FLORIDA PRISON LEGAL

Perspectives

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U.S. Supreme Court Upholds Constitutionality of Religious Freedom Act

In a unanimous decision, the U.S. Supreme Court has upheld the constitutionality of a law enacted by Congress in 2000 that was designed, in part, to protect religious freedoms of institutionalized persons, including prisoners. In holding that the law does pass constitutional muster, the high Court overturned a decision of the federal Sixth Circuit Court of Appeals that had held that the section of the law that applied to prisoners was unconstitutional because it gave greater protection to religious rights than is afforded to other constitutionally protected rights. The high Court disagreed.

The case began when several Ohio state prisoners, adherents of "nonmainstream" religions, Satanist, Wicca, Asatru religions, and the Church of Jesus Christ Christian, filed federal civil rights lawsuits claiming that Ohio prison officials were retaliating and discriminating against them for exercising their non-traditional faiths. The prisoners claimed that prison officials denied them access to religious literature, denied them the same opportunities for group worship that were afforded adherents of mainstream religions, prohibited them from adhering to dress and appearance requirements of their religions, withheld access to religious ceremonial items that are essentially the same as those that mainstream religious adherents are permitted, and failed to provide them a chaplain trained in their faith like are available to mainstream religious adherents in Ohio prisons.

The prisoners initially filed suit asserting their claims under the First and Fourteenth Amendments to the U.S. Constitution. After filing suit, Congress enacted a new law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the prisoners amended their complaints to include claims under section 3 of that Act.

Section 3 of RLUIPA provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." And section 3 of the Act applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance."* The Act also specifically provides that a "person may assert a violation of [RLUIPA] as a claim or defence in a judicial proceeding and obtain relief against a government."

When the prisoners amended their complaints to include a claim that Ohio prison officials' actions failed to accommodate their religious exercise in violation of RLUIPA, the prison officials motioned to dismiss that claim, arguing that section 3 violates the Establishment Clause of the First Amendment, more commonly known as the clause mandating separation of church and state.

ON THE INSIDE

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Prison officials also claimed that forcing them to comply with RLUIPA would compromise prison security as prison gangs use religious activity to cloak their illicit and often violent conduct.

The federal district court rejected the argument that section 3 conflicts with the Establishment Clause and prison officials' weak, and basically unsupported, claim that enforcement of RLUIPA would, inevitably, threaten prison security. The motion to dismiss was denied and the prison officials filed an interlocutory appeal.

The federal Sixth District Court of Appeals reversed. That court held that section 3 of RLUIPA "impermissibly advanc[es] religion by giving greater protection to religious rights than to other constitutionally protected rights," therefore affording religious prisoners more rights than nonreligious prisoners, which might, the court suggested, "encourag[e] prisoners to become religious in order to enjoy greater rights." That, the appeal court held, was an unconstitutional promotion of religion by the government not allowed by the Establishment Clause. The prisoners sought review of that finding, which the U.S. Supreme Court granted.

The high Court held that the Sixth Circuit wrongly decided the issue.

Foremost, the high Court held, that section 3 of RLUIPA is compatible with the Establishment Clause because it prevents exceptional government-created burdens on private religious exercise. And courts properly applying RLUIPA must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries and must be satisfied that the Act's requirements will be administered neutrally among different faiths.

Noting that section 3 covers state-run institutions, in which the government has a great degree of control uncomparable to civilian society and severely disabling to private religious exercise, the Supreme Court opined that RLUIPA thus protects institutionalized persons who are unable to freely attend to their religious needs and who are therefore dependant on government's permission and accommodation to exercise their religion.

But, the Court held, RLUIPA balances the accommodation of religious exercise so that it does not override other significant governmental interests, such as prison security. Lawmakers, who enacted RLUIPA, were mindful of the importance of prison security and anticipated that courts will apply the Act's requirements with due difference to the experience and expertise of prison and jail administrators. In fact, the Court continued, if prisoner requests for religious accommodation should become excessive, impose

unjustified burdens on other prisoners, or jeopardize the effective functioning on an institution, the facility would be free to resist the imposition, under the compelling interest provision of the Act.

And finally the Court held that the Act is constitutional because it does not differentiate among bona fide religious faiths.

The Supreme Court did not address the individual claims of the Ohio prisoners who originally brought the suit. Instead, it sent the case back to the district court to hold further proceedings on those claims under RLUIPA standards as explained by the high Court in its decision.

Ohio is not the only state to have challenged the institutionalize person provisions of RLUIPA. Several states filed briefs in support of Ohio's position. It is expected that Ohio and other states will continue to challenge the law on other grounds where it provides a measure eof empowerment to prisoners, which prison officials naturally oppose in any context. For now, however, prisoners have some protection to exercise their religious faiths.

See: Cutter, et al. v. Wilkinson, et al., __U.S.__, __S.Ct.__, 18 Fla.L.Weekly Fed. S317 (5/31/05).

* All states, including Ohio, receive federal funds for their prison systems. ■

Shift or Sham?
Is the Prison Boom Really Ending?

by Joseph Washawitz

There may be a shift from building prisons to offering rehabilitation in some states. California, for example, where 33 prisons were built since 1984, has decided to build no more prisons and on July 1, '05, even renamed its corrections department the California Department of Corrections and Rehabilitations. The last prison built by California, the Kern State Valley Prison, is reportedly marked as the first maximum security prison to offer rehabilitation on a full scale. Other states, like Massachusetts and Michigan, have also made a change in policy and established programs to help releasees reenter society. But is there really a shift in corrections policy?

Beginning in the 1970's, the powers that began to focus on crime, corrections and law enforcement in a different way. State and federal taxes (viewed as pocketbooks from which monies could be indiscriminately taken, if the excuses were good enough) were used to erect prisons all over the nation. The entity primarily responsible for the boom in prison growth, and the concomitant caging of hundreds of thousands of men, women and children, is the American Legislative Exchange Counsel (ALEC). In fact, the nation-wide correction industry was boosted to over $50 billion a year by the mid-1990's, and more than two million people were locked behind bars. ALEC had the answer to generate revenues; all it needed was the problem.

The problem was created through criminal legislation introduced in large measure by ALEC and its constituents. All sorts of common human behaviour became criminal, or, if already criminal, punishments became harsher. Public outrage was founded by political rhetoric and a well-motivated media campaign. The agenda was easy to advance, too, because, after all, who wants to defend criminals?

It seems that too few Americans actually stopped to consider why so many were being labelled as "criminal" all of a sudden. According to Paul Sutton, a criminal justice professor at California State University, San Diego, "The binge of the '80s and '90s was simply political; it was not correlated to crime or increases in the civilian population."

Somewhere in the political landscape, elected officials forgot that they were supposed to represent all of the American public...and not play one group against another. "In the past, it has been you are either for the victim or for the offender. It was a specious dichotomy," said Peggy Burk, an agent at the Center for Effective Public Policy: Politicians and law enforcement had begun to treat hundreds o thousands of Americans as though they were disposable citizens.

An example of misplaced loyalties: intolerance and ineffective policies in our public schools has led to greater numbers of children roaming the streets with uninformed minds to guide them (indeed, misinformed if contemporary media, movies, music and television are their primary sources of information). Another example: many mental health institutions across the land were shut down in the name of budget concerns. With the overhaul effected by ALEC and like-minded legislators (the "get tough on crime" agenda), our youth and mentally infirm were soon packed away in prisons throughout the nation. No longer were they children and mentally ill, but juveniles and offenders.

"I applaud California for saying this is the last prison they are going to build," said Ohio Department of Correction director Reginald Wilkinson. Two Ohio prisons have closed in this century. "If you build a prison," Wilkinson said, "you are going to find people to put in it."

In fact, the present structure of the criminal justice system not only ensures that more people go to prison to serve longer sentences but also ensures that two-thirds of all prisoners are rearrested within three years of their release. These statistics hold true despite a drop in the crime rate nationally. Thus far politicians acknowledge no responsibility for the $50-plus-billion-dollar-a-year beast that is the corrections industry, nor for the lives, families and economics damaged by the tough-on-crime rhetoric used to allocate taxes to me-too pockets. Prison spending increased by more than 1,000 percent in the United Stats over the past 15 years.

Despite an across-the-board decrease in crime, most sheriffs, police commissioners and law enforcement lobbyists *still* have their hands out for more taxpayer dollars; moreover, to justify the budgets already in use, law enforcement is driven to be more inventive—indeed, creative—in its "protection" of the public. This, in many instances, the public servant is transformed into the suspicious and intrusive inquisitor. To some, the arrogance encountered in those sworn to "serve and protect" is appalling.

Where the media is often used as a tool to promote universal fear for isolated crimes, grassroot outcries are beginning to influence the political landscape in the opposite direction. Groups like Families Against Mandatory Minimums are attempting to unveil the troubled reasoning behind placing our citizens in prisons for decades at a time for property crimes or cries that involve no injuries. The discontent does not stop there: overextended state and federal budgets are causing some politicians to raise eyebrows and ask questions. The corrections/law enforcement beast has gotten out of hand, and something must be done about it.

