 (Fla. 1999), and, if so, should the Department of Corrections add such tolled time onto the sentence in calculating the new release date?"

Wise v. State, 28 Fla. L. Weekly D206 (Fla. 2d DCA 1/10/03)

Florida prisoner Joseph Wise challenged his conviction and sentence for lewd and lascivious act in the presence of a child under age 16. The DCA held that the trial court's instruction to the jury on subsection of statute other than the subsection under which defendant was charged was reversible error where jury's verdict was general verdict that did not specify the theory by which it found defendant guilty.

[Editor's Note: In *O'Bryan v. State*, 692 So.2d 290 (Fla. 1st DCA 1997), the First DCA held that it was fundamental error to instruct the jury on a crime not charged and that the resulting verdict was a nullity.]

State v. Schreiber, 28 Fla. L. Weekly D278 (Fla. 4th DCA 1/22/03)

On rehearing, the Fourth DCA withdrew its earlier opinion in this DUI case and issued the following holding. Florida law authorized two alternative theories for the crime of driving under the influence; driving while one's normal faculties are impaired [impairment theory], or driving with a blood alcohol content (BAC) of 0.08 or higher [unlawful blood alcohol theory – DUBAL]. See: Section 316.193(1)(a), (b), Fla. Stat. (2001).

As the Florida Supreme Court noted in *Robertson v. State*, 604 So.2d 783 (Fla. 1992), the second theory, DUBAL, is a strict-liability theory of DUI, since the fact of operating a motor vehicle with a BAC of 0.08 or higher constitutes the offense of DUI even if impairment cannot be proven. The court further noted there is some redundancy in the statutory DUI scheme, since impairment is presumed if the defendant's BAC is 0.08 or higher. See: Section 316. 1934(2), Fla. Stat. However, the presumption of impairment created by S316. 1934 (2) is a moot concern if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle with an unlawful BAC, i.e. 0.08 or higher. Adding further confusion to this redundancy issue, in Miles II, the Supreme Court held the statutory presumption provided for in s. 316 1934(2) was invalid, i.e., the State is not legally entitled to the presumption of impairment associated with the Implied Consent Law. Yet, the court reaffirmed the admissibility of blood results introduced through the three prong predicate discussed in *Robertson*, and not introduced pursuant to the Implied Consent Law, but the court noted that blood results introduced through the *Robertson* predicate are not entitled to the Implied Consent presumptions, which are specially contingent upon compliance with the Implied Consent Law.

On rehearing in *Dodge v. State*, 805 So.2d 990 (Fla. 4th DCA 2001), the Fourth DCA adopted the Second DCA's analysis in *Tyner v. State*, 805 So.2d 862 (Fla. 2d DCA 2001), holding where BAC results have been properly admitted under the *Robertson* predicate, and not vis-à-vis the Implied Consent Law, the court may instruct the jury that if it finds the defendant did infact drive with an unlawful BAC, the defendant is guilty of the crime of DUI. As such, the standard jury instruction, which includes the alternative theories of DUI (impairment and DUBAL), does not improperly instruct the jury on the Implied Consent presumption of impairment, since the jury can be instructed on DUBAL (provided blood results have been introduced via the Robertson predicate) absent proof of any impairment.

Nivose v. State, 28 Fla. L. Weekly D313 (Fla. 4th DCA 1/29/03)

This case addresses the propensity of trial judges to construe "letters" as "motions" for post-conviction relief. In a correctly reasoned opinion, the Fourth DCA held it is error for a trial court to construe a letter as a motion for post-conviction relief under Rule 3.850 when the letter is neither sworn to and did not include the requirements of Rule 3.850 (c). ■

Rehabilitation Rebound

by Bob Posey

It's not hard to understand why U.S. imprisonment rates are so high, statistics show that two thirds of all felons released from state prisons are rearrested within three years. Added to that is the increased length of sentences, extended as a result of the "tough on crime" sentencing policies of the past three decades, and the recategorization of former misdemeanors as felonies that carry mandatory prison sentences. In most states, like in Florida, and in the federal criminal justice system, sentencing guidelines have greatly limited judges' discretion in what sentence is appropriate for offenders. Under guidelines, discretion is replaced with a system of charts and points that are controlling over the sentence that must be imposed, and according to some critics, dehumanizing the process with one-size-fits-all sentences.

When imprisoned, prisoners are simply warehoused in inefficiently operated prisons that provide little or no incentive or opportunity for them to want to change their lives, and when released, and ninety-five percent of prisoners will be released, the cycle starts over again.

Demise of Rehabilitation

For a brief period in the late 1960s up to the mid-1970s, rehabilitation was considered to be the most effective way to reduce crime and prevent recidivism by the majority of criminologists in America. The shift away from rehabilitation to a philosophy favoring punishment is largely credited to an influential article published in 1974 by Robert Martinson, a sociologist with City University of New York, who concluded that "with few exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Five years later, in 1979, Martinson admitted that his earlier conclusions had been wrong. Martinson noted that further research showed that rehabilitation efforts **did** have a positive effect on reducing crime and recidivism, but by then it was too late.

Seizing upon Martinson's first article in 1974, the mainstream press interpreted his conclusions on rehabilitation into headlines proclaiming 'REHABILITATION A FAILURE" and 'NOTHING WORKS". Not to be left out, a slue of other neoconservatives, like James Q. Wilson of Harvard University, sought their moment of media fame by urging longer and harsher prison sentences as the solution to fighting crime and discouraging repeat offenders. Conservative politicians quickly saw the platform benefits of being perceived as tough-on-crimefighters. It didn't take long before the erroneous conclusions posited by Martinson had become the accepted, largely unquestioned, conventional wisdom among criminology pundits, conservatives, and the media alike.

