FLORIDA PRISON LEGAL

Perspectives

VOLUME 13 ISSUE 4 ISSN# 1091-8094 JULY/AUG 2007

Taylor the Terrible

by Thomas C. O'Bryant

In May of this year, fires burned out of control throughout several parts of Florida. Areas of the State were ordered to be evacuated. State and local government agencies began making preparations. The Florida Department of Corrections was no exception. Prison officials determined that one of the dorms at Mayo Correctional Institution was to be cleared out in order to make room, if necessary, for prisoners from the Columbia County Jail. Some of the prisoners in C-dorm at Mayo were moved to available beds elsewhere on the compound; others, approximately 115 of us, were temporarily transferred to Taylor CI Annex.

From 1996 through 2006, I was housed at various institutions throughout the Florida panhandle. I was convinced that Holmes CI was the worst institution in the State of Florida. When I arrived in Region II I began hearing negative things about Taylor CI. From what I heard, it sounded as if Taylor and Holmes were very much alike. I was about to find out first hand.

When we were transferred we were told by Mayo officials that we could not take anything with us except personal hygiene items. That was probably a good thing. We did not have much property for the in-take officers at Taylor to search. Therefore, it was that much less time we had to spend in the visiting park with staff going through the in-take process.

Initially we were taken to Taylor CI Main Unit. Upon arrival, we were told the normal spiel one hears every time one is transferred, "You're not at (fill in name of prior institution) anymore." While going through the in-take process at Taylor, though, it was apparent that things at Taylor were different from most other institutions. It started to feel as if I were entering the Twilight Zone.

To be identified during the in-take by one of several female classification officers, we had to stand up, place our hands behind our backs, look down at the floor, and walk around several rows of chairs to where the classification officers were sitting at tables. There were strict orders shouted from the guards to not look up from the floor when speaking to the classification officers. The guards giving this asinine order declared, "We don't want you looking at any of the women here." Of course, out of habit, a couple of prisoners were unfortunate enough to look up when answering the classification officers' questions. One was yelled and cursed at; the other was immediately placed in handcuffs and taken to confinement. Effectively, we were humiliated and "hooded" from the start.

From the first moments at Taylor one thing became obvious: unprofessionalism was rampant among the staff. This first impression was reinforced by personal observations during the week we spent there, as well as from consistent conversations I had with several prisoners there that I knew from other institutions. Cursing at prisoners, threatening them, and a constant barrage of verbal abuse and harassment by staff. It is a daily

ON THE INSIDE

FLORIDA PRISON LEGAL PERSPECTIVES

P.O. BOX 1511
CHRISTMAS, FLORIDA 32709

Publishing Division of:
FLORIDA PRISONERS' LEGAL AID ORGANIZATION, INC.

A 501 (c) (3) Non-profit Organization

E-mail
Website

Florida Prisoners' Legal Aid Organization, Inc., P.O. Box 1511, Christmas, FL 32709, publishes FLORIDA PRISON LEGAL PERSPECTIVES (FPLP) up to six times a year. 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 will receive individual attention. Permission is granted to reprint material appearing in FPLP that does not indicate it is copyrighted provided that FPLP and any indicated author are identified in the reprint and a copy of the publication in which the material is published is provided to the FPLP publisher. This publication is not meant to be a substitute for *legal or other professional* advice. The material in FPLP should not be relied upon as authoritative and may Not contain sufficient information to deal with a legal problem. FPLP is automatically sent to all members of FPLAO, Inc. as a membership benefit. Membership dues for FPLAO, Inc., operate yearly and are $10 for prisoners, $15 for family members and other private individuals, $30 for attorneys, and $60 for agencies, libraries, and institutions.

occurrence at Taylor CI.

I was told by Taylor prisoners that we actually had it easy during the in-take process. Normally, according to those prisoners, the guards like to actually slap a few prisoners for looking up from the floor while being processed in. I was also informed that if we had came with all of our property that, it was more likely than not, almost everyone would have had property confiscated. Whether the property was authorized and legitimately belonged to a prisoner is irrelevant to Taylor staff. If the guards felt like taking something, they would simply take it. No receipt or confiscation slip given as required by FDOC rules. Simple as that.

Speaking to prisoners unfortunate enough to be housed at Taylor, I learned that physical abuse of prisoners, as well as widespread verbal abuse, was not uncommon. Nor is blatant retaliation. File a grievance, expect to go to confinement. Get placed in handcuffs, do not be surprised if you get hit by one or more guards on the way to confinement. According to some that I spoke with, a few months before we were transferred there several guards beat and kicked a prisoner on the sidewalk in the middle of the compound, while the prisoner—surprise, surprise—was already handcuffed behind his back. From my personal observations of the attitudes and behavior of the guards there, I have absolutely no doubt that such incidents are fairly common at Taylor CI.

FDOC Secretary, Jim McDonough has claimed that abusive behavior by prison officials will not be tolerated under his watch. If the recent firings at Hendry CI are any indication, Mr. McDonough seems to be backing up his words with definite action (see last issue and this issue of *FPLP*). Hopefully the housecleaning at Hendry will not turn out to be an isolated incident. A thorough purging of staff at Taylor CI is in order as well, before someone is seriously injured or worse.

While a changing of the guard would make things somewhat more humane at Taylor, it would not have any impact on another problem. Bugs. And I do not mean psych prisoners. The institution is infested with biting insects. It seems as if a person spends more time swatting at bugs and scratching their bites than anything else.

And of all the institutions I have been to, the recreation yard at Taylor Annex is the worse I've seen. The weight pile could fit inside two two-man cells. The softball field, pillow cases filled with sand for makeshift bases.