Hence, the shift in focus is now to try rehabilitation. In California, Governor Arnold Schwarzenegger (R) has called for a conceptual shift, which may indicate that something more than rehabilitation of prisoners is in order: perhaps the rehabilitation of the criminal justice system.

But some are unconvinced that a shift is occurring at all. Rose Braz, director of Critical Resistance, stated that Governor Schwarzenegger has cut educational programs and added beds to existing facilities. "Beyond rhetoric, we have not seen [the governor] put his money where his mouth is," she said, "other than changing the name of the department and shuffling some chairs around." The Florida Department of Corrections has likewise cut education and added beds in its prisons.

It may be that there is no shift, but a recession of a sort due to the strain on the nation's finances. Professor Sutton said, "Why all of a sudden does it stop? Once again it is not tied to a crime turn around or people leaving the state [of California]. Once again it's political. This time the politics driving the change is economics."

Actually, it was always economics; what started out as a cute little revenue generator has turned into an obese beast that is hungry for billions and billions more of taxpayers' dollars, and it is ravaging the society that it is supposed to be protecting. A shift may or may not be in the making, but one thing is certain. A shift is needed. A big one.

[Source: *Christian Science Monitor*, 6/20/05] ■

Florida Prisoner Settles First Amendment Claim

by Glenn Smith

At a recent settlement conference conducted by a senior magistrate judge in *Smith v. Mingo*, U.S. District Court Southern District of Florida Case No. 04-14015-CIV-Middlebrooks/White, prisoner Glenn Smith settled a First Amendment claim against former Florida Department of Corrections Warden Timothy Mingo.

While warden at Martin Correctional Institution, Indiantown, Florida, Mingo repeatedly refused to allow Smith to receive routine mail containing newspaper clippings, even after FDOC central office officials had approved Smith's receipt of the clippings. The central office response to Smith's grievance of the newspaper clipping's rejection stated, "We cannot conclude that they are a threat to security." The rejections took place during a period when the FDOC was engaged in formal rulemaking proceedings to amend the routine mail rules specifically to allow clippings and other enclosures.

At a status conference preparatory to a bench trial in the case, District Judge Donald M. Middlebrooks ordered the settlement conference, indicating that the necessary due process applied to Smith's First Amendment rights was apparently the grievance procedure which Smith followed and was successful on. But, Judge Middlebrook noted that due process was essentially abrogated when "Mingo said no." The judge also told Smith the downside at trial would be that it didn't appear that he had much in the way of damages.

Smith was ably represented at the settlement conference by Rene D. Harrod of the Ft. Lauderdale office of the law firm Berger Singerman, which took the case *pro bono* through the Volunteer Lawyers Project of the Southern District of Florida. Smith had contacted the Project for assistance prior to the status conference.

The case was settled for $500 to Smith and $2500 to the attorneys and Project. ■

Family Ties: DNA Searches Uncover More Than Family Secrets

by Oscar Hanson

Law Enforcement agencies in the United States and the United Kingdom have begun to solve not just crimes committed by suspects whose DNA profiles are in government databases, but also those committed by relatives whose profiles were not on file. Siblings, parents, and even uncles and cousins are being investigated for crimes because their genetic fingerprints closely resemble the DNA of a known criminal.

The familial searches have expanded the power of the computer databases that authorities in both nations have used for the past decade to compare genetic profiles taken from convicted criminals with DNA left at crime scenes.

State and federal agencies have collected over 2.4 million DNA profiles and have used those profiles to solve more than 16,000 cases. Police expect to use familial profiling to double or even triple the size of the databases without adding new samples.

Yet the new techniques raise a host of ethical and legal questions: Is it fair for someone who has committed no crime to become a "virtual" suspect because he happens to have a relative who has been required by law to provide his DNA profile because of his crime? And how can familial searches of DNA databases avoid violating the rights of unrelated people whose genetic profiles happen to resemble that of someone in the databases? Since all humans share some similarities in their DNA, thousands of unrelated people could have DNA profiles that partially match.

Here's how the technique works: Familial searching is based on the power of modern computer databases and on genetic principles that are as old as the human race.

With the exception of identical twins, each person's DNA profile is believed to be unique. But long stretches of the chemical sequences that make up the DNA molecule are identical in all humans. DNA analysis works by comparing areas, called alleles, where the sequence varies greatly among individuals.

In the 90s, the United States and the United Kingdom began to maintain databases that use a series of such alleles to match DNA from unsolved crimes to known or suspected offenders. Nationally, state and federal agencies keep DNA indexes of suspects and unsolved crimes, and share information through a computer system maintained by the FBI.

Herein lies a slippery slope: Siblings inherit their DNA from both parents, meaning that even non-twin siblings often have several alleles in common. Only a complete match, meaning 26 identical alleles, can be used to connect a suspect to an unsolved crime. But a near match can indicate that the suspect is a close relative. Just how many alleles does it take to connect the relative? Only 16. The problem is that unrelated people can have some of the same genetic markers.

The evolution of this science came into the spotlight when North Carolina authorities were searching for the man who raped and killed a Winston-Salem newspaper editor. Lab technicians compared DNA left at the crime scene with the genetic profiles in the state's database of convicted felons. The crime scene DNA didn't match any of the 40,000 felons on file, but I did offer a clue: The unknown suspect's profile was remarkably similar to that of Anthony D. Brown.

The technicians determined that Brown and the man they were seeking likely inherited their DNA from the same parents. Law enforcement took that information and began to stalk Brown's brother, Willard. They got what they were looking for when Willard *discarded his* cigarette butt. Police collected I and extracted DNA from the saliva. It was a perfect match with the DNA collected from the crime scene.

Willard Brown ultimately plead guilty to the crime that had occurred nearly 10 years earlier and was sentenced to life in prison plus 10 years. Meanwhile, the man who was wrongfully convicted of the crime was finally freed after spending 18 years in prison for the crime and had persuaded a court to order DNA testing.

But as this case demonstrates how DNA advances can free innocent men, the technology of familial searches has pitfalls. In 1999, Great Britain thought it had matched a DNA sample from the scene of an unsolved crime to a man who had a perfect alibi. He was in jail when the crime occurred.

The convict's DNA and that from the crime scene sample matched at 12 alleles. Had this man not been in jail, he could have been a prime target for a wrongful conviction.

The technology on familial searches is relatively new in the United States, and there are few laws on the subject.

Federal privacy law bars the FBI from performing familial searches within its own databases. Yet New York and Massachusetts have laws that authorize familial searching. California's DNA database technicians report partial matches that "appear useful" to law enforcement, but they do not actively search for relatives. In Virginia lab examiners are permitted to tell law enforcement that a crime scene sample might have come from a family member when the DNA near match is very, very close.

Beginning this year, Florida's DNA database operators have bee permitted to give investigators the names of convicted offenders who match a crime scene sample at 21 of 26 alleles. According to David Coffman, a state crime lab supervisor, research using Florida's convicted offender database suggests that men who have 21 alleles in common almost always are brothers. Almost always?

Florida also has begun searching its database for rape suspects by using the DNA of children born to rape victims to identify their fathers. The database has helped solve at least eight rape cases. ■

IN THE NEWS

AZ – During March 2005, Ray Krone, who was twice wrongfully convicted of murder and sentenced to death, reached a $1.4 million settlement with Maricopa County, Arizona. Krone spent over two years on death row and a decade in prison overall after being wrongfully convicted of killing Phoenix bartender Kim Ancona in 1991. Advanced DNA testing conducted in 2002 cleared Krone of the murder.

CT – A prisoner who sparked an anthrax scare when he sent a white powder to a state prosecutor received 30 years in federal prison on May 11, 2005. Noel Davila, 34, is the first person to be convicted in Connecticut of threatening to use a weapon of mass destruction. The letter containing the white powder was sent in 2002, one year after someone sent anthrax through the mail killing five people.

FL – On May 12, 2005, prison guards and police were searching for William Hawley, 41, who escaped from a road crew from a work camp at Martin Correction Institution, located near Stuart, Florida. Charlotte Yoder said she had unwittingly drove Hawley around for three hours and gave him $20 for a meal. Hawley had told Yoder his car had broken down. He was serving 10 years for charges including burglary and theft.

FL – On March 4, 2005, former Hernando County jail guard Louis Gregory, 38, was sentenced to six months in jail after pleading guilty to sexual misconduct involving the sexual assault of a 17-year-old female prisoner at the jail. The jail is run by the private, for profit Corrections Corporation of America.

FL – Jacqueline Santoni, 25, a Seminole County Jail guard was arrested and charged with driver license fraud, forgery, perjury and criminal use of a public record on March 19, 2005. Santoni, before being hired at the jail in Dec. '04, had worked as a prison guard at the Central Florida Reception Center in Orlando. There she started a relationship with a prisoner and in order to visit him and conceal it from the jail, which prohibits such relationships, she obtained state identification under a false name.

GA – Tommy Cardell, 52, a guard at Rogers State Prison, was reinstated to the payrolls May 23, 2005, while the Georgia Bureau of Investigation and Department of Corrections investigates his claims that handcuffed prisoners were beaten at the prison. Cardell says he was fired May 11. On May 23 he was unfired and suspended with pay. Five others at the prison, including the warden and deputy warden, were also suspended with pay pending the outcome of the investigation.