In 1985, then administrator of the Office of Juvenile Justice and Delinquency prevention, Alfred S. Regnery, told the nation that "rehabilitation...has failed miserably." Two years later, in 1987, widely recognized Attorney General Edwin Meese commented on the "substantially discredited theory of rehabilitation." And in 1989, the U.S. Supreme Court signaled it was time to close the casket and throw in the dirt on a dead idea by upholding federal sentencing guidelines that removed rehabilitation from consideration when sentencing offenders.

Rethinking Rehabilitation

In the past decade the previously accepted consensus of rehabilitation not working has started to be questioned. The renewed thinking is largely the result of something called meta-analysis, a new research technique that convincingly demonstrates that rehabilitation does work. The new technique, instead of focusing on just one of a few studies, combines the results of many studies. In that way extraneous and inconclusive factors in studies are averaged out in the final result.

Applying meta-analysis to almost 2,000 studies that encompass a variety of approaches to reducing recidivism, results were achieved that show rehabilitation does have a positive effect, although modest, partially because of the inclusion of therapies that did not work. Notable, however, were the findings that certain behavior modification therapies for violent offenders and for low to medium-risk sex offenders have been effective, obtaining 50 percent or more reductions in recidivism rates as compared to controls. Additionally, high success rates in preventing crime have been achieved with programs that target juvenile offenders that include mentoring, skills instruction, and for teenage mothers, intensive home visitation to prevent child abuse.

While it cannot be ignored that research studies can only measure the effect of programs in an artificial environment, and that in real-life situations such programs are often less effective, nevertheless, even if the results were diluted by half they still show that rehabilitation can have a significant impact on reducing crime and recidivism in the U.S.

Kneejerk Solutions Fail

James McGuire of the University of Liverpool in London, recognized as one of today's leading researchers on criminal behavior, has observed that, generally, harsh penalties are not effective and may actually increase crime rates. Studies done on bootcamps, three-strike laws, so-called scared straight programs and the death penalty are proving that such harsh measures are ineffective in reducing recidivism.

A recently released report by David A. Anderson, an associate economics professor at Centre College, Danville, Ky., entitled "The Deterrence Hypothesis and

Picking Pockets at the Pickpocket's Hanging,"* concludes that harsher criminal sentences do not result in substantial reductions in crime and that a new emphasis on alternative deterrents is needed. Anderson's report is based on data from interviews with 278 male prisoners in two medium-security state prisons and a county jail between 1997 and 1999. The study found that 76 percent of the offenders in the sample and 89 percent of the most violent offenders were either not aware of the possibility that they would be caught or the probable punishment that would be imposed if caught for their crimes.

"Still more active criminals are impervious to harsher punishments because no feasible detection rate or punishment scheme would arrest the impelling forces behind their behavior, including drugs, fight-or-fight responses, and irrational thought," wrote Anderson.

Another recent report, co-authored by Steven Raphael of the University of California at Berkley, and Jens Ludwig of Georgetown University and Brookings Institution, entitled "Do Prison Sentence Enhancements Reduce Gun Crime? The Case of Project Exile," essentially debunks the claimed success of a harsh sentencing program that has become the darling of some politicians and law enforcement agencies. Project Exile first began as an experiment in Richmond, Va., as a kneejerk political fix to gun crimes. Under the project, offenders convicted of possessing a gun during commission of a crime, or convicted felons in possession of a firearm, were sentenced under federal law, which provides for a minimum five-year sentence for the firearm possession to be served consecutive to any other sentence. Federal sentences meant the offenders would serve longer terms than under state laws, and result in "exile" of the offenders to federal prisons outside of the Richmond area.

When law enforcement reported a 40 percent drop in gun homicides between 1997 and 1998 and a 21 percent drop in overall violent crime Project Exile was expanded to cover all Virginia. The feds subsequently promoted expansion of the project in the Safe Neighborhoods program. However, according to Raphael and Ludwig, Project Exile's apparent success was skewered by improper analysis that did not take into account that violent crime rates fell even further in areas where the project was not implemented.

Researchers Raphel and Ludwig concluded that impressive declines in firearm homicides can be almost entirely explained by the fact that in cities like Richmond with larger-than-average firearm homicide rates there usually follows a period with large declines in the number of homicides. "One larger lesson from the analysis is the apparent tendency of the public to judge any criminal justice intervention implemented during a period of increasing crime as a failure, while symmetrically judging those launched during the peak or downside of a crime cycle as a success," noted the researchers. "Given that," they continued, "policymakers, news reporters and voters all seem to employ this heuristic device in evaluating government programs, Project Exile would appear to highlight the enduring maxim that it is often better to be lucky than good."

That latter observation by the researchers appears to be accurate. On January 7, 2003, when members of the 108th Congress of the United States were sworn in, Rep. Ander Crenshaw (R-Fla.) introduced a bill that would provide incentives to states to enact five-year mandatory minimum sentences for certain gun crimes. The bill, H.R. 54, is entitled "Project Exile: the Safe Streets and Neighborhood Act of 2003." Crenshaw has five co-sponsors to the bill: Mica (R-Fla.), Putnam (R-Fla.), Forbes (R-Va.), Kennedy (R-Minn.), and Oxley (R-Ohio). Of course, there is no guarantee the bill will ever become law, but it demonstrates the persistence of "tough on crime" policies even in the face of discrediting research.

The Cost to Society

It cannot be ignored that punishment-over-rehabilitation has and is continuing to exact a huge toll on society. America now has the distinction of incarcerating more of its own citizens than any other country in the world. According to recently released statistics from the Dept. Of Justice, there are now over 2 million people in U.S. prisons and jails. It wasn't always that way.