Those of us who were transferred from Mayo to Taylor were fortunate in only staying there for a week. To those unfortunate enough to be housed at Taylor, I say keep your heads up. While Mr. McDonough cannot do anything about the bugs, and probably won't do anything about the rec yard, he can do something about the unprofessional and abusive staff—if he receives enough valid complaints about them. Change only comes when you fight for it. ■

The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996

*Thomas C. O'Bryant**

I. INTRODUCTION

Imagine a defendant pleading guilty to an offense and being sentenced to life in prison after his court-appointed attorney informed him that, under the plea, he will be eligible for release after ten years. His attorney reiterates this understanding in open court at sentencing, and neither the prosecutor nor the judge refutes him. Now imagine that, when the defendant arrives at prison, he learns that—contrary to his counsel's information—he will never be released from prison.[1]

Under such circumstances, a person should be able to receive some sort of relief from the court system. What happens, however, if the state court system refuses to rectify the matter? Traditionally, a defendant could turn to the federal courts, but for nearly a decade access to the federal courts has not always been available due to a devastating combination: pro se litigation[2] and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[3]

I have been a "jailhouse lawyer" since 1997, and I have encountered hundreds of situations like this.[4] These cases are not limited to defendants who entered into negotiated pleas based on incorrect information provided by defense counsel, but also encompass defendants whose defense counsel failed to investigate alibi witnesses or exculpatory evidence, seek the dismissal of sleeping jurors, object to prosecutorial misconduct, etc. In all of these cases, defendants have been unable to seek federal review of their claims.

I have been incarcerated since June 10, 1995, and I am serving two concurrent life sentences in the Florida Department of Corrections for robbery while armed with a firearm and attempted first degree murder of a law enforcement officer.[5] Because of my financial inability to retain an attorney to pursue any post-conviction matters for me, I had to engage in two *extremely* difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.

In this Article, I will discuss the difficulties faced by those of us who, because we cannot afford to hire counsel, must challenge violations of our federal constitutional rights ourselves.

When Congress enacted AEDPA, it curbed the federal judiciary's habeas corpus jurisdiction[6] and undermined the ability of pro se prisoners to file meaningful federal habeas corpus petitions. As a result of this, many individuals incarcerated in the state prison systems are unable to obtain federal review of potential constitutional violations, simply because they cannot afford to retain counsel to pursue post-conviction matters on their behalf.[7]

In this Article, I will demonstrate the unreasonableness of AEDPA by addressing some of the problems that plague indigent pro se litigation by prisoners—problems which AEDPA greatly enhanced. In Part II of this Article, I will present a brief summary of the writ of habeas corpus and its purpose. In Part III, I will discuss AEDPA and the changes it created. Because the most critical component of pro se litigation is the prisoner himself,[8] I will devote Part IV to an examination of the prisoner and the resources available to him. Specifically, I will examine the educational background and mental health of prisoners, as well as the process of memory acquisition as it may affect a prisoner's memory of his trial. I will also explore some of the defects and inadequacies of prison law libraries, of the legal assistance available to prisoners, and of prison officials' application of the Supreme Court holdings attempting to minimize the hurdles indigent prisoners face in pursuing judicial remedies. In Part V, I will use my own criminal case to demonstrate how AEDPA is preventing federal judicial review of violations of federal constitutional rights. I will conclude, in Part VI, that AEDPA's restrictive provisions should be re-pealed because they are unreasonable and unnecessary.

I hope this Article brings to light a matter I believe was overlooked by Congress when it enacted AEDPA: the reality of pro se prisoner litigation.

II. THE IMPORTANCE AND HISTORY OF HABEAS CORPUS

Habeas corpus, also known as the "Great Writ," has long held a place in the American legal system.[9] Moreover, it is of such importance, that it was once claimed that it, along with the Ex Post Facto Clause of the Constitution,[10] eliminated any need for a Bill of Rights."[11]

The Great Writ was available as part of common law[12] in the American colonies[13] and was included in the U.S. Constitution after the colonies won independence from England.[14] The very first statute enacted by the First Congress empowered the federal courts "to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."[15] This authority, however, was limited to cases involving federal prisoners.[16]

Since Congress did not define the term "habeas corpus," courts had to resort to the common law for clarification of the statute. Even though the purpose of the Great Writ was to secure the liberation of those unlawfully incarcerated, at common law, a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that the confinement was legal. Thus, such a judgment, without more, prevented issuance of a writ."[17]

In 1861, at the beginning of the Civil War, President Lincoln suspended the writ of habeas corpus. This suspension was met with the immediate protest of Chief Justice Roger B. Taney, who claimed that only Congress held the authority to suspend the Great Writ.[18] Chief Justice Salmon P. Chase later reaffirmed the magnitude of habeas corpus, describing it as "the best and only sufficient defense [sic] of personal freedom."[19] With the Judiciary Act of 1867, Congress changed the common law rule by providing for an inquiry into the facts of detention, a process now referred to as an evidentiary hearing, and expanded the federal courts' habeas corpus authority to encompass state prisoners.[20] Over time, the habeas corpus statute was recodified several times, but the basic grant of authority to issue the writ remained unchanged.[21]

For centuries a person deprived of his liberty has had habeas corpus available to deliver him from unjust confinement.[22] However, this beacon of hope is beginning to fade, and the writ of habeas corpus may now be evolving into what could be considered the "Great Unobtainable Writ."