MA – David Smith, 58, a former Taunton police officer, was allowed to enter a plea agreement during May '05 that will allow him to keep his pension and stay out of prison, despite the fact that he admits molesting his adopted daughter. Smith resigned after his arrest and was sentenced to four years of probation under the agreement, although he admitted to assaulting the child almost every night for a year starting when she was 7-years old. As part of the agreement Smith was ordered to undergo sex offender counseling and stay away from the child. (Talk about benefits of the job!)

National – US Catholic bishops launched a campaign during March '05 against the death penalty. The effort will include increased advocacy in Congress and state legislatures, and filing legal briefs in death-penalty cases. Archbishop Theodore McCarrick of Washington, DC, said the campaign fits into the church's general ideology of respect for life. Use of the death penalty has been falling. In 2004, 59 people were executed, the lowest number since 1997. The number of people sentenced to death has also fallen, from a high of 320 in 1996 to 136 in 2004.

TN – A state prison guard resigned as officials investigate the fatal stabbing of a prisoner just minutes after the guard left his post. Sgt. Warren Russell claimed stress caused him to resign about two weeks after prisoner Keith Drinkard was stabbed to death and his body set on fire at Riverbend Prison. Another guard was fired over the same incident.

VA – During Apr. '05 advocacy groups launched a campaign to help convicted felons regain their right to vote. Those organizing the Virginia Voter Restoration Initiative say they will soon announce a toll-free number where convicts call to get help filling out lengthy voter restoration applications.

FL – During July '05 almost 3,100 prisoners and hundreds of prison employees were tested at a women's prison in Marion County after confirmation of three cases of tuberculosis and five suspected cases were discovered, said the Fla. Dept. of Corrections. The facility was placed under quarantine, visitation was suspended and transfers of

prisoners in or out of the facility were stopped.

FL – A federal lawsuit was filed against the Jacksonville Sheriff's Office in July '05 by Ginger Laughon the mother of John Laughon, 39, who suffered injuries in Feb. '05 after getting in a fight with guards at the jail. Laughon's injuries have left him in a persistent vegetative state. He was serving time in the jail for marijuana possession. According to reports, Laughon was placed in a restraining chair for attacking a guard at the jail. Later, reports claim, he was found out of the restraints and then attacked two other guards, they had to restrain him. He was then taken to a hospital for treatment of minor injuries and a mental evaluation. When he arrived he was not breathing, had no pulse and was cold. Doctors resuscitated him, then found he had nine broken ribs, both lungs punctured and a head injury. Undersheriff Frank Mackesy said Laughon only had minor injuries when taken to the hospital and that the more serious injuries may have been caused by doctors resuscitating him.

National – The federal Bureau of Prisons is moving to collect DNA samples from all prisoners in federal custody or under federal supervision who have a conviction for any type felony, sex offense, violent crime or conspiracy to commit such crimes. The DNA samples are being collected for the FBI's electronic Combined DNA Index System (CODIS). Authority for the collection was included in the Justice for All Act of 2004 that was passed in October 2004. Those refusing to cooperate will be charged with a Class A misdemeanor, carrying up to a year in prison. The Act also provides that those required to provide DNA samples may be subjected to whatever means are necessary to collect the samples.

PA – Prisoner in Blair County Jail must pay a $50 fee if they wasn't to visit their children. The fee covers transporting prisoners two blocks from the jail to the courthouse and salaries of deputies who monitor the visits, said Sheriff Larry Field. It would also cut down on "frivolous visits," Field said. Prisoners and their families protested the fees and the jail warden said he would look at other ways to pay the cost of visiting.

PA – On August 1, '05, Thomas Doswell, 46, who spent 19 years in prison for the 1986 rape of a 48-year-old woman at a hospital in Pittsburgh, was released after new DNA tests proved he didn't commit the crime. Prosecutors had opposed the new tests but were overruled by a judge. Doswell had been convicted on witness testimony resulting from an apparently rigged photo lineup conducted by police. The victim and other witnesses picked Doswell out of a group of eight photos shown to them by police. Doswell's photo had the letter "R" underneath it, signifying he was a rapist. The Pittsburgh police no longer marks photos with an "R." Doswell had said he was innocent from the time he was charged. He was represented in his DNA challenge by the Innocence Project at the Cardozo School of Law at Yeshiva University in New York. ■

Donations Needed

Florida Prisoners' Legal Aid Org., Inc., conducts many projects besides just publishing *FPLP*. The organization depends on members, readers and other concerned people to fund those projects, usually through donations. Please consider making a donation to help FPLAO continue those projects and to continue working for Florida state prisoners and their families and friends. Donations, in any amount, should be sent to FPLAO at the address given on the form on page 23 of this issue of *FPLP*. Thank you for your support.

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Often when a 3.850 Motion for Postconviction Relief makes it to the stage of an evidentiary hearing, it seems that the State will take whatever position is necessary to refute the movant's claims. Sometimes this means that the State will take a position which is directly in conflict with its previous position at trial or on appeal. It is improper and unethical for a prosecutor to do this. Unfortunately, though, it happens often enough that one should be prepared for such tactics at an evidentiary hearing. If and when the State tries to switch arguments on an issue at a postconviction evidentiary hearing, one should be ready to argue the doctrine of judicial estoppel to prevent such an unfair and opportunistic attempt to refute claims.

In Florida, the general rule of judicial estoppel is that a claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions. Grau v. Provident Life and Acc. Ins. Co., 899 So.2d 396 (2005); *see also*, Federated Mut. Implement and Hardware Ins. Co. v. Griffin, 237 S0.2d 38 (Fla. 1s DCA, 1970) [Litigants are not permitted to take inconsistent positions in judicial proceedings, and a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose]. The doctrine of judicial estoppel has been developed to protect the integrity of the judicial process and to prevent parties from "making a mockery of justice by inconsistent pleadings." Grau *quoting* American National Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983). Judicial estoppel further prevents parties from "playing fast and loose with the courts." Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). A situation justifying the application of judicial estoppel "is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." Scarano v. Cen. R. Co. of N.J., 203 F.2nd 510, 513 (3rd Cir. 1953).

Thus, if a prosecutor argues an issue one way at trial and then later takes the opposite position at a postconviction evidentiary hearing, he should be judicially estopped from using the intentional self-contradiction as a means of obtaining an unfair advantage at the evidentiary hearing. Even if the prosecutor at the evidentiary hearing is different from the original prosecutor on the case, he still should not be able to argue a position which conflicts with the one which the State presented at trial or on appeal. Any State Attorney's office is the equivalent of a law firm.

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. ■

State Watchdog Commission Complicit in Private Prison Fraud

by Sandra Arnold

The two private, for-profit prison companies that receive taxpayer money to run five prisons in Florida were allowed to over bill the state by almost $13 million and even rebated some money to cover expenses and salaries of the commission that was suppose to be policing their contracts, according to a new state audit.

The audit was released a year after the state Legislature abolished the controversial Correctional Privatization Commission (CPC). (See: FPLP, Vol. 10, Iss. 6, pg. 4.) The CPC had been set up to oversee the contracts between the state and two private prison companies that have operated five private, for-profit prisons in Florida for a decade. The two companies are Corrections Corporation of America of Nashville and The GEO Group (formerly Wackenhut) of Boca Raton.

The disclosures in the audit, which was performed by the Department of Management Services, that was given the job of overseeing the private prison contracts last year, paints a picture of a cozy, if not felonious, relationship between the defunct CPC and the prison companies.

"The CPC failed to safeguard the state's interests... The CPC consistently made questionable contract concessions to vendors," states the audit report. The audit was based on records dating from 1997 and include findings that:

- The private prison companies were paid $4.5 million for jobs that were vacant, in part because CPC failed to require the companies to report the vacancies.

- The CPC authorized $5 million in cost-of-living salary adjustments at GEO's South Bay Correctional facility. Auditors say the money wasn't fully passed on by GEO to employees as required.

- Corrections Corp. received $2.9 million more for facility maintenance at Gadsden Correctional facility than was actually spent on maintenance.

- The CPC, when the Legislature cut its budge in 2001, simply increased each private prison company's per-diem rate by the amount needed to cover CPC's operating costs and salaries and the companies "in turn remitted the per-diem increases back to the CPC's Grants and Donations Trust Fund." The funds were then used to pay CPC expenses and salaries that the Legislature refused to fund.

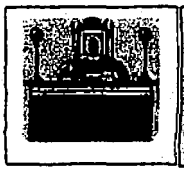
Alan Duffee, the last director of CPC, said, "I agree 100 percent of what's in here," referring to the audit report. Duffee, who noted that the alleged discrepancies most occurred before he took over as CPC director, said it illustrates weaknesses in privatization, as companies holding contracts use lobbyists to fend off competition and set specifications favorable to their bottom line.

Ken Kopczynski, lobbyist for the Police Benevolent Association, the union for Florida prison guards which opposes prison privatization, was more harsh. "We should be talking criminal charges," he said.