In 1973, only one in 1,042 Americans was in prison. Today it is one in every 137 Americans who is behind bars. An estimated 4.8% of all black males are in prison or jail, and about 1.7% of Hispanics and 0.6% of whites are incarcerated.

Special interest groups claim that rising prison rates, combined with generally declining crime rates, show that the tougher laws and sentencing policies of the 1980s and 1990s are working. But critics of the punishment-over-rehabilitation policies point out that tough anti-crime laws fail to take into account the recent declines in crime.

As more people are imprisoned, there is an increasing financial interest in seeing crime and the correctional/criminal justice system continue to expand. Whole industries have evolved to *build the* prisons and sell everything to the prison system from bars to bars of soap. Corporations have sprung up to operate private prisons to make a profit off taxpayers for the corporate owners and stockholders. Such industries and corporations have become heavy contributors in the political process to keep their businesses growing.

With so many adults incarcerated the criminal justice system is increasingly targeting young people while the media portrays them as criminals who also generally cannot be rehabilitated, and thus, must be incarcerated. Not only is an alarming number of children being swept up into the criminal justice system, but an equally alarming number are losing parents to the system.

Critics of rehabilitation have often pointed at the cost of therapies as being prohibitive. Yet, rehabilitation is far cheaper than our present criminal justice/prison warehousing system that incurred direct costs of $147 billion in 1999 and has been growing by more than 5% annually every year since.

With roughly one half, or 1 million, of the people imprisoned in America being nonviolent offenders, it only makes sense that many of them could be rehabilitated if given the incentive and opportunity. The alternative simply wastes too many lives.

Further Reading

What Works: Reducing Reoffending. Edited by James McGuire. John Wiley and Sons, 1995.

Offender Rehabilitation and Treatment. Edited by James McGuire. John Wiley and Sons, 2002.

Evidence-Based Programming Today. James McGuire. Paper delivered at the International Community Corrections Association annual conference, Boston, 2002.

The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging. David A. Anderson. 2002. *Explaining his report's title, Anderson noted that in England in the late 18th and early 19th centuries picking pockets was one of 220 capital crimes. Thousands would gather to watch the executions. Undeterred by the fate of their brothers in crime, pickpockets would work the crowds at the public hangings.

Do Prison Sentence Enhancements Reduce Gun Crime? The Case of Project Exile. Steven Raphel and Jens Ludwig, 2002.

Recidivism of Prisoners Released in 1994. Patrick A. Langan and David J. Levin. Bureau of Justice Statistics, June 2002. NCJ#193427. Available free from www.ojp.usdoj.gov/bjs/abstract/rpr94.htm or by writing to: NCJR S, P.O. Box 6000, Rockville, MD 20849-6000.

Reducing Crime: Rehabilitation is Making a Comeback. Rodger Doyle. Scientific American, May 2003. ■

*** Notice ***
FPLAO Prisoner Members

The last issue of *FPLP*, Volume 9, Issue 3, May/June 2003, was impounded by some institution mailrooms pending a review by the FDOC Central Office to determine if that issue will be rejected as inadmissible reading material. Okaloosa CI was the institution that initiated the review, but under the FDOC's blanket (and arguably, unconstitutional) publication impoundment/rejection procedure the issue was likely impounded at other institutions.

The problem, according to FDOC officials, was the front page article entitled, "FDOC Panics Over Threat To Prison Telephone Monopoly Scheme." Allegedly that article encourages prisoners to violate FDOC rules and is a security threat because it "tells prisoners how to circumvent the [FDOC] telephone system." Actually, that is not true. The article informs prisoners' families how to circumvent the prison telephone rate gouging.

FPLP has filed an appeal challenging the impoundment/rejection and blanket rejection procedure. If necessary, *FPLP* will seek judicial review on those matters. Stay tuned.

FAMILIES AGAINST INFLATED RATES (FAIR) CAMPAIGN

Are you tired of the high cost of the collect-call phone rates being charged the families and friends of Florida state prisoners? FPLAO intends to do something about those exorbitant rates, but your help is needed. If you have access to the Internet, log on to ww.fplao.org to participate in the FAIR Campaign online. You can also write and receive a FAIR Campaign Action Packet to participate in the effort to achieve lower rates. Together, we can make a difference. Write for your Action Packet today and visit www.fplao.org to get involved.

FAIR Campaign
P.O. Box 660-387
Chuluota, FL 32766

Prisoners: If you would like your family to receive information about the FAIR Campaign and an Action Packet, send their name and address to the above.

Membership Drive

Check it out. For the next six months, until Jan. 31, 2004, Florida Prisoners' Legal Aid Organization, Inc. (FPLAO) is engaging in a drive to increase memberships. During that period we hope to gain 1,000 new members. To do that your help is needed. Those who help will not only be helping the organization to grow and become more effective, but will also be benefiting themselves.

Here's how it will work: For every person who gets three people to become an FPLAO member between now and Jan. 31st, whether prisoners or free citizens, that person will receive either a free one-year membership, or if they are already a member, then their membership will be extended for a year with no dues owed. This is a great and easy way to either become a member of FPLAO or to get a free membership extension. All members receive the organization's news magazine *Florida Prison Legal Perspectives*, of course.

You don't have to stop at getting three new members. If you get six people to join, your membership dues will be covered for two years; get nine to join and you will not have to pay any membership dues for three years being a member of Florida's largest and most effective organization that works to help Florida prisoners and their families and loved ones. Don't delay; start signing up new members today!