Until recently, two important characteristics of habeas corpus remained unchanged. There was no statute of limitations[23] for seeking the writ because it was believed that the right of personal freedom from illegal restraint never lapses."[24] Also, there was no prohibition against successive applications for a writ.[25] Sadly, public perception of these essential characteristics contributed to the mistaken belief that the Great Writ was being abused,[26] and on April 24, 1996, they faded into history when President Clinton signed AEDPA into law."[27]

For the first time in history, habeas corpus petitions were subject to a statute of limitations, and successive applications for a writ were prohibited. [28] These amendments [29] to habeas corpus procedures have tragically "eviscerate[d] the ancient writ of Habeas Corpus..."[30]

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 19, 1995, a tragic event occurred that would dramatically change the Great Writ: a bomb exploded in the Alfred P. Murray Federal Building in Oklahoma City, killing 168 people and injuring nearly 500 more. As a result of this terrible bombing, AEDPA "was drafted, enacted, and signed in an atmosphere of anger and fear"[31] At this point let me make it clear that I do believe legislation was warranted to combat terrorism. However, limitations on habeas corpus procedures do not serve that purpose.

AEDPA did contain many provisions that were related to terrorism prevention and victims of terrorist attacks.[32] The habeas provisions, how-ever, were called a "knee-jerk reaction"[33] to the Oklahoma City bombings. As the *New York Times* noted, including these habeas provisions in this antiterrorism bill was nothing more than an "exploit [ation of] public concerns about terrorism to threaten basic civil liberties."[34]

It was claimed that these habeas provisions were "the only legislation Congress [could] pass as a part of [AEDPA] that [would] have a direct effect on the Oklahoma City bombing case."[35] Such legislation, though, does nothing to *prevent* terrorism or to *fight* terrorism: "To truly protect citizens of this Nation, terrorists must be stopped before they strike..."[36] In order for a terrorist to be affected by a change in habeas proceedings, the terrorist must already have committed an act of terrorism.[37] As Senator Feingold stated:

> The link between habeas corpus and keeping the people of this Nation free from acts of terrorism is tenuous at best. The argument that [the habeas provisions in AEDPA] will prevent another Oklahoma City [was] one which [was] manufactured solely to justify inclusion of these unrelated provisions in a bill originally meant to address terrorism.[38]

Because of AEDPA, habeas corpus proceedings for state prisoners now have: (1) a one-year statute of

limitations;[39] (2) a prohibition against successive applications for a writ, except when, in very limited circumstances, an appellate[40] court grants prior approval;[41] (3) restrictive limits on obtaining permission to appeal[42] decisions of the trial court;[43] (4) modified exhaustion of remedies[44] requirements for pursuing claims prior to seeking federal review; [45] (5) a requirement that federal courts defer to state court determinations on federal constitutional issues; [46] and (6) additional restrictive procedures that become available to states if they conform with certain requirements.[47]

To prevent a prisoner's federal habeas corpus time limitation from expiring prior to the exhaustion of his state court remedies, Congress included a "tolling" provision in AEDPA.[48] This tolling provision functions like a time clock. Whenever a prisoner's conviction and sentence become final at the conclusion of direct review, the time clock starts. Whenever a state post-conviction motion is properly filed with the state courts, the time clock pauses until completion of the proceeding.[49] Once the proceeding is complete, the time clock begins to run from the point in time that it left off. The time limit does not start over at the completion of each state court proceeding, unless either the prisoner is re-tried, or an adjustment is made to his sentence.[50] This time clock runs until either the prisoner files his federal habeas petition, or a total of 365 days has elapsed during which he has no properly filed motion pending in state court.

For the pro se indigent prisoner, seeking federal habeas corpus relief prior to AEDPA was already an extremely daunting task that was rarely achieved.[51] The pro se prisoner had to teach himself complex criminal procedure,[52] legal reasoning,[53] legal doctrines,[54] how to research claims, and how to write legal briefs and motions;[55] only then could he actually initiate a proceeding. In the post-AEDPA world, the pro se prisoner must still learn the same procedures, doctrines, and skills, but now must do so within an unrealistic and unreasonable one-year time period.

Because of the reality of the circumstances facing pro se prisoners, which I will discuss in the next section, the new statute of limitations for seeking a writ of habeas corpus has resulted in an untold number of indigent prisoners having federal review of potential federal constitutional violations completely foreclosed to them.[56]

Not only is the one-year statute of limitations unreasonable and unrealistic, it is also unnecessary. In all of the time that I have been incarcerated and been a jailhouse lawyer, I have never witnessed a situation in which a pro se prisoner wished to delay his post-conviction remedies. Those of us who are incarcerated and pursuing such proceedings are doing so because we wish to be free. Intentionally or needlessly delaying the pursuit of these remedies would be illogical and contrary to the reason we file the petitions in the first place.

Moreover, the time limitation has a perverse effect, as prisoners no longer have sufficient time to learn legal procedures and research potential claims adequately. Therefore, many pro se prisoners, rushed to file petitions, end up filing claims that may not warrant reversal of a conviction while overlooking claims that may.[57]

Based on my years of personal experience with pro se litigation and pro se prisoners, I can assert that prisoners do not intentionally file petitions raising claims they know are without merit. We research claims to the best of our ability using what limited legal knowledge and legal reference materials we have at our disposal. With these constraints, just researching claims consumes a great deal, if not all, of AEDPA's time limitation for filing a habeas petition. The one-year statute of limitations has forced many of us to file petitions without being able to research some claims adequately. In my experience AEDPA has, therefore, had the perverse result of *increasing* the number of meritless claims filed by pro se litigants. At times it is only after we file petitions—trying to comply with AEDPA—that we learn that a claim may not have the merit we originally believed it to have.

IV. AEDPA AND PRISONER LITIGATION

In nearly eleven years of incarceration, I have never seen, nor heard of, a non-death row prisoner having a court-appointed or pro bono attorney research, draft, and file post-conviction pleadings for him. These matters have all been performed without guidance from counsel, using what legal materials and assistance were available within the prison walls.