But it is very unlikely that any serious ramifications will result. Republican lawmakers, who generally promote privatization and reap its benefits, have been reluctant to change the system despite recurring questions and evidence showing the state's private prisons cannot meet the 7 percent cost savings required by law and as was promised taxpayers when they were sold the private prison idea a decade ago.

In fact, during this year's legislative session, lawmakers voted to build additional beds at three of the private prison facilities, requiring a two year extension on their contracts. And negotiations are underway to build a sixth private prison in Jackson County, which either Corrections Corp. or GEO will contract to run.

Florida's private prisons are a $106.4 million-a-year business. This year Gov. Jeb Bush vetoed legislation that would have created new protections for taxpayers concerning all kinds of privatization. Bush has lead the charge for privatization in Florida. As long as private prison companies continue to ply politicians with campaign cash and lobbyists, and Republicans continue to control Florida's Legislature and governor's office, it's a fair bet that the interests of the private prison companies will trump the interests of taxpayers.■



NOTABLE CASES

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 (So. 2d); Supreme Court Reporter (S. Ct.); Federal Reporter 3d (F.3d); or the Federal Supplement 2d (F.Supp. 2d), since these summaries are for general information only.

UNITED STATES DISTRICT COURTS

Doss v. Crosby, 18 Fla.L.Weekly Fed. D580 (N.D. Fla. 6/6/05)

This case involved a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254 that challenged prison disciplinary proceedings for possession of narcotics and bribery, which resulted in forfeiture of gain time, and the forfeiture of additional days of gain time as the result of an audit.

The respondent, James V. Crosby, Jr., filed a motion to dismiss Richard Scott Doss petition as moot. Respondent asserted that Doss had been released from prison on the expiration date of his sentence.

Doss replied to the motion to dismiss raising two arguments in contention that his petition was not moot. First, if the unlawfully forfeited gain time were to be restored, he could have started serving his probation (to which he was released on expiration of sentence) much sooner. Second, Doss contended that the petition is not moot because he may not seek compensatory relief for false imprisonment until the disciplinary reports are overturned.

A Magistrate Judge filed his Report and Recommendation which asserted that Doss' first argument on reply was not persuasive. According to exhibits brought out in the respondent's motion to dismiss, Doss was sentenced to 22 years imprisonment and 8 years of probation, a probationary split sentence under Florida law. This made Doss' issue similar to that in a prior case that was brought before the district court. In that case, it was found by the Magistrate that a petitioner challenging the loss of gain time (based on allegedly false and retaliatory disciplinary reports) was mooted by expiration of the sentence, even though petitioner was released to the probationary portion of his split sentence. That rationale followed *United States v. Johnson*, 529 U.S. 53 (2000).

In *Johnson* it was found that the Florida Statute authorizing a split sentence specifically states that the defendant may be placed on probation "*upon completion of any specified period of such sentence*," and that the period of probation or community control "*shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.*" See: Florida Statutes, section 948.01(6).

The Magistrate stated that the same statutory language applied in Doss' case, and *Johnson* controls. Doss could not serve his probation and incarceration simultaneously and even if he could prove that gain time was wrongfully forfeited, the court could not grant relief. Under Florida law, gain time may only be applied to shorten the term of imprisonment and that term had expired. Therefore, the Magistrate recommended that Doss' petition should be found moot.

In regards to Doss' other argument, it was stated that it was unsupported. The United States Supreme Court has rejected the argument that a habeas petition is not moot because a 42 U.S.C. 1983 action for damages would then be foreclosed under *Heck v. Humphrey*, 512 U.S. 477 (1994). The Supreme Court has said: "That is a great non sequitur, unless one believes (as we do not) that a section 1983 action for damages must always and everywhere be available." See: *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). See also: *Nonnette v. Small*, 316 F.3d 872, 876-878 (9th Cir. 2002), cert. denied, 540 U.S. 1218 (2004)(because no case or controversy remained for released inmates and habeas petition would be moot under *Spencer*, *Heck* did not bar section 1983 suit).

As a result, the Magistrate Judge's report recommended that respondent's motion to dismiss be granted and Doss' petition be dismissed as moot. There were no objections to the recommendation and the district court held that the report and recommendation was correct and adopted it as its opinion. The district court added an additional note: "[T]he conclusion that this petition is moot is correct regardless of whether petitioner's release removes the bar to any civil cause of action he might have, under 42 U.S.C. section 1983 or otherwise, for challenging the revocation of his gain time."

FLORIDA SUPREME COURT

Van Poyck v. State, 30 Fla.L.Weekly S373 (Fla. 5/19/05)

William Van Poyck, along with his accomplice Frank Valdes*, was convicted of first-degree murder of a Florida correctional officer during a botched 1987 attempt to free a mutual friend from a prison transport van. Both defendants had

separate trials and both were ultimately sentenced to death. On Van Poyck's direct appeal the Florida Supreme Court held that there was insufficient evidence to sustain a conviction of first-degree premeditated murder, and insufficient evidence to establish that Van Poyck was the triggerman. However, the Court found sufficient evidence to support a conviction of first-degree *felony* murder, and upheld his death sentence under a *Tison v. Arizona* analysis. See: *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990).*

Van Poyck subsequently filed a post conviction motion for DNA testing pursuant to Rule 3.853, Fla.R.Crim.P., alleging that DNA testing on blood-stained clothing could conclusively establish that Van Poyck was not the triggerman. Van Poyck argued that because he had been recommend for, and sentenced to death by a jury and judge who *erroneously* believed that he was the triggerman, his sentence was tainted and rendered unreliable by newly discovered DNA evidence establishing that he was not the shooter.

Relying on *State v. Mills*, and other similarly favorable decisions, Van Poyck argued that he could meet the "reasonable probability" standard in that the newly discovered DNA evidence created "a reasonable probability that had Van Poyck's jury and judge known that he was not the triggerman Van Poyck would have received a different sentence." This was especially true, Van Poyck argued, where the state, at trial, had vigorously argued that Van Poyck was the triggerman (even as they suppressed evidence proving otherwise) and where the jury's unorthodox verdict form, and the judge's written sentencing order, both indicated their belief that Van Poyck was the shooter. The trial court summarily denied the motion and Van Poyck appealed.

On May 19, 2005, a majority of the Florida Supreme Court disagreed with Van Poyck and upheld his death sentence. In a 6-1 vote, the Court, while implicitly conceding that Van Poyck was not the triggerman, nevertheless stated that "we hold that there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial." The Court did not cite a single case in support of that remarkable proposition and simply ignored the wealth of prior decisions holding the opposite to be true. Justice Anstead authored a vigorous 4-page dissenting opinion, calling the majority decision contrary to "common sense and our death penalty jurisprudence."

*Frank Valdes was subsequently murdered in his death row cell by Florida State Prison guards on July 17, 1999. Despite overwhelming evidence, none of those guards were convicted for Valdes' brutal murder.

Bulgin v. State, 30 Fla.L.Weekly S368 (Fla. 5/19/05)

In this case the Florida Supreme Court held that a defendant's right to a speedy trial is not waived just because the defendant agreed to cooperate with the police.

On review, William C. Bulgin's case was consolidated with two other cases out of the First District Court of Appeals, *State v. Patel*, and *State v. Pelky*. In these cases the First District opined that because it was the defendants' agreement to help law enforcement in a continuing drug investigation and because it was decided to delay trial proceedings due to the defendant's concern that formal charges and court appearances would jeopardize their covert assistance, the delay was attributed to the defendants, not to the state. Thus, it was decided speedy trial rights were waived.

The decision made by the First District expressly and directly conflicted with what was decided by the Fifth District in *Williams v. State*, 757 So.2d 597 (Fla. 5th DCA 2000). In *Williams*, the court rejected the argument that because Williams was assisting the state he was unavailable for trial. The court reasoned that a person is deemed unavailable, as prescribed in Florida Rule of Criminal Procedure 3.191(k), for trial if the person or the person's counsel fails to attend a proceeding where their presence is required or the person or counsel is not ready for trial on the day trial is scheduled.

The Fifth District had found that Williams had *not* (expressly or written) waived his right to a speedy trial, nor had he engaged in conduct that would stop him from asserting his rights. The same was found of the defendants in the consolidated cases from the First District.

It was noted by the Florida Supreme Court, in reviewing the conflicting opinions, that is was the *state* that essentially had complete control of the chain of events in the Fifth District's *Williams'* case, as well as the cases from the First District, (e.g., arrest, offer and terms of the cooperation agreement, re-arrest, and timetable on filing formal charges). It was reasoned that any delay or unavailability in prosecution and trial would be attributed to the state because of their seeking the benefit of the defendant's cooperation to make other arrests. To waive a person's speedy trial right, there must be some more explicit action or evidence of an intent to do so than the mere agreement to cooperate with police in other criminal investigations or prosecutions.

The Florida Supreme Court held that the First District improperly attributed the delays to the defendants. Thus, the First District's decision in its cases was quashed and

the Fifth District's in *Williams* was approved.

State v. Anderson, 30 Fla.L.Weekly S437 (Fla. 6/16/05)

The Florida Supreme Court in this case was faced with dueling tests, where it had to decide which harmless error standard applied in determining whether a scoresheet error requires resentencing.