Simply have new members complete the below membership form, putting your name on the "sponsored by" line so you get credit for signing them up, and have them send in the form with their indicated membership dues. We'll let you know every time three new people sign up that you sponsored. Prisoners: Been hesitating to become an FPLAO member because your funds are tight, but want to receive *FPLP*? You can't get it any easier than this. If you aren't interested, tell someone else about it. Let's build up FPLAO!

Yes, I want to become a member of Florida Prisoners' Legal Aid Org.

1. Check type membership:
□ $15 per year Family member/friend/individual
□ $9 per year Prisoner

2. Please Print:
Name:_____
Address:_____
_____
City:_____State_____Zip_____

3. Sponsored by (name & DC#)
_____

4. Send this completed form plus indicated yearly membership dues made payable to:
Florida Prisoners' Legal Aid Org. Inc.
Membership Dept.
PO Box 660-387
Chuluota, FL 32766

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Circuit Court Grants FDOC Summary Judgment on Denial of Access to Court Claims, Appeal Will Follow

by Bob Posey

On May 6, 2003, Second Judicial Circuit Court Judge Nikki Ann Clark granted summary judgment to the Florida Department of Corrections in a class action case filed on behalf of all Florida state prisoners, which alleges that various policies and practices of the FDOC deny prisoners adequate court access and due process in violation of the Florida Constitution.

Judge Clark's final summary judgment order in that case is reprinted here in its entirety since this case affects all Florida prisoners. Florida prisoners are being represented in this case by attorney Robin L. Rosenberg, an attorney with the prestigious Holland and Knight Law firm, one of the largest law firms in the South. Ms. Rosenberg has informed *FPLP* staff that Judge Clark's decision will "definitely" be appealed. As an interesting aside, it is noted that Judge Clark perpetuated the FDOC lie that the law library, typewriters, and computers were bought with taxpayers' money. In reality, all of the equipment that was taken (stolen, according to some) from the prison law libraries in 2001 was either donated or purchased and maintained with monies from the Inmate Welfare Trust Fund, which comes from profits gouged out of prisoners with high canteen prices and gouged out of their families with outrageously high collect-call telephone rates by the FDOC. Many of the taken typewriters and computers have now ended up in FDOC offices and areas that are prohibited by law from purchasing or using IWTF-purchased property.

FPLP will report more on this case as it proceeds.

STATE OF FLORIDA SECOND JUDICIAL CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA

GREGORY HENDERSON, et al.,
Plaintiffs,

v. CASE NO: 2001 CA001307

JAMES V. CROSBY, JR.,
et al.,

Defendants.
_____/

FINAL SUMMARY JUDGMENT FOR DEFENDANTS

This cause came before the court upon the parties' cross motions for summary judgment. The hearing was held February 7, 2003, and the parties have filed a joint stipulation of facts. Having reviewed the motions, supporting memorandum, and documents filed in support of the motions, having heard argument of counsel, and being otherwise duly advised in the premises, the court finds that there are no genuine disputes of material fact and that the defendants are entitled to a declaratory judgment in their favor as a matter of law. Fla. R. Civ. P. 1.510.

This is a class action lawsuit pursuant to Rule 1.220, Florida Rules of Civil Procedure and the class was certified on April 10, 2002.[1] In the Amended Complaint, filed July 3, 2002, the plaintiffs seek declaratory and injunctive relief with regard to the Department of Corrections' provision of access to courts and due process for prisoners. The plaintiffs challenge 8 aspects of the Department's procedures and regulations regarding prisoner litigation, specifically (1) the elimination of inmates' access to word processing equipment; (2) reduction of the title list for legal publications and removal of form files from the Department law libraries; (3) restrictions on inter-library loans; (4) limitations on storage of legal papers within institutions; (5) breach of confidentiality of inmate legal documents mailed out for typing or copying; (6) inadequate hours of access to law libraries; (7) a reduction in the availability of research aides to assist inmates with legal papers; and (8) restrictions on possession of legal papers by other inmates and on times and places for prisoners to assist each other with legal proceedings. The current regulations governing prison libraries and legal mail are found in Rules 33-210.102 and 33-501.301, Florida Administrative Code.

The plaintiffs seek a declaration that the above aspects of the Department's library system violate their rights under Article I, Section 21 of the Florida Constitution (Access to Courts) and Article I, section 9 of the Florida Constitution (Due Process Clause).

There are no genuine disputes of material fact regarding the past and current regulations and procedures at issue. The parties stipulate that on May 10, 2001, defendant Richard Nimer, Director of Program Services for the Florida Department of Corrections, issued a directive to all Program Managers and Library Managers statewide, informing them of a change in Department policy regarding prisoners' use of typewriters, word processors, and computers for the preparation of legal documents and legal mail. The Managers were directed to discontinue inmate access to word processing equipment and the forms and other information stored on such equipment. At the time of the Nimer memo, 52% of the prison law libraries had word processing equipment.

The parties also stipulate that in July 1996, the Department reduced the titles in its law library title list from 98 to 45 titles in major libraries and from 82 to 40 titles in minor libraries. The parties agree that the title list for major collection law libraries, set out in Department of Corrections Procedure No. 501.301 and Florida Administrative Code Rule 33-501.301(4), has been approved by the U.S. District Court in Hooks v. Moore, (Case Nos. 71-144-CivJ-21B and 71-1011-CivJ-21B) (Order of Dec. 8, 2000). The approved list does not contain the titles eliminated in 1996, including portions of the United States Code governing immigration, disabilities, racial discrimination, veteran's benefits, and social security. It also lacks a Florida family law treatise and 3 immigration law treatises previously available to inmates. There is no dispute as to the existence and development of the other aspects raised by the plaintiff. Fla. Admin. Code Rules33-210.101(2) and 33-210.102(8); Fla. Admin. Code Rule 33-501.301(2).