It goes without saying that an indigent pro se prisoner faces greater hurdles to gaining meaningful access to the courts than does an affluent free citizen.[58] Recognizing this fact, the U.S. Supreme Court handed down an entire body of case law attempting to reduce the additional burdens of indigency and incarceration. *Lane v. Brown* prohibited the states from adopting regulations that leave indigent defendants cut off from the appellate process by virtue of their indigence.[59] *Burns v. Ohio* required that indigent prisoners be allowed to file appeals and habeas corpus petitions without paying docketing fees.[60] *Griffin v. Illinois* ruled that, when necessary, trial records must be provided at no charge to inmates who are unable to afford them.[61] *Younger v. Gilmore* affirmed a

district court's opinion invalidating an overly restrictive California prison regulation limiting prisoners access to books and a law library.[62] *Ex parte Hull* struck down a regulation that required prisoners to obtain a determination from a parole board "legal investigator" that a petition was properly drawn prior to filing.[63] *Johnson v. Avery* invalidated a prison regulation that prohibited inmates from assisting one another with habeas corpus petitions.[64] *Bounds v. Smith* held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[65] More recently, in *Lewis v. Casey*, the Supreme Court limited the *Bounds* decision but reaffirmed a prisoner's constitutional right to have the capability of bringing contemplated challenges to his conviction and sentence.[66]

The foregoing body of case law creates the impression that everyone has equal access to the courts, whether they are affluent or indigent, imprisoned or free. The efforts of the Supreme Court to place indigent, pro se prisoners on equal footing with non-indigent litigants appears to imply that any imposition on the habeas corpus right would affect everyone equally. Unfortunately for indigent, pro se prisoners, things are not always as they appear.

An individual who is involved in the judicial process on a daily basis can attest to the fact that the judicial system consists of two entirely different "systems" that can best be described as the "myth system" and the "real system"[67]

The "myth system" is the way the judicial system is designed to work: an indigent defendant has a constitutional right to court-appointed counsel;[68] the right to appointed counsel extends to direct appellate review;[69] and the defendant has a constitutional right for counsel to provide adequate and effective representation. [70] The "real system" is the reality of the judicial process. Indigent defendants *do* receive appointed counsel, but these attorneys regularly have such an overburdened caseload that they are unable to spend sufficient time on any one particular case.[71] Counsel, in the majority of cases, lack funds to retain expert witnesses or to perform independent tests on evidence and must use tests performed by the prosecution.[72] Many of the attorneys lack funds to hire enough investigators to prepare the cases adequately.[73]

The "myth system" and the "real system" problem is not limited to the innocence/guilt phase of the judicial process, but also extends to post-conviction proceedings.

The efforts of the U.S. Supreme Court to place indigent prisoners on equal footing with non-indigent non-prisoners, as laudable as they were, unfortunately are part of the "myth system." Comprehending the reality of pro se prisoner litigation requires looking beyond the case law and examining the average pro se prisoner, the challenges he faces, and the regulations imposed upon him and implemented by prison officials in response to governing laws.

This part of the Article discusses the reality of pro se litigation as I have witnessed and experienced it. I will show that the average prisoner lacks the education, and sometimes the mental competency, necessary to pursue meaningful and timely post-conviction remedies. Prisoners must count on unreliable memories of trial court proceedings and may not be able to obtain a record of their trial in time to meet AEDPA's deadline. In addition, prisoners sometimes cannot obtain assistance from prison law clerks, and cannot receive assistance from other prisoners without fear of being subjected to disciplinary action. Even the limited assistance that clerks provide is not always helpful because law clerks are often insufficiently trained or incapable of providing necessary legal assistance. The above hurdles, taken together with the fact that prison law libraries are inadequate and governed by outrageously restrictive regulations, make the pursuit of meaningful pro se litigation from prison prohibitively difficult.

A. The Educational Background of Prisoners

Because every facet of pro se prisoner litigation begins with the prisoner, understanding the effects of AEDPA requires understanding the average prisoner. Prisoners do not enter the prison system armed with a legal education and skilled in the art of legal advocacy; rather, they must acquire what legal knowledge they can once in prison. This can be an extremely daunting task. As the Supreme Court long ago acknowledged, "[prisons] include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight and whose intelligence is limited."[74]

The claim that prisoners have "slight" educational attainments is an understatement. In fiscal year 2003-04, using the Test of Adult Basic Education ("TABE"), the Florida Department of Corrections ("F.D.O.C.") found that the average tested prisoner has obtained an education equivalent to a 5.5 grade level.[75] This TABE grade level score is consistent with the tests performed in each of the four preceding years.[76] For an inmate to be considered even functionally literate, he

must achieve at least a 6.0 grade level TABE score.[77] Since reading and language skills are essential to judicial litigation, these two areas of the TABE should be examined in particular. The average reading score of a Florida inmate is a 6.0 grade level, while the average language score is a mere 4.8 grade level.[78]"

A person with such slight educational attainments can hardly be expected to teach himself complex legal procedures and how to research viable post-conviction claims, and then to pursue meaningful post-conviction remedies pro se. As unrealistic as these expectations are, they are even more unrealistic in light of AEDPA's one-year time limitation.