Jerry D. Anderson, had file a rule 3.850 motion in a trial court alleging a scoresheet error, claiming that the lower court had incorrectly classified his offence as a level 9 when it should have been a level 8. By classifying Anderson's offence as a level 9, it reflected 137 total sentencing points, resulting in a guideline range of 81.75 to 136.25 months. Had the offence been scored as a level 8, the correct level, it would have reflected 120 total sentencing points, which would have resulted in a range of 69 to 115 months.

Being faced with the incorrectly scored guideline, the lower court had sentenced Anderson to 90 months, which fell in the low end of that guideline range. As such, Anderson argued that the imposed 90 month sentence would only fall in the mid-range of a corrected scoresheet with the offence classified as a level 8 offence. Thus, Anderson sought to have the scoresheet corrected and to be resentenced to the low end of the corrected guideline range.

It was found and agreed by the lower court that Anderson's offence should have been classified and scored as a level 8. However, it disagreed in that he should be resentenced, citing *Hummel v. State*, 782 So.2d 450 (Fla. 1st DCA 2001). It was reasoned that based on the standard found in *Hummel*, Anderson was not "adversely affected" by the error because his sentence fell within the corrected range. Consequently, Anderson's motion was denied.

In *Hummel* the First District Court of Appeals had applied a *could* – have – been - imposed test. Under that test, scoresheet error does not require resentencing if the sentence could have been imposed (absent a departure) with a correct scoresheet.

In Anderson's case on appeal, *Anderson v. State*, 865 So.2d 640 (Fla. 2d DCA 2004), the Second District agreed with the lower court's decision in that the offence level was incorrect, however, it disagreed with the standard the lower court used found in *Hummel*. Consistent with prior Second District cases and a test used by other districts, the Second District applied a *would* – have – been - imposed test in Anderson's case. Under that test, a scoresheet error requires resentencing unless the record conclusively shows that the same sentence would have been imposed using a corrected scoresheet. Absent such showing, the lower court in Anderson's case was instructed to resentence him with a corrected scoresheet. In conclusion, the Second District certified conflict with the First District's decision in *Hummel*.

The Florida Supreme Court noted, in reviewing the conflict, courts have developed a harmless error analysis to determine whether a scoresheet error must be merely corrected (harmless) or whether the error warrants both correction and resentencing (harmful). This, by using the would – have – been - imposed test, from the original sentencing guidelines in 1984 through to the current Criminal Punishment Code, in both rule 3.850 motions and on direct appeals regarding scoresheet errors.

In reviewing the *could* – have – been - imposed test used by the First District in *Hummel*, the Florida Supreme Court found that the First District had actually renounced the *would*-have-been-imposed test. Instead, it had embraced the "new harmless error analysis to be applied in dealing with scoresheet inaccuracies," which it believed that the Florida Supreme Court had adopted in *Heggs v. State*, 759 So.2d 620 (Fla. 2000). However, *Heggs* did not supplant the *would* – have – been - imposed standard for claims alleging scoresheet errors. *Heggs* concerned unconstitutional guidelines, and it held that if the sentence that was unconstitutionally imposed *could* legally have been imposed under the still - valid 1994 guidelines (without a departure) no resentencing was required. The *Heggs* remedy for sentences imposed under the unconstitutional 1995 guidelines does not apply to situations that do not involve those guidelines. Therefore, it was found by the Florida Supreme Court that the test adopted by the First District in *Hummel*, rested on a faulty premise that *Heggs* imposed a new standard for determining whether scoresheet error was harmless.

Accordingly, the First District's decision in *Hummel* was disapproved and the Second District's decision in *Anderson* was approved.

It was noted just before the conclusion of this case that the decision reached will only apply to scoresheet errors raised on direct appeal or in a motion filed under rule 3.850. Also, although it was stated that a issue of whether the standard, *would*-have-been-imposed test, applied to rule 3.800(a) motions need not be reached in this case, it was opined that such standard may be too speculative and subjective for purposes of rule 3.800(a).

DISTRICT COURTS OF APPEAL

Gomez v. State, 30 Fla.L.Weekly D1152 (Fla. 4th DCA 5/4/05)

Francisco Leonardo Gomez's case involved time limitation and jurisdictional issues of a trial court when it rules on a motion to disqualify a trial judge.

Pursuant to Florida Rule of Judicial Administration 2.160, a motion for judicial disqualification must be ruled on by the court within

thirty days following its presentation to the court.

In Gomez's case the trial court failed to rule on his motion to disqualify the judge within thirty days. Thus, the Fourth District court of Appeals decided that Gomez's motion should be granted.

It was also noted in Gomez's appellate review that while a motion to disqualify is pending, the trial court is not authorized to rule on any other pending motions; all such motions that the trial court has ruled on must be vacated.

Maine v. State, 30 Fla.L.Weekly D1011 (Fla. 1st DCA 4/20/05)

In this case, Samuel Maine's request to the trial court for his transcripts to use on his direct appeal was denied. The trial court reasoned that Maine had waived his right to appeal, except for the legality of the sentence he received, which the court decided was a legal sentence.

The trial court opined that because Maine had no right to appeal a legal sentence, and although he was found to be indigent, the costs of the transcripts for purposes of an appeal should be borne by him and not the state. As a result, Maine sought to have the First District Court of Appeals quash the trial court's decision. He argued that just because he entered a plea does not preclude him from pursuing his direct appeal with a record on appeal, citing *State v. Trowell*, 739 So.2d 77 (Fla. 1999) and *Ford v. State*, 575 So.2d 1335 (Fla. 1st DCA 1991).

In reviewing Maine's case, the First District opined that an indigent is entitled to have all proceedings transcribed at public expense that are necessary to support the claims raised in an appellate court. As a matter of equal protection, the state must provide indigent defendants with the basic tools of an adequate defense or appeal, when those tools are available for a price to other defendants. See: *Griffin v. Illinois*, 351 U.S. 12 (1956). Furthermore, a trial court cannot withhold transcripts based on its belief that no reversible error has occurred.

Although the lower court in Maine's case was convinced that his sentence was legal, the First District vented that that was judgment for the appellate court to make, not the lower court, after a review of the record, including the transcripts.

In granting Maine's request to quash the lower court's order of denying him the transcripts, the First District opined that to decide otherwise would give another defendant who can pay for his own transcripts a greater review than what would be afforded to an indigent defendant. Thus, the order denying Maine his transcripts was quashed and the lower court was instructed to enter all such orders as are necessary for Maine to obtain a transcript of both his plea and sentencing hearings.

Norman v. State, 30 Fla.L.Weekly D1058 (Fla. 2d DCA 4/22/05)

In an effort to resolve a violation of probation (VOP) from an offense in Sarasota County, due to being arrested and convicted of an offense in Alachua County, John Lee Norma filed a writ of mandamus in the Second District Court of Appeals.

In the petition Norman claimed and presented documents that the state had filed an affidavit of violation, arrested him, and gave a first appearance hearing on the Sarasota VOP in Alachua County. For relief he sought to compel the lower court in Sarasota County to conduct a hearing on the affidavit alleging VOP, in hopes that any prison sentence for that VOP can be ran concurrently with the Alachua offense.

When just a detainer has been issued against a prisoner, generally the prisoner will not be entitled to prison credit in the case causing the detainer when he is sentenced in that case following the completion of the sentence he would be currently serving. However, if an arrest warrant was transmitted and the prisoner was arrested under the authority of that warrant for a VOP, the prisoner may then be entitled to credit because of him being held on both the current charge and the VOP charge at the same time.

In further reviewing Norman's case the Second District noted from a prior case that a prisoner who has actually been arrested for a VOP is entitled to a hearing "as soon as practicable." See: section 948.06(4), Florida Statutes (2004). In Norman's case the state had not concede that he was arrested for the VOP, and the appellate court could not conclude that the lower court had a ministerial duty to conduct a hearing when it may not be deemed "practicable" to do so since Norman was imprisoned elsewhere. However, it was opined that if Norman was correct in that he was arrested on the affidavit of VOP, then it would seem that he would have a good argument regarding prison credit for the Sarasota case that was accrued while serving his Alachua offense sentence.

The Second District decided that is would not resolve the matter in Norman's case, denying the petition, but opined that Norman would be free to make his argument if or when the state conducted a hearing on the VOP in Sarasota County.

Jewett v. State, 30 Fla.L.Weekly D1152 (Fla. 4th DCA 5/4/05)

On appeal from a denial of a motion to correct an illegal sentence where Todd R. Jewett claimed he had been denied proper jail credit, it was found that what he was actually complaining of the Department of Corrections (DOC) application of forfeiture of gain-time.

One of the sentences that the DOC had a copy of for Jewett was found not to be the sentence imposed according to the lower court's files. That particular copy DOC had in their file showed Jewett was sentenced to a nine-year prison term

followed by twenty-two years of probation for a second degree felony. What the lower court files revealed was a stipulated order vacating that sentence, which was Jewett's original sentence, indicating that he had been resentenced to nine-year prison *with no probation* imposed.