The court finds no grounds upon which to revisit its earlier orders certifying this class of plaintiffs or denying dismissal of this action. The plaintiffs have adequate standing to challenge the Department's provision of access to courts and due process via the inmate library and mail programs due to their commitment to the custody of the Department and the attendant application of the administrative rules governing all prisoners in the Department's custody. Whether the plaintiffs have suffered actual injury from the regulations at issue is a matter of proof rather than of standing to bring the action.

Based on the undisputed material facts alleged in the complaint and stipulated by the parties, the court finds that the defendants are entitled to declaratory judgment in their favor.

ACCESS TO COURTS

Regarding the plaintiff's access to courts claim, the Florida Supreme Court has explained that:

> There are two sources of the right to access the courts. Florida's constitution specifically guarantees a citizen's access to courts. *See* art.I, §21, Fla. Const. The Constitution of the United States does not, however, contain a specific clause providing for this right. The United States Supreme Court, nevertheless, has held that there is such a right arising from several constitutional provisions, including the First Amendment, the Due Process Clause, and the Equal Protection Clause. *See generally Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1997)...,*modified, Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Mitchell v. Moore, 786 So.2d 521, 525 (Fla. 2001). The plaintiffs correctly point out that the fact that Florida's constitution contains a specific provision for access to courts differentiates the analysis of whether access to courts is infringed under Federal law from that analysis under Florida law. Under Florida law, if the challenged regulation or policy "obstructs or infringes that right to any significant degree," Florida's article I, section 21 guarantee that "justice shall be administered without sale, denial, or delay" is violated. *See* Mitchell v. Moore, 786 So.2d at 527.

On the other hand, every inconvenience and restriction placed on prison inmates by the Florida Department of Corrections does not constitute a significant obstruction on inmates' constitutional rights. While "prisoners do not shed all constitutional rights at the prison gate," Wolff v. McDonnell, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974), it is well settled that "lawful incarceration brings about the necessary withdrawal or limitations of many privileges and rights, a reaction justified by the considerations underlying our penal system." Sandin v. Conner, 515 U.S. 472, 485, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

Applying these principles to the 8 policies challenged here, the court finds as follows:

Concerning the removal of the word processing equipment from prison libraries, the Florida Constitution does not require any particular method for accessing the courts. While modern electronic technology and mechanical typewriters certainly speed document preparation, the provision of these conveniences at taxpayers' expense is not constitutionally mandated. The plaintiffs have pointed to no case where a legal document from a prisoner was rejected by a court solely on the basis that the document was hand-written.

The deprivation of mechanical and electronic means to access the courts may be an inconvenience, but this restriction on the method of preparing legal papers is not a denial of the right to access the courts. So long as the Department provides adequate access, this court will not interfere in the details of that access. As stated in Lewis v. Casey, 518 U.S. at 349, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such a fashion as to comply with the laws and the Constitution."

Furthermore, access to courts, while specifically provided for in the Florida Constitution, is not an absolute right for prison inmates or non-incarcerated citizens and may be significantly curtailed in certain circumstances. For example, indigent citizens' right to redress injuries in the courts without legal counsel and without payment of filing fees may be curtailed entirely if the plaintiff is found to have abused court processes with repeated frivolous or otherwise improper filings. Jackson v. Florida Dept. Of Corrections, 790 So.2d 318 (Fla. 2001); Lussy v. Fourth District Court of Appeal 828 So.2d 1026 (Fla. 2002); Martin v. State, 833 So.2d 756 (Fla. 2002)(non-inmate). Accordingly, the Department's managerial decision to remove mechanical and electronic word processing

equipment from prisoners does not violate the plaintiff's right to access the courts.

Likewise, the fact that the Department's libraries do not contain research materials on immigration law, social security law, family law, and other legal topics of interest to prison inmates does not establish that the Department's library title lists and policies constitute a denial of the plaintiff's right of access to courts. In Mitchell v. Moore, 786 So.2d 521, 525 (Fla. 2001), the Florida Supreme Court stated:

The [federal] Supreme Court described the right of "access to courts" as including, among other things, the provision of an acceptable law library. ***[citing Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491 (1977)].*** In *Lewis v. Casey*, 518 U.S. at 355, 116 S.Ct. 2174, however, the court made it clear that "access to courts" does not guarantee inmates the right to "transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." States must only provide a reasonable adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. ***Id.***

As noted in Lewis v. Casey, the constitutional right under both Federal and Florida Constitutions is the right to access the courts, not the right to a particular law library or internal system for legal assistance. Impairment of prisoners' abilities to litigate matters not connected with challenges to their sentences and conditions of confinement "is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Lewis v. Casey, 518 U.S. at 355, 116 S.Ct. at 2182.

Access to courts is achieved if prisoners have "a reasonable adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Bounds v. Smith, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d (1997). Neither the Federal nor Florida Constitutions require "the conferral of...sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population" for the purpose of discovering actionable claims and litigating effectively once in court. Lewis v. Casey, 518 U.S. 343, 354, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). The plaintiffs concede that the current library title lists comport with Lewis v. Casey and Hooks v. Moore, but assert that access to courts under Florida law requires additional titles on immigration, family law, veteran's benefit law, etc. However, this court has not discovered, nor have the plaintiffs directed this court to, any case requiring that Florida prison inmates must be provided research material on all legal topics which might affect any prisoner.