B. The Mental Health of Prisoners

A significant portion of the U.S. prison population lacks the mental competency necessary to proceed pro se adequately and effectively. In fact, the rate of mental illness among prisoners is more than *triple* the rate in the rest of the U.S. population.[79] A Bureau of Justice Statistics report describes the extent of this phenomenon, finding that approximately sixteen percent of prisoners in the United States are mentally ill.[80] The National Commission on Correctional Health Care similarly finds that:

> On any given day, between 2.3 and 3.9 percent of inmates in State prisons are estimated to have schizophrenia or other psychotic disorder, between 13.1 and 18.6 percent major depression, and between 2.1 and 4.3 percent bipolar disorder (manic episode). A substantial percentage of inmates exhibit symptoms of other disorders as well, including between 8.4 and 13.4 percent with dysthymia, between 22.0 and 30.1 percent with an anxiety disorder, and between 6.2 and 11.7 percent with post-traumatic stress disorder.[81]

Nearly ten percent of all State inmates are being treated with psychotropic medications.[82] *This* percentage increases to nearly twenty percent in Hawaii, Maine, Montana, Nebraska, and Oregon[83] These medications do not necessarily alleviate the psychological encumbrances faced by the prisoners. In many instances these medications may actually increase the difficulties for these prisoners because of the cognitive side effects of the psychotropic medications. These side effects are well-documented and may include: decreased psychomotor speed and general intelligence, and memory loss; sedation, drowsiness, and deficits in learning, attention, and concentration; and psychosis, confusion, and somnolence.[84]

Considering the foregoing information, it is both unreasonable and unrealistic to expect mentally ill prisoners to file meaningful petitions within a one-year time limitation. Under the guidance of *Bounds v. Smith*, a prisoner meeting the foregoing description should be provided "adequate assistance from persons trained in the law.[85]

Prison officials in states such as Florida *have* adopted regulations pertaining to mentally ill prisoners.[86] These vague regulations, though, are woefully inadequate to satisfy any "adequate assistance" standard and do not establish any set criteria to consider in determining what constitutes a "mentally disordered" inmate. For the purpose of this Article, I can use my-self as an example to show the deficiencies in these regulations when a prisoner such as I have been describing attempts to engage in pro se litigation. I am an inmate in the Florida Department of Corrections who was treated with psychotropic medications for approximately two years of my incarceration.

Shortly after my arrest[87] I was given a psychological evaluation and placed on Wellbutrin, Congentin, Tegretol, and Loxitane at a dosage of 200 mg of each, three times a day.[88] These medications had me in a continuously drugged state and affected my memory of some of the proceedings concerning my criminal case. Upon my intake into the F.D.O.C. in January 1996, I was evaluated by F.D.O.C. mental health officials, who determined that I was being overmedicated. All of the medications were discontinued, with the exception of Wellbutrin, which was reduced to 100 mg, twice a day. After this adjustment to the psychotropic medications, my mental facilities improved rapidly and significantly.[89] I was given the TABE in February 1996, approximately two weeks after the adjustment to my medications, and scored a total battery of 12.9 grade level.[90] In March 1996, I was re-evaluated by mental health officials, and my medication was again adjusted. The Wellbutrin was increased to 200 mg, twice a day, and I was placed on Tegretol at a dosage of 200 mg, twice a day. My mental condition quickly deteriorated. As a result of taking these medications, I began experiencing side effects such as sedation, disorientation, confusion, lack of concentration, memory loss, difficulty comprehending things, and at times I did not even know where I was. It was while I was in this condition that I had to begin pursuing post-conviction remedies pro se, since I could not afford an attorney and Florida does not provide counsel to indigent defendants

for the preparation of collateral post-conviction motions or petitions.[91]

An inmate law clerk[92] who worked in the law library at Washington Correctional Institution described his attempts to discuss legal matters with me as follows:

> Mr. O'Bryant would just stare at me. He was not able to grasp the concept of different levels of degree of offenses] (he was sentenced under a life felony as opposed to a first degree felony). Furthermore, he was not even able to grasp the information of how the legal books corresponded to one another. It was as if I was teaching basic legal principles to a 12 year old.
>
> After repeatedly covering any particular subject Mr. O'Bryant would finally say "Now I understand," but the next time I saw him he would only be able to remember a small portion of what was covered previously, leading me to believe that he never really understood to start with.[93]

Despite my mental condition, my relatively high TABE score (which I achieved during my brief period of clarity when my medications had been reduced) disqualified me from being eligible to have a law clerk assigned to my legal work to help draft a post-conviction motion on my behalf,[94] even though my medical records demonstrated that I was suffering from psychosis.[95] If I had been given the TABE test at the time I was trying to get assistance from the law library, and while I was on the increased medications, I believe I would have qualified for assistance.

Dr. Judith O'Jile, director of the Neuropsychology Laboratory of the University of Mississippi Medical Center, reviewed my situation and determined that "the combined side effects of these medications could have easily caused a diminished ability to read, comprehend, and remember the complex legal information necessary for him to complete the legal procedures, research legal issues, and draft legal petitions and/or motions in a timely manner."[96]

However, because of my ineligibility to have a law clerk assigned to assist me in pursuing post-conviction remedies—which was determined based solely on my TABE score, without any consideration of my psychological status—and my inability to grasp the complex legal information necessary to pursue these remedies myself, I was unable to comply with AEDPA's one-year time limitation.

My conviction and sentence became final prior to AEDPA's April 24, 1996, effective date.[97] Therefore, I had until April 24, 1997, to initiate state post-conviction procedures if I wanted to seek federal habeas corpus relief later.[98] I was being administered psychotropic medications during this entire time period by prison mental health officials, which rendered me incapable of pursuing such remedies. After discontinuing these medications in September 1997, my mental health improved, and I filed my first state post-conviction motion on November 7, 1997.