As a result of these findings the state conceded that the sentencing document DOC had a copy of and was enforcing was an illegal sentence. Consequently, the Fourth District Court of appeals reversed that sentencing order and remanded the case back to the lower court, directing it to issue an order vacating that sentence. The lower court was further instructed to furnish the DOC with the vacating order so it would enable DOC to recalculate the forfeiture of gain-time in accordance with the correct sentencing document.

Cooper v. State, 30 Fla.L.Weekly D1156 (Fla. 4th DCA 5/4/05)

The issue that was involved in Clayton Cooper's case concerned the trial court instructing the jury, in part, with a non-existent crime as a lesser included offense instead of giving the proper lesser included offense.

Cooper had been charged with attempted first-degree murder, but was convicted of attempted second-degree murder following a jury trial. The contents of the instruction the trial court issued related to, in part, attempted manslaughter by culpable negligence, a non-existent offense. On appeal, the Fourth District Court of Appeals opined that it was fundamental error for the trial court to instruct the jury that it may find guilt of the non-existent crime instead of giving the proper lesser-included offense instruction. See: *Reid v. State*, 656 So.2d 191 (Fla. 1st DCA 1995).

The state argued that Cooper had not been convicted of the non-existent crime, he was convicted of attempted second-degree murder, which was supported by the record, causing Cooper's case to be distinguishable from *Reid*. The state also cited to *State v. Abreau*, 363 So.2d 1063 (Fla. 1978) and argued that in *Abreau* it was held that "[o]nly the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible." When the omitted instruction relates to an offense two or more steps removed, the error is harmless.

The appellate court, however, noted that the Supreme Court later clarified that *Abreau* "stands for the rule that a refusal to instruct on a lesser include offense two steps removed from the offense for which defendant is *convicted* is harmless error." See: *Acensio v. State*, 497 So.2d 640, 642 (Fla. 1986).

The Fourth District found that the trial court in Cooper's case did not instruct on the next lesser included offense of attempted manslaughter, but rather, instructed on a non-existent offense. It was concluded that under *Abreau* and *Acensio* the error was fundamental and Cooper was entitled to a new trial. Accordingly, Cooper's case was reversed and remanded for a new trial.

Williams v. State, 30 Fla.L.Weekly D1157 (Fla. 4th DCA 5/4/05)

The main issue involved in Mack Charles Williams' case was a seizure of drug paraphernalia when authorities conducted an *inventory search* of Williams' car subsequent to his arrest for possession of cocaine. The arrest for possession of cocaine was executed away from where Williams' car was legally parked and where he was initially approached by the arresting authorities.

After Williams' arrest, authorities allegedly followed their standard policy in the impoundment of his car by conducting an inventory search. That search revealed a crack cocaine pipe and digital scale found in the car. As a result, the authorities further charged Williams with possession of drug paraphernalia.

At trial, Williams sought to suppress the evidence found in his car, arguing that the search was an unjustified inventory search. The trial court denied the motion to suppress, it concluded that the standardized policy to tow an arrestees' vehicle, upon arrest, is "one of the possible justifications" for a warrantless search. Williams appealed the denial of his motion to suppress.

The Fourth District Court of Appeals noted that warrantless searches are generally prohibited pursuant to the Fourth Amendment. However, it was further noted that well-recognized exceptions to the general prohibition have been created. One of those exceptions is the inventory search. It was explained that such a search serves the needs of protection of the owner's property, protection of police against claims of lost or stolen property, and protection against potential danger from such things as explosives.

To satisfy the Fourth Amendment for an inventory search, law enforcement must conduct the search in good faith and not use it as a subterfuge to conduct a warrantless search for incriminating evidence. See: *U.S. v. Prescott*, 599 F.2d 103 (5th Cir. 1979). A court must determine the inventory search's purpose in whether the impoundment of the vehicle was justified, and not just a pretext to an exploratory search of it. "Standing alone, the arrest of a defendant does not justify the impoundment of his legally parked car." Quoted from Robert M. Gross, Automobile Inventory Searches, L V 6 Fla. Bar J. 483, 484 (June, 1981)(citing *G.B. v. State*, 339 So.2d 696 (Fla. 2d DCA 1976)).

The Fourth District found that Williams' car was legally parked in a parking lot. There was no evidence presented that the care was

in danger of creating a hazard to the public or of being lost or stolen. Consequently, it was concluded that the state may not rely on the inventory search of Williams' vehicle.

Accordingly, the denial of the motion to suppress the related evidence seized during the inventory search was reversed. Williams' case was remanded for the lower court to vacate the conviction and sentence for the use or possession of drug paraphernalia.

Florida Parole Commission v. Hulkelbury, 30 Fla.L.Weekly D1187 (Fla. 1st DCA 5/6/05)

This case pointed out some of the necessary showing a petitioner must make to establish abuse of discretion by the Parole Commission when it decides to suspend a presumptive parole release date and defer setting an effective parole release date.

The First District Court of Appeals cited to *Williams v. Florida Parole Commission*, 625 So.2d 926 (Fla. 1st DCA 1993). In *Williams* it was observed that an abuse of discretion may be established in various ways, including a showing that the commission deviated from the legal requirements imposed upon it, such as the obligation to review the inmate's complete record and to articulate the basis for its decision. An abuse of discretion also occurs if the denial of parole is based upon illegal grounds or improper considerations.

Once it can be shown that an abuse of discretion has been committed, the Parole Commission's decision can be set aside by a court directing the Commission by order to reconsider its decision.

The petitioner in this case failed to show any of the showings necessary to establish abuse of discretion by the Parole Commission, therefore the denial of his petition was affirmed.

Proctor v. State, 30 Fla.L.Weekly D1232 (Fla. 1st DCA 5/12/05)

While on direct appeal, David W. Proctor's counsel filed an Anders brief (pursuant to *Anders v. California*, 386 U.S. 738 (1967)) noting Proctor's case was without any reversible errors present on record.

Thereafter, the First District Court of Appeals granted Proctor the opportunity to file his own pro-se brief. Instead, Proctor filed a request for the appellate court to relinquish jurisdiction to the lower court allowing him to file a pro-se rule 3.800(b) motion regarding several scrivener's errors involved in the judgment.

The First District treated Proctor's motion as *requesting leave to file a rule 3.800(b)(2) motion.* Subsequently, the state responded that Proctor may not file a rule 3.800(b)(2) motion because, regarding the *Anders* brief, his counsel had already file a "first brief."

Florida Rule of Criminal Procedure 3.800(b)(2), provides that: "If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellant counsel and must be served before the party's first brief is served. A notice of pending motion to correct sentencing error shall be filed in the appellate court, such notice automatically shall extend the time for filing of the brief until 10 days after the clerk of the circuit court transmits the supplemental record under Florida Rule of Appellate Procedure 9.140(f)(6)."

The First District noted that several district courts of appeal have strictly construed that time limitation, namely *Hill v. State*, 890 So.2d 368 (Fla. 4th DCA 2004) (refusing to permit counsel to withdraw brief in favor of filing a rule 3.800(b)(2) motion), and *Lee v. State*, 779 So.2d 341 (Fla. 2d DCA 2000).

The First District reasoned, however, that by strictly construing the rule regarding its time limitations in *Anders* cases would present a procedural quagmire. The United States Supreme Court in its *Anders* decision expressly provided for the indigent appellant to raise any points on appeal that he wished in a separate pro-se brief. It clearly intended to allow the indigent appellant to continue with the proceedings pro-se and any pro-se points raised on appeal would supplement the exhaustive review done by the appellate court to the extent they were properly preserved.

Proctor sought to preserve or have corrected three errors in the written judgment. It was noted by the First District that those errors did exist. However, absent the trial court's ruling on a rule 3.800(b)(2) motion, the errors were not preserved, thus precluding the errors from being addressed on appeal.

The First District gave the opinion that not to allow the filing of a rule 3.800(b)(2) motion after the filing of a counsel's *Anders* brief would render meaningless the appellant's ability to file a pro-se initial brief to the extent that sentencing errors were raised in it. The outlet create by the Florida Supreme Court for preserving such errors in rule 3.800(b) would no longer be available. A counsel's *Anders* brief should not be construed as a "party's first brief." To be held otherwise would prevent a pro-se appellant from preserving alleged sentencing errors that were missed by an appointed counsel.

The opinion of the First District conflicted with that of the Fifth District in *Rodriguez v. State*, 881 So.2d 671 (Fla. 5th DCA 2004). In *Rodriguez* it was held that a pro-se appellant may not file a rule 3.800(b)(2) motion after an *Anders* brief has been filed. The First District noted that the Fifth District not only construed the *Anders* brief as the "party's first brief," it also was determined by the Fifth District that

What do a Movie Star, a Businessman and
A Professional Wrestler Have in Common?
They Have All Run for the Office of Governor and Won!

Bernie DeCastro,
Having overcome great adversity in his own life, Bernie can identify with the average working man. Sentenced in 1976 to life plus 30 years for drug related offenses there was little hope that Bernie would ever again be a free man. In 1983 he had a Spiritual awakening and his life began the process of transformation. Three years later he was miraculously released on parole.

In 1994 Bernie was granted a full pardon by Governor Lawton Chiles. Bernie is the Founder and President of Time For Freedom, Inc. in Ocala, FL.