The plaintiff's claims regarding the limitations on inter-library loans pertain to the availability of publications in the Department law library system. The court finds that the analysis for the title lists above also governs the inter-library loan issue and that the inter-library loan program does not violate the plaintiffs' rights to access the court.

Plaintiffs' fourth claim, regarding storage of legal materials at Department facilities, is moot. The plaintiffs' concerns have been addressed by the Department and legal property is stored by the Department. No violation of access to courts is presented by the storage issue.

The fifth aspect of Department policy raised by the plaintiffs is the alleged breach of confidentiality for legal materials the inmate sends out to third parties for typing, then receives through the Department mail system. The addressees of the documents are observed by the Department mail staff and if the document is not being sent to a lawyer, the mail is not subject to the legal mail rules. This practice does not violate a prisoner's access to courts because typed documents are not a filing requirement which will subject a prisoner to dismissal if not followed. The decision to mail out documents for typing is in the prisoner's discretion. In addition, the confidentiality of legal papers stems from the right against self-incrimination (Art. I, section 9) and the attorney/client privilege. Because hand-written pleadings are accepted by courts, prisoners are not compelled to incriminate themselves in order to access the courts by sharing documents with third parties. Likewise, section 90.502, Florida Statutes, provides that communications between a lawyer and a client which are not intended to be disclosed to third parties are confidential. There is no attorney/client privilege if the document or communication is voluntarily provided to non-lawyer third parties by the prisoner. The facts alleged do not show a denial of access to courts imposed by the mail policies in Rule 33-210.102 Fla. Admin. Code.

Regarding library hours, availability of research aides to assist inmates, and restrictions on possession of other inmates' legal papers, meeting times, etc., federal law is well settled that there is no constitutional right to any particular number of hours in the law library or of hours of research aide assistance. See e.g. Walker v. Mintzes, 771 F.2d 920 (6th Cir. 2001). Access to courts does not mean unlimited hours in the library, reference materials on all legal topics, and unrestricted research assistance opportunities.

The policy of prohibiting inmates from possessing each other's legal materials outside the library has a legitimate basis in that the Department needs to curtail any improper transfer of papers through coercion among inmates and to prevent loss or destruction of legal papers which is likely when the owner of the documents does not keep possession of them.

Like the analysis of the equipment and publications provided as the means of access to the courts, the particulars of library hours, etc. are for the political

branches to implement and the court's only role is to "remedy past or imminent official interference with individual inmates' presentation of claims to the courts." Lewis v. Casey, 518 U.S. at 349, 116 S.Ct. at 2179. The particular method of accessing the courts is an executive function and the court will not usurp that administrative authority over the details of the prison library system. The Department's policies regarding library schedules and research aide availability is a managerial function outside the province of this court's supervision unless these policies have been shown to significantly obstruct or infringe upon the plaintiff's access to courts. There has been so such showing in this case.

DUE PROCESS

In their motion for summary judgment, the plaintiffs allege seven property and liberty interests deprived by the Department's court-access policies. Property interests protected by the Due Process Clause are property interests created by state law or liberty interests guaranteed by the Bill of Rights independently of state law. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). However, "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980). Where there is no positive rule of law or mutually explicit understanding, there is no actionable claim of entitlement to the property. See Cone v. The Florida Bar, 626 F.Supp. 132 (M.D. Fla. 1985), *aff'd.*, Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir. 1987). Applied to the case at bar, the plaintiffs must show a protectable property or liberty interest before such interest may be protected by the Due Process Clause.

The first property interest asserted is the plaintiffs' property interest in the research materials and draft pleadings formerly stored on the discs and hard drives of the word processors removed in 2001. This claim does not apply to the class as a whole because the parties agree that only about half of the correctional institutions in the State had such equipment at the time of the Nimer memo. Further, the plaintiffs have alleged no statute, rule, policy, or other source to support their expectation of ownership of the data stored on the agency's computers. Finally, the plaintiffs whose data was stored on the removed computers did have the opportunity, albeit on short notice, to print out data before the computers were removed. Under the circumstances, the Department is entitled to judgment as a matter of law on the plaintiff's due process claim for the data on Department computers.

The plaintiffs next claim the deprivation of due process in their property interest in their right to bring civil actions. This right appears to be grounded in the right to access to courts, Article 1, section 21 of the Florida Constitution. However, as discussed above, the plaintiffs have not been deprived of their right to access the courts by the actions and policies of the Department. Accordingly, no deprivation without due process of law has been shown.

Thirdly, the plaintiffs claim the deprivation o their property interest in the use of typewriters in those institutions with Institutional Operating Procedures providing for such use. Similar to the data claim, this claim only applies to those class members from institutions where a typewriter policy was once in effect The court finds that the provision of typewriters in some institutions did not establish a mutual, explici understanding that all prisoners (the class in this case would have an actionable expectation that the convenienc of access to typewriters at taxpayer expense woul continue indefinitely.

The prisoners' asserted property right i "reasonable access to legal research materials, form pleading, and the assistance of inmate law clerks" i likewise not established by any statute or rule. A previously noted, the right to access to courts is the righ to "a reasonably adequate opportunity to present claime violations of fundamental constitutional rights to th courts" and is not synonymous with a right to a fre standing library or to legal assistance. Lewis v. Casey 518 U.S.343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 60 (1996). Because the plaintiffs have not establishe property interest in particular research materials, forms, a particular system for assistance of inmate research aide no deprivation of due process has been shown.