Unfortunately, my time limitation for seeking federal habeas corpus relief had expired on April 24, 1997—five and one-half months before I filed my first state post-conviction motion. Had it not been for these psychotropic medications and their adverse side effects, I would have been able to learn the legal procedures necessary for me to pursue meaningful post-conviction matters earlier and would not be time-barred from the federal courts by AEDPA.

To be clear, I am *not* asserting that prisoners should not be given psychotropic medications because it may render those prisoners unable to pursue legal claims pro se; these medications do have benefits for those who need them.[99] What I *am* asserting, though, is that prisoners in this situation are being deprived of federal habeas corpus review because the medications they are being given for their diagnosed mental disorders are preventing them from comprehending the legal information they must learn when they cannot afford to retain counsel. Congress either overlooked or completely ignored this aspect of pro se litigation when it enacted AEDPA.

C. Prisoners' Reliance on Memory of Trial Court Proceedings

Even if a prisoner is fortunate enough to be functionally literate and mentally competent, he faces unreasonable hurdles in attempting to comply with AEDPA.

Since AEDPA's time limitation does not begin until the judgment and sentence become final, it might seem logical that the time period in which an appeal of the judgment and sentence is pending would give the pro se litigant a sufficient head start on compliance with AEDPA. However, it is important to take into account another reality of the post-conviction process that prevents the pro se litigant from making use of this time.[100] Unless the pro se prisoner has sufficient funds to purchase a copy of the trial court record, he must attempt to

discover and research potential claims based on his memory of the proceedings.[101]

As mentioned previously, the Supreme Court has held that an indigent defendant is to be given a copy of the trial record, or a reasonable alternative, without charge.[102] This copy of the trial court record, however, is provided only if an appeal is taken and it is then given to appellate counsel, *not* to the defendant.[103] Some courts have even held that the right to free trial court records established in *Griffin v. Illinois* does not apply for the purpose of preparing collateral post-conviction remedies.[104] A prisoner wishing to pursue post-conviction remedies, therefore, will only receive a copy of the trial court records *after* completion of the direct appeal and, in turn, after AEDPA's time limitation has begun. At times, much of the one-year time limitation has elapsed before the prisoner actually receives the record.[105]

The Supreme Court has stated that indigent defendants are to be given a copy of the record of their conviction, without charge, because obtaining "'adequate and effective...review' is impossible without a trial transcript or [an] adequate substitute ...."[106] This proposition is well-founded. It is extremely unwise to rely on memories of trial court proceedings, especially for a pro se prisoner.

Experts break down the memory process into three major stages: acquisition (when a witness perceives an event and information enters the memory system), retention (the time between acquisition and retrieval), and retrieval (the attempt to recall the event).[107]

At each of these three stages, several factors affect the accuracy and reliability of an individual's memory: in the acquisition stage, "witness factors" (expectations, stress/fear) and "event factors" (duration of the event, lighting conditions, noise levels);[108] in the retention stage, the length of the retention interval and the timing of post-event information;[109] in the retrieval stage, factors such as method of questioning and confidence level.[110] The education level or mental competency of a prisoner could be "witness factors" that negatively impact the acquisition stage, and therefore affect the accuracy of his memory of his trial. The "stress/fear" factor and "expectation" factor of trial court proceedings could also heavily influence the memory process.

As anyone who has ever been a defendant in a criminal trial can attest, it is an *extremely* stressful and fearful experience."[111] The prosecution describes everything in the worst possible context, using "experts," "scientific evidence," and "distinguished law enforcement officers." All the while, a panel of complete strangers weighs the evidence and testimony and decides a defendant's fate, which in some instances may very well be a decision between life and death."[112] Some defendants, because of the level of stress, experience nausea, disorientation, and feel as if they are in a daze through-out the trial.[113] Pro se prisoners must rely on these memories to prepare requests for post-conviction remedies in order to take advantage of the supposed "head start" on AEDPA's time limitation. Due to the unreliability of the memories acquired during such a situation, some pro se prisoners find themselves having to begin anew the process of attempting to discover and research potential post-conviction claims when—and if—they manage to obtain the record of their conviction. In some instances this may contribute to the pro se litigant being time-barred under AEDPA. According to one inmate:

> When I got my trial transcripts, I thought they'd been altered. There were things I thought happened that were nowhere in the transcripts. And these were the issues I'd been trying to learn about so I could file my state post-conviction motion. The entire time I spent trying to learn about those issues was dead time. I had to start all over again. By the time I filed my state post-conviction motion, I was already time barred in the federal court."[114]

This is not an uncommon occurrence."[115] Many times while assisting other inmates I have had them tell me, very adamantly, that their trial transcripts have been altered and that things happened differently from what the transcripts actually reflect."[116]

If a pro se prisoner waits until he obtains a copy of the transcripts of his conviction to begin preparing state post-conviction motions, he runs the danger of failing to comply with AEDPA. If the prisoner attempts to pursue state post-conviction remedies prior to receiving the transcripts, he then runs the danger of filing motions the courts deem frivolous and meritless, and of potentially overlooking (and in some instances, thereby waiving) viable claims that are supported by the record."[117]

The time period in which a direct appeal of a judgment and sentence is pending, which delays the triggering of AEDPA's one-year time limitation, is therefore of little meaningful benefit to the prisoner as far as discovering and researching post-conviction claims.