A few of his issues include:

*Get in step with most other states criminal justice policies by adopting a "Get Smart on Crime" strategy rather than the failed "Get Tough on Crime" policy.

*Make the return of discipline in our public schools a top priority. Adopt an enforceable dress code. Better training and higher pay for teachers. Smaller classrooms.

*Continue to expand on the Faith & Community-Based Initiative. Especially when it comes to at-risk youth, prisoners, ex-offenders, and substance abusers.

*Ensure that the citizens of Florida never lose the fundamental right to amend the Florida constitution by a simple majority.

*TO FIND OUT MORE INFORMATION ON **Bernie DeCastro** VISIT HIS WEBSITE AT: www.bernieforgovernor.com

such a motion (rule 3.800(b)(2)) would be an unauthorized filing because the appellant would still be represented by counsel at the time of the filing.

Nevertheless, the First District conclude that to accept the view as opined by the Fifth District in *Rodriguez* would remove the main internal functions of the spirit of *Anders*. The indigent litigant's right to raise his own points on appeal would become simply illusory if he was barred from filing a motion to properly preserve the issues on appeal raised within his pro-se brief.

.The First District granted Proctor's motion for leave to file a rule 3.800(b)(2) motion in the lower court, and certified conflict with the Fifth District's decision in *Rodriguez*.

Carter v. Florida Parole Commission, 30 Fla.L.Weekly D1254 (Fla. 1st DCA 5/18/05)

The First District Court of Appeals withdrew its previous opinion in this case sited at 30 Fla.L.Weekly D569 (1st DCA 2/28/05) on a motion for rehearing.

The First District determined that Rickey J. Carter is not entitled to relief regarding his claims concerning revocation of parole or the imposition of restitution. As to his claim that requested recalculation of the presumptive parole release date, the Fist District explained its denial of the request.

The court determined that the Commission would seek to use the exact same number of months for aggravating circumstances as it initially used in establishing the presumptive parole release date. See: *Terry v. Florida Probation and Parole Commission*, 634 So.2d 228 (Fla. 1st DCA 1994) (where it was held that during a determination of a new presumptive parole release date after revocation of parole, the commission may rely on the same aggravating factors that were considered in the first calculation, but that the number of months may not exceed the initial number) which agrees with *Tubb v. Florida Parole Commission*, 580 So.2d 616 (Fla. 5th DCA 1991).

Thomas v. State, 30 Fla.L.Weekly D1280 (Fla. 4th DCA 5/18/05)

In this case Dorrie M. Thomas filed a rule 3.800(a) motion in the lower court that challenged parole statutes. The lower court determined that Thomas did not have an illegal sentence and due to the motion challenging parole statutes, the motion was treated as a petition for writ of mandamus, the *proper vehicle* in reviewing parole statue challenges.

On appeal, the Fourth District Court of appeals affirmed the lower court's decision of treating the motion as a petition for writ of mandamus. However, it was found that the lower court erred in requiring Thomas to comply with section 57.085, Florid Statues. Collateral criminal proceedings are exempt for that statue and the general indigency statue. Section 57.081, Florida Statutes, would apply. See: section 57.085(10), Fla. Stat. and *Cason v. Crosby*, 892 So.2d 536, 537 (Fla. 1st DCA 2005).

Nevertheless, Thomas was found not to be entitled to relief because his claims have been fully litigated more than once and without merit.

[**Note**: This appears to be the first case finding that Florida parole-eligible prisoners may proceed as indigents under s. 57.081 instead of s. 57.085 in challenging parole commission actions, inactions or statutes. An important distinction as far as paying filing fees goes. – bp.]

Jumper v. State, 30 Fla.L.Weekly D1309 (Fla. 2d DCA 5/25/05)

Laine A. Jumper originally filed a rule 3.850 motion in the lower court, timely filed one-year and 363 days after his judgment became final from a direct appeal. The lower court dismissed the motion because Jumper failed to include a proper oath. The order of dismissal stated it would allow Jumper to refile a legally sufficient motion. Because the order failed to specify a time limit to refile, Jumper sought a rehearing or clarification regarding the amount of time he would have to refile his rule 3.850 motion.

The lower court granted Jumper's rehearing or clarification and issued an order that stated, in part, "the law is clear that a refiled postconviction motion that merely corrects a technical deficiency is not subject to the two-year limitation" regarding rule 3.850. The order reiterated its allowing Jumper to refile a proper motion again, without including any time limit to file it.

Almost 9 months after the lower court's order granting the rehearing/clarification motion, Jumper refiled his rule 3.850 motion. Almost one-year after that he filed a supplemental motion to the rule 3.850 motion. Eleven months later the lower court denied all of Jumper's motions as untimely. (Jumper had filed tow other supplemental motions several months after the first supplemental motion. However, those two asserted new claims, therefore they were properly dismissed).

On appeal the Second District Court of Appeal cited to *Mendes v. State*, 770 So.2d 202 (Fla. 4th DCA 2000). In that case Mendes had been given leave to file an amended motion for postconviction relief. Because Mendes waited eight months after the leave was granted, the lower court summarily dismissed the amended motion as being untimely. In *Mendes*, the Fourth District determined that Mendes had been granted the leave without the lower court specifying a time limitation of when the amendment should be filed. Based on those findings the Fourth District concluded that Mendes' amendment was not time barred.

Likewise in Jumper's case, the lower court did not specify a

limitation as to when Jumper's deadline would be to refile his motion. Over and beyond that fact, Jumper sought a rehearing or clarification regarding the lower court's order in relation to the amount of time he had to refile, to which the lower court still failed to specify.

The Second District opined that under the circumstances found in Jumper's case and being consistent with the Mendes rationale, it decided to reverse the lower court's dismissal of Jumper's refilled motion and his initial supplemental to that motion. The lower court was instructed to consider those motions on their merits.

Bostic v. State, 30 Fla.L.Weekly D1235 (Fla. 5th DCA 5/13/05)

The issue involved in this case concerned whether a firearm is an antique and it being a defense for a convicted felon arrested for possession of such a firearm.

David Christopher Bostic was arrested and charged with possession of a firearm by a convicted felon. He sought to have the charge dismissed arguing that the firearm he was in possession of was exempt from being defined as a firearm under the statutes because it was an antique. See: section 790.001(6) Florida Statutes (2001).

The trial court denied Bostic's dismissal motion for two reasons. First, it pointed to an interpreted that section 790.23 of the Florida Statutes as prohibiting any firearm, whether antique or otherwise, from being possessed by a convicted felon. Its second reason was that because Bostic added a fiber optic sight tot eh firearm, it was no longer considered to be an antique or replica of a firearm manufactured in or before the year 1918. Bostic appealed the lower court's order denying his motion to dismiss the charge.

The Fifth District Court of Appeals pointed out that the lower court's first reason was in error because the statute, or its face, provides that the firearm a convicted felon is prohibited from possessing excludes an "antique firearm." However, as to the second reason, the Fifth District agreed that because the firearm had been added to with modern equipment, the firearm was no longer considered an antique as provided by the statutes defining an antique firearm. See: section 790.001(1), Florida Statutes (2001).

The Fifth District also decided that the term "replica" under the statute is not so vague as to render it unconstitutional. As a result of the findings the appellate court affirmed the lower court's denial of Bostic's motion to dismiss charge.

[Note: Fifth District's Judge Sharp gave quite an interesting and well-written lengthy opinion dissenting from the court's majority decision in Bostic's case. It is a must read for convicted felons who enjoy the hunting seasons and plan to acquire a legal antiqued firearm for their hunting purposes. It depicts numerous ideas of precautions one (convicted felon) should take when seeking to legally possess such a firearm.]-as

Smith v. State, 30 Fla.L.Weekly D1310 (Fla. 1st DCA 5/25/05)

In this case the issue revolved around whether odor of marijuana on a person, by itself, justifies searching an area from which that person came.

Because of an anonymous tip to authorities that Douglas Smith was growing and selling marijuana in his home, the authorities went to Smith's home to question him. After entering the home with consent and seeing no visible incriminating evidence, or receiving no incriminating statements, the authorities requested and was denied consent to search the home. While there in the home, however, one of the investigating authorities noted that he detected a burnt marijuana odor on Smith's girlfriend's person. Afterward, consent to search was requested and denied a second time.

Consequently, the authorities set up surveillance of Smith's home nearby while they sought to obtain a search warrant. During that time, Smith, his girlfriend, and their child entered their car and left the area. A short time later Smith returned to his home where he was advised by the authorities to remain in his car and that he could not enter his home. When Smith was advised by authorities that they believed there was probable cause to obtain a search warrant and were awaiting such, Smith made a decision and negotiated with the authorities, allowing them to search his home. Ultimately, contraband was found.

At trial Smith sought and was denied suppression of the found contraband evidence. He had argued that the authorities lacked probably cause to detain him and secure his home, and that the negotiation to allow the authorities to search his home was not a result of his "consent," but was, instead, an involuntary submission to authority.