Items 5 and 6 ("e" and "f" of Count II in th Amended Complaint) are the plaintiff's property interes in their personal legal material and mail, and property an liberty interest in "their familial relationships." Howeve no facts have been alleged or shown to establish that th plaintiffs have been significantly deprived of leg material, legal mail, regular mail, or familial relationship The Due Process Clause applies where a restraint limitation on prisoners "imposes atypical and significa hardship on the inmate in relation to the ordinary inciden of prison life." Sandin v. Conner, 515 U.S. 472, 484, 11 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995); Plymel Moore, 770 So.2d 242 (Fla. 2000). The changes Department policy regarding publications on family la mail room procedures, possession of personal leg material, etc. do not amount to atypical and significa hardship in relation to the ordinary incidents of prison lif considering that the prisoners retain the ability to file leg actions in hand-written form, to move the courts f extensions to time when necessary, to send and recei mail, and to maintain familial relationships via the mail visits, etc. Because the changes in the Department policies and procedures at issue did not significant interfere with protected property interests, no due proce violation is present.

Finally, the plaintiffs contend that they have be deprived of their liberty interests in immigrati

proceedings due to the removal of immigration reference books from the libraries. This claim is limited to those in the class of plaintiffs with immigration issues without counsel to assist them. As already discussed, the rights to challenge a conviction, a sentence, prison conditions, and the legality of a current incarceration were not significantly interfered with by the removal of federal immigration laws from the prison libraries. If a prisoner has a right to counsel in particular proceedings, the affected class member may move for the appointment of counsel to assist him or her in the individual case. The process due in immigration proceedings is not sufficiently dependent upon the Department's provision of immigration statutes in prison law libraries to effect a deprivation of due process when such research materials are not provided by the Department.

It is therefore ORDERED AND ADJUDGED that:

1. Plaintiffs' Motion for Summary Judgment is hereby **DENIED.**

2. Defendants' Motion for Summary Judgment is hereby **GRANTED** and the court hereby **DECLARES** that the prison regulations on prisoner mail raised by the plaintiffs and set out in Rule 33-210.102, Florida Administrative Code and on law libraries as set out in Rule 33-501.301, Florida Administrative Code, including the title lists, research aide provisions, and library schedules do not deprive prisoners of the right to access the courts under Article I, Section 9 of the Florida Constitution. The court further declares that the changes in the Department's policies and rules since 1996 regarding law library titles, mechanical and electronic typing equipment, and the other aspects of the prison law library system challenged by the plaintiffs did not violate Article I, section 9 of the Florida Constitution.

DONE AND ORDERED this 6th day of May 2003, in Chambers at Tallahassee, Leon County, Florida.

"Signed"
NIKKI ANN CLARK
Circuit Judge

Copies furnished to:

Ms. Robin L. Rosenberg, Esq.
Mr. Joe Belitzky, Esq.
Mr. Joseph Rogers, pro se
Mr. Gerald M. McKire, pro se

[1] The class is defined as "[a]ll persons who, now, or in the future, will be incarcerated as inmates in a facility run by the Florida Department of Corrections who have legal needs and no means by which to purchase legal advice or assistance." ■

Rule Amendment

By Anthony Stuart

A notable amendment has taken place within the Florida Administrative Code (F.A.C.). At Rule 33-602.201(5)(a) it has been added that:

1. If an inmate receives postage stamps in the mail, which, added to the number already in his possession, place him over the maximum allowed, he shall be allowed to send the excess stamps out at his own expense. It is the inmate's responsibility to send out the extra stamps as soon as they are received. The stamps must be sent out; the institution will not store excess stamps for inmates. Excess stamps found in an inmate's property will be considered contraband.

Also, at Chapter 33-602.201, Appendix One Property list, regarding the number of stamps prisoners may possess, the personal items list has been changed to allow possession of 40, instead of only 25, one-ounce first class postage stamps. These rule changes became effective July 8, 2003.

However, be aware that Rule 33-210.101(2)(f), F.A.C., still provides that prisoners may only receive 20 one-ounce first class postage stamps in a letter. So, prisoners can possess two regular books of stamps now, but correspondents may still only send one book of stamps at a time.■

65 Percent Bill Dies

Senate Bill 618 sponsored by Senator Miller died in the Senate Criminal Justice Committee.

The bill would have amended section 921.002 and 944.275, Florida Statutes, to allow prisoners under the 85 percent provision of Florida Statutes to earned gain time up to 35 percent of their sentences instead of the present 15 percent. The measure would have applied to only those prisoners with non-forcible felonies. This is bad news for those prisoners hoping for the return of 65 percent. With the passing of the Florida budget, which gave DOC additional money for more prison beds, don't look for a reappearance of this bill soon.

■

Florida Parole Commission: A Culture of Corruption

by Bob Posey

In the last issue of *Florida Prison Legal Perspectives (FPLP)* it was reported that on May 9, 2003, the chairman of the three-member Florida Parole Commission (FPC), Jimmie L. Henry, had been forced to resign when the Florida Department of Law Enforcement launched a criminal investigation into matters concerning Henry and the Commission. Although mainstream media reports were unable to determine what exactly the investigation was about, FPLP reported details on widespread mismanagement and misuse of taxpayers' money by the Commission, but alerted readers that there was much more that couldn't be reported right then because of the ongoing FDLE investigation. In mid-July clearance was given for more information to be released, as follows.

Jimmie L. Henry is being investigated behind allegations, supported by documentation, that during his tenure as a parole commissioner he used taxpayers' money budgeted to the Parole Commission to make personal purchases and falsified travel and expense records of the Commission. According to Stephen Dobson, a Tallahassee attorney that Henry has retained, Henry has no comment on those allegations or the more serious allegations now coming to light that Henry was involved in covering up a rape at the Commission and paying $50,000 to hush it up.