D. Law Clerks, Jailhouse Lawyers, Prison Law Libraries, and Other Barriers to Legal Assistance

The time in which a direct appeal is pending should be an excellent opportunity for the pro se prisoner to begin learning legal research and writing, legal reasoning, legal theories and doctrines, and legal procedures, even

if the prisoner cannot effectively research viable post-conviction claims until he obtains the record of his conviction. However, *Bounds v. Smith* was a limited decision that left prison officials—who are experienced in prison administration, *not* in judicial or post-conviction matters—without any mandates to follow in *assisting* prisoners with access to the courts."[118]

The Supreme Court later modified *Bounds* in *Lewis v. Casey*, where it held that *Bounds* did not recognize a freestanding, absolute right to "physical access to excellent law libraries *plus* help from legal assistants and law clerks."[119] *Bounds*, according to *Lewis*, "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences...."[120] Therefore, "it is that capability, rather than the capability of turning pages in a law library, that is the touchstone [to adequate law libraries and adequate assistance from persons trained in the law]."[121]

Examining prison law libraries, inmates' access to law libraries, the training provided to law clerks, and other hurdles reveals another aspect of the "real system" of pro se litigation. In this Section, I will address the reality of the resources provided to prisoners, which they must use to develop the "capability" of launching meaningful post-conviction challenges to their convictions.

1. Law Clerks

Speaking from personal experience and personal observations, I can confidently assert that a prisoner untrained in the law needs guidance when he first visits a prison law library to begin pursuing post-conviction remedies. To obtain the necessary guidance, a prisoner must turn to prison law clerks—the inmates to whom prison officials assign jobs in the prison law libraries.

Prison officials *do* provide training to inmates working in the law library so they can assist other inmates in the preparation of legal documents.[122] Whether the training, education, and experience of these inmate law clerks satisfies an "adequate assistance from persons trained in the law" standard, or any "confer[red] capability" standard,[123] is another matter.[124] To begin with, the qualifications to become a law clerk are meager, to say the least. For example, in Florida a prisoner wishing to work as a law clerk only needs to have: (1) either a high school diploma, *or* a GED, *or* a 9.0 grade level score on the TABE, or demonstrate sufficient reading and language skills; (2) enough time remaining on his sentence to complete the research aide training program and work in the law library; (3) a satisfactory adjustment to prison; and (4) a demonstrated willingness to work with others.[125]

An inmate with a TABE score in the range of a 9.0 grade level is on the borderline of functional literacy. Should such an inmate be charged with the responsibility of assisting other inmates with the preparation of legal documents and complying with AEDPA? What about a law clerk who has a TABE grade level score below 9.0 and is allowed to work in the law library?

Moreover, the qualifications set by F.D.O.C. to become a law clerk do not establish any requirements concerning mental health.[126] It would seem logical that an inmate with a diagnosed mental disorder being treated with psychotropic medications would not be entrusted with a task as serious as providing legal assistance.[127] This, however, is not the way things are in the "real system" of pro se litigation. Prison officials not only allow mentally disordered inmates to work in the law libraries, but will certify them as inmate law clerks as well. In fact, in November 2005, the F.D.O.C. held a law clerk training and certification seminar at Apalachee Correctional Institution ("A.C.I."). The primary purpose behind A.C.I. being selected as the site for this seminar was so that the F.D.O.C. could certify more "psych inmates" as law clerks.[128]

One must wonder whether "psych inmates" were the types of "per-sons trained in the law" that the Supreme Court envisioned when it handed down its decisions in *Bounds* and *Lewis*.[129] Apparently F.D.O.C. officials believe they are.

Prisoners are trained as law clerks so they can provide legal assistance to other inmates. I do not believe that "psych inmates" should be used as law clerks, mainly because they may be prone to psychotic episodes, they may be in need of psychiatric intervention at any time without any warning, and they might be affected by cognitive side effects of the medications used in their treatment.[130] I am not implying that such inmates should be prohibited from performing legal research and drafting motions. I believe they should be allowed to work on their own cases if they so choose but *not* on other inmates' cases. The F.D.O.C. has a limited budget allotted for training law clerks. I believe these resources should be used to train the most competent and able inmates available so the inmate population may receive the greatest benefit possible from these limited funds.

The law clerk training seminar, even for a prisoner who is functionally literate and not mentally disordered, is insufficient to render him qualified to assist other prisoners with legal research and the drafting of legal motions. The law clerk training seminar in Florida lasts approximately thirty hours, spread out over two weeks. It briefly touches on only an *extremely* small portion of the things a prisoner needs to know to provide

adequate assistance to other prisoners.[131]

For a prisoner to become a "certified" law clerk, and thereby become authorized under prison regulations to provide legal assistance and advice, the prisoner only needs to take the seminar, complete a few written exercises during the seminar, and receive a passing score on the final examination.[132] This final examination is a test consisting of fifty true/false and multiple choice questions. Before taking the examination, the prisoner is given the option of either answering the first thirty questions "closed book" or answering all fifty questions "open book," using any manuals and notes available. A "passing score" is a mere seventy percent.[133]

The law clerk training seminar held in November 2005 by F.D.O.C. officials at A.C.I. used a different final exam for the completion of the seminar and for certification. A passing score on this particular test was eighty percent, but the test consisted of only twenty-five questions and the inmates were allowed three hours to complete the test using any materials in the law library—including the assistance of others. Whether this test was just for the "psych inmates" or will be the test used from now on has yet to be seen.