On appeal, it was noted by the First District Court of Appeals that in *Brown v. State*, 330 So.2d 861, 862 (Fla. 4th DCA 1976), it was held that "probable cause cannot be based on mere suspicion, but must be based on facts *known to exist.*" The only incriminating fact "known to exist" in Smith's case was the odor of burnt marijuana on his girlfriend that was used to justify the search of his home. Like "plain view," whatever probably cause the odor on the girlfriend would have provided was limited to the location of the "plain smell," which was on the girlfriend.

The First District decided that the odor of burnt marijuana on Smith's girlfriend, by itself, did not amount to probable cause to search the home. It was noted that the fifth District has held an opposite opinion in that it does give probable cause. See: *State v. Bennett*, 481 So.2d 971

(Fla. 5th DCA 1986) and *State v. Wells*, 516 So.2d 74 (Fla. 5th DCA 1987).

Furthermore, it was found in Smith's case that his consent to search was coerced, thus involuntary, it was the result of submission to authority. Where officers represent they have lawful authority to search, a suspect's resulting acquiescence is not an intentional and voluntary waiver of Fourth Amendment rights. See: *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968).

In regards to the odor of burnt marijuana being detected on Smith's girlfriend, the First District pointed out that if such could have given probable cause to search the area from which she came, then the authorities could search anywhere she's been: the home she came out of; the car, after she entered it; and one would have to conclude that if she stopped and went into a neighbor's house, that home could be searched as well.

The First District declined the state's invitation to stretch the "plain smell" doctrine into a *de facto* roving proxy for probable cause. Accordingly, the First District certified conflict with the Fifth District's opinion and finding the search of Smith's house illegal, reversed the denial of his motion to suppress. The case was remanded for the lower court to conduct proceedings consistent with the First District's decision.

Cooper v. State, 30 Fla.L.Weekly D1386 (4th DCA 6/1/05)

This case involved the timelines of a rule 3.850 motion after a belated appeal from a re-sentencing became final.

Leon Cooper's sentence was reversed by the Fourth District Court of Appeals and upon remand, he was re-sentenced in February, 2001. Cooper's counsel failed to file a notice of appeal regarding that re-sentencing. Cooper sought and was granted a belated appeal in May, 2003. That appeal was dismissed in July, 2003 due to failure of paying court fees or filing an affidavit of indigency.

Subsequently, Cooper filed a rule 3.850 motion in May, 2004, more than two years after his re-sentencing in February, 2001. Consequently, the lower court denied the motion as untimely, and Cooper appealed that decision.

The Fourth District brought out that typically, the two-year limit for filing a rule 3.850 motion does not begin to run until the appellate court issues it mandate disposing of a direct appeal or, if no appeal is filed, when the time for filing such expires. Cooper's time limit for the rule 3.850 motion would have expired on or about March 15, 2003 but, he filed his belated appeal of the re-sentencing on March 8, 2003. Being the Fourth District granted that belated appeal, it was, as if Cooper filed the appeal back in February, 2001, within 30 days from his re-sentencing. Thus, not only did the lower court not have jurisdiction to rule on the motion, due to the direct appeal pending, Cooper's re-sentencing had not become final until that appeal was dismissed.

As such, Cooper's time limitation to file his rule 3.850 motion did not begin to run until that dismissal. Therefore, the Fourth District concluded that Cooper's motion was timely, and the lower court's summary denial of his rule 3.850 motion was reversed.

Kennedy v. State, 30 Fla.L.Weekly D1419 (Fla. 4th DCA 6/8/05)

Ronnie Kennedy's case gave a good example of a manifest injustice if relief was denied and it did not matter that it was successively brought to the lower court on a rule 3.800(a) motion because the issue had not previously been raised in the appellate court.

Apparently, Kennedy had previously brought up in the lower court, pursuant to a rule 3.850 motion, the claim that the lower court incorrectly scored his conspiracy offense as a level 8 on his guideline scoresheet. Later, Kennedy filed a rule 3.800(a) motion regarding the subject. He argued that his conspiracy to traffic in cocaine offense should have been classified as a level 7 offense. The trial court subsequently denied him relief stating that his motion was successive, and Kennedy appealed this decision.

On appeal, the state asserted that it disagreed with Kennedy's argument and relied on the provisions of section 893.135(5), Florida Statues (1998), which make conspiracies to traffic in illegal drugs equal in severity to the trafficking offenses themselves. Consequently, the state determined that Kennedy's conspiracy offense should be scored at a level 9, the same offense level as his substantive offense of trafficking in cocaine in excess of 400 grams and less than 150 kilograms.

The Fourth District Court of Appeals, after reviewing the parties arguments, stated that penal statutes should be construed in favor of the accused and against the prosecuting agency. See: *Preston v. State*, 667 So.2d 939, 939 (Fla. 2d DCA 1996). For that reason, the appellate court held that the clear reading of section 921.0013 of the Florida Statues requires that unlisted first-degree felonies are to be classified as level seven offenses.

Additionally, the state brought up the issue that Kennedy previously filed a rule 3.850 motion in the lower court. In reply, the Fourth District stated, "However, he has not previously raised this issue in this court. Therefore, we determine that a manifest injustice would result if he is denied relief."

As a result, regarding the issue raised, Kennedy's case was reversed and remanded for resentencing on the conspiracy offense to score it as a level seven offense.

Paige v. State, 30 Fla.L.Weekly D1368 (Fla. 1st DCA 5/31/05)

This case brought out a distinguishing effect from that of the opinion held in *Proctor v. State*, summeized under this column of this FPLP issue herein.

On appeal, Terrill Paige's counsel sought to withdraw the initial brief he filed for Paige in order to seek leave to file a motion to correct sentencing error, pursuant to rule 3.800(b)(2), in the trial court. The state filed an objection to the granting of such motion arguing that appellant's "first brief" had already been served and, accordingly, the rule 3.800(b)(2) remedy is foreclosed. It was further argued that the rule makes no provision for withdrawal of a party's brief if a sentencing error is discovered after service of that brief.

The First District, in agreeing with the state's argument, noted the similarity of Paige's case to that of Proctor's but pointed out the distinguishing matter involved between the two cases.

In *Proctor*, the public defender filed an *Anders* brief on behalf of the appellant, where in Paige's case an *initial* brief arguing reversal of the case had been filed. Therefore, the First District distinguished *Proctor* on that basis and limited its holding to the facts in *Proctor*, where counsel filed an *Anders* brief and the pro-se appellant seeks to file a motion to correct sentencing error prior to the filing of his or her own brief.

Paige's motion to withdraw the initial brief was denied.

McFadden v. State, 30 Fla.L.Weekly D1415 (Fla. 4th DCA 6/8/05)

This case briefly pointed out that probation is a "sentence" within the meaning of Florida Rule of Criminal Procedure 3.850(b). See: *Lyell v. State*, 872 So.2d 447 (Fla. 2d DCA 2004) and Fla.R.Crim.P. 3.710(a) (providing that "[n]o sentence or sentences other than probation shall be imposed...").

The Fourth District Court of Appeals in this case opined that construing the predecessor to the current version of rule 3.850, the Florida Supreme Court has held that probation "in and of itself" constituted "custody under sentence" within the meaning of that rule. See: *State v. Bolyea*, 520 So.2d 562 (Fla. 1988). The Fourth District opined that it saw nothing in the recent amendment to the rule to preclude a probationer from seeking relief under rule 3.850. Unfortunately, however, the probationer in this case was found to be untimely in his filing.

Westley v. State, 30 Fla.L.Weekly D1449 (Fla. 2d DCA 6/8/05)

The issue involved in this case was whether a date stamp on an envelope containing a prisoner's pro-se motion is controlling because the stamped date is initialed by a prison official.

William E. Westley's time limit to file a rule 3.850 motion expired April 10, 2004. When he had filed that motion, it was noted by the receiving lower court that a date stamp on the face of Westley's motion reflected April 10, 2004. However, the lower court also noticed a date of April 13, 2004, was stamped on the motion's envelope, accompanied by the initials of a prison official.

Consequently, the lower court reasoned that because the stamped date on the face of the motion did not reflect a prison official's initials, while the one on the envelope did, and Westley did not provide any documentation reflecting otherwise, the date accompanied by the initials of a prison official controlled. Westley's motion was denied as being untimely and he appealed the decision.

On appeal it was pointed out that a motion is deemed filed the moment an inmate places it in the hands of a prison official: See *Haag v. State*, 591 So.2d 614, 617 (Fla. 1992). The date on the face of the motion determines whether it was timely received by prison officials. Although not receding from *Haag*, *Thompson v. State*, 761 So.2d 324, 326 (Fla. 2000), later held that the date on the certificate of service controls issues of timeliness. However, when a document lacks a certificate of service, as it did *in* Westley's case, then the date on the face of the motion is controlling. See: *Haag, Id.* at 617 n. 3.

It was further opined that whether a prison official initials the date *has no legal significance*. Nothing in the rules requires prison officials to initial a motion's date. Such a requirement would run counter to current case law. See: *Haag, Id.* at 617, where it was reasoned that "the pro-se prisoner is unable to do anything but trust the prison officials...if they betray this trust...the prisoner is usually unable to even prove who is at fault."

Because of the above findings Westley's rule 3.850 motion was timely. The lower court's order of denial was reversed and the case remanded for consideration of the motion's merits. ■

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