During 2002, Henry and the state's two other parole commissioners, Monica David (who was appointed as chairman in May when Henry resigned), and Frederick Dunphy, agreed among themselves to quietly pay $50,000 in taxpayers' money to a part-time Commission employee who had accused the agency's human resources director of sexually harassing and raping him.

The alleged rape by Human Resources director Frank Trueblood, 37, occurred in 2001, and although many at the FPC knew about the claim, including the commissioners, it was not reported to the police until July 8, 2003, almost a month after Henry resigned and the Commission came under fire by the FDLE. In Florida, failure to report a crime is a crime itself.

Commission Chairman Monica David was the one who finally reported the alleged rape to the Leon County Sheriff's Department in July, but even she waited until Trueblood resigned from his $75,000 a year job before going to the *police*. Strangely, only three days before Trueblood resigned David had approved a $4,100 pay raise for him. And the story only gets worse.

In June 2001, about the same time that the employee began complaining that Trueblood had homosexually raped him, Henry authorized a $6,500 pay raise for Trueblood and reported in Commission records that he was an "exemplary" employee. While serving as chairman, Henry had also authorized as much as $3,500 in bonuses for Trueblood. Exampling just how deep the corruption went, eight months after paying the alleged rape victim $50,000 to agree to take no legal action against the Commission or Trueblood, Henry in a job review described Trueblood as an "innovative, creative, loyal" employee who deserved another bonus.

It is unclear what, if any, actions FPC officials took to investigate the rape victim's accusations against Trueblood. Some files relating to the employee's complaints of sexual harassment and assault disappeared from the Parole Commission offices after the payoff was made, according to other state officials.

Tom Gallagher, the state's chief financial officer with the State Treasury, said the payment was made after the Florida Commission on Human Relations reviewed a complaint filed with that agency by the alleged victim and found in his favor. The state Division of Risk Management approved the $50,000 payoff. Gallagher said the settlement avoided more costly litigation. It also avoided the public being informed about the corruption within the FPC for two years.

Officials at the Commission on Human Relations now refuse to release records of the complaint that had been filed with them citing a confidentiality exemption from Florida public records laws. FPC Chairman Monica David's office told the *St. Petersburg Times* they could not immediately produce any record documenting the incident or how the FPC handled the matter.

Leon County sheriff's Maj. John Schmidt said that no one reported the alleged sexual attack to law enforcement when it occurred two years ago. Although it is obvious that all of the FPC commissioners and officials at the Commission on Human Relations and Division of Risk Management would have had some knowledge of the rape allegations, for two years they kept quiet about it. Monica David only reported it after it became clear that the FDLE was not going to allow it to remain under the rug where it had been swept.

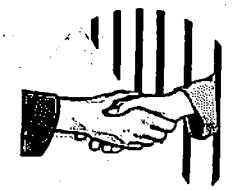
On May 1st of this year Florida Prisoners' Legal Aid Organization, which produces *FPLP*, officially launched the Parole Project. The purpose of that project is to focus public attention on the Parole Commission, expose the corruption, and increase the number of paroles, while reducing the number of parole "Technical" revocations. As the Parole Project continues, expect further revelations about the Parole Commission. As stated the last *FPLP*, these are just the first ripples in a wave of change bearing down on the Florida parole system.

[Sources: FPC records; Div. Of Risk Management records; Leon Co. Sheriff Dept. records; St. Petersburg *Times*, 7/18/03; Auditor General records and reports.]

For information on how you, as a parole-eligible prisoner, parolee, or family member or friend of same, can be a part of the FPLAO Parole Project, write:

FPLAO Inc.
Parole Project
P.O. Box 660-387
Chuluota, FL 32766 ■

Florida Prisoners' Legal Aid Organization Inc.



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Donations Needed

FPLAO is calling on members and supporters to make a donation to help us obtain additional office space. Donations, in any amount, large or small, are needed to purchase a mobile type office where volunteers can work. Approximately $6,000 will be needed to purchase a good, used office building of that type. We have an offer of rent-free property where such office will be set up within two blocks of the main FPLAO office. The additional workspace is badly needed with the several projects FPLAO has going on. So far almost $400 has been donated to this cause. Please continue sending what you can so we can get the needed additional office space as soon as possible. Thank you.

SUBMISSION OF MATERIAL TO *FPLP*

Because of the large volume of mail being received, financial considerations, and the inability to provide individual legal assistance, members should not send copies of legal documents of pending or potential cases to *FPLP* without having first contacted the staff and receiving directions to send same. Neither *FPLP*, nor its staff, are responsible for any unsolicited material sent.

Members are requested to continue sending news information, newspaper clippings (please include name of paper and date), memorandums, photocopies of final decisions in unpublished cases, and potential articles for publication. Please send only copies of such material that do not have to be returned. *FPLP* depends on YOU, its readers and members to keep informed. Thank you for your cooperation and participation in helping to get the news out. Your efforts are greatly appreciated.

PRISON LEGAL NEWS

Prison Legal News is a 36 page monthly magazine which has been published since 1990. It is edited by Washington state prisoner Paul Wright. Each issue is packed with summaries and analysis of recent court decisions from around the country dealing with prisoner rights and written from a prisoner perspective. The magazine often carries articles from attorneys giving how-to litigation advise. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

Annual subscription rates are $18 for prisoners. If you can't afford to send $18 at once, send at least $9 and *PLN* will prorate the issues at $1.50 each for a six month subscription. New and unused postage stamps or embossed envelopes may be used as payment.

For non-incarcerated individuals, the yearly subscription rate is $25. Institutional or professional (attorneys, libraries, government agencies, organizations) subscription rates are $60 a year. A sample copy of *PLN* is available for $1. To subscribe to PLN, contact:

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