Over the years that I have been a jailhouse lawyer, I have had to show certified law clerks how to research claims, explain that introductory signals to a citation *do* actually have meaning and are *not* merely a portion of the title of the book or journal the cited authority is published in,[134] and show that the West Key Numbering System cross-references state case law with federal case law. I have even had to assist certified law clerks in preparing their own motions because, as they admitted, they did not know what to do or where to begin. These certified law clerks, however, are the prisoners who the F.D.O.C. officials assert meet the "adequate assistance from persons trained in the law" requirement of *Bounds* and the "conferral of capability" requirement of *Lewis*.[135]

2. Jailhouse Lawyers

There are prisoners among the prison population, other than the ones working in prison law libraries, to whom prisoners may turn in order to gain legal knowledge and assistance. Some of these jailhouse lawyers were trained by prison officials initially to be law clerks, some trained themselves, and some enrolled in correspondence courses.[136]

The Supreme Court has addressed prison regulations concerning jail-house lawyers providing assistance to other prisoners. In *Johnson v. Avery*, the Supreme Court struck down a Tennessee prison regulation that prohibited jailhouse lawyers from assisting others with legal matters and would have effectively barred illiterate prisoners from filing habeas corpus petitions. The Court held that the regulation violated a prisoner's right of access to the courts.[137]

Given the Supreme Court's decision in *Johnson*, a prospective pro se prisoner should be able to seek out jailhouse lawyers to find guidance in gaining the necessary legal knowledge to prepare for post-conviction procedures. Prison officials in some states, such as Florida, have adopted regulations in response to *Johnson*.[138] Florida's regulation states: "Inmates may assist other inmates in the preparation of legal documents and legal mail."[139] The F.D.O.C., however, has also adopted regulations that, in effect, operate to prevent the assistance authorized in *Johnson*.[140]

In order for a jailhouse lawyer to "assist other inmates in the preparation of legal documents and legal mail,"[141] the jailhouse lawyer must be able to read the inmate's legal documents. For the jailhouse lawyer to read these documents, he must possess them—and therein lies the problem. Prison officials prohibit an inmate from possessing property belonging to another inmate, including legal documents and papers.[142]

I have personally been subjected to disciplinary action for assisting other inmates in the preparation of legal documents.[143] I was given fifteen days in disciplinary confinement,[144] and lost twenty days of incentive gain time,[145] for assisting other inmates in attempting to file timely state post-conviction motions in order to comply with AEDPA. I could have been punished more severely, and I have been informed that I will be given the maximum penalty if I am found in possession of another inmate's legal papers again.[146] The maximum penalty for possession of "contraband" in Florida is fifteen days disciplinary confinement and loss of thirty days incentive gain time.[147] This, however, is *not* the end of the punishment.

"An inmate is not eligible to receive incentive gain time for the month in which there is an infraction of the rules,"[148] nor is the inmate eligible to receive incentive gain time for the three months following the month the rule infraction occurred.[149] Therefore, if a jailhouse lawyer provides assistance to an inmate in Florida, and the jailhouse lawyer is found in possession of that inmate's legal papers, the jailhouse lawyer can spend anywhere from five to nine days in administrative confinement[150] pending a disciplinary hearing,[151] fifteen days in disciplinary confinement after the hearing, and an additional seventy days in prison. These disciplinary sanctions act as *quite* a deterrent and severely hinder many prospective pro se prisoners.

Over the years, I have seen competent jailhouse lawyers who were within a year or two of being released

turn down other inmates needing assistance because they were, understandably, *afraid* of getting caught providing assistance and having to accrue prison extra time for it.

3. Prison Law Libraries

Prison officials are required to provide prisoners with law libraries.[152] These law libraries should be evaluated to determine whether, in light of AEDPA, they guarantee a "conferral of a capability" to prisoners to gain meaningful access to the courts.[153] An examination of these law libraries reveals that they fall short of being "adequate" to assist prisoners with obtaining post-conviction relief.[154]

Ineffective assistance of counsel ("I.A.C.") is "the most frequently cited reason for habeas corpus petitions filed by State inmates.[155] I.A.C. claims, therefore, are an appropriate reference point for an examination of prison law libraries.

In order for the pro se prisoner to establish an I.A.C. claim, the prisoner must satisfy the two-prong test announced in *Strickland v. Washington.*[156] This is an extremely difficult task for anyone to accomplish, but even more so for the pro se prisoner. Not only must the pro se prisoner teach him-self complex legal procedures, but he must also become a "jack-of-all-trades" in the fields of evidence and witness testimony. If testimony is presented concerning DNA, the pro se prisoner must learn about biology, genetics, population statistics, and the methods of DNA analysis. If an autopsy was performed, the pro se prisoner must become familiar with forensic pathology. If a police officer testifies concerning police procedure, the pro se prisoner needs to be familiar with the police department's standard operating procedures. If a records custodian testifies, the pro se prisoner must learn about the business's record keeping practices. Without learning these things, the pro se prisoner cannot determine whether proper procedures were followed, whether the witness was qualified to testify, whether the testimony and evidence were reliable and admissible, or whether defense counsel rendered deficient representation for not properly objecting or impeaching. The pro se prisoner must also learn about the psychology behind a jury's decision-making process to be able to determine whether defense counsel's errors or omissions were prejudicial.

In Florida, prison officials do not provide the materials in prison law libraries to teach the foregoing matters. Florida regulations define a "major collection" law library as containing:

> an annotated edition of the Florida Statutes; an annotated edition of the U.S. Constitution and federal statues governing habeas corpus and prisoner's rights; Florida and federal case reporters; Florida and federal Shepard's citation indexes; Florida and federal practice digests; forms manuals; and secondary source materials providing research guidance in the areas of federal habeas corpus, Florida post-conviction and post-sentence remedies, and prisoner's rights.[157]

It seems logical that with the importance of researching subjects such as scientific evidence, jury psychology, and police procedures, prison law libraries would be required to possess resource materials concerning these subjects. This, unfortunately, is *not* the case.

The materials that *are* in the law library can be difficult for prisoners to access, especially federal material, which is critical when attempting to comply with AEDPA. For example, some prisons in Florida have replaced their hardbound volumes of federal case reporters with a CD-ROM collection of these reporters.[158] In theory, this should benefit the pro se prisoner. In reality, it does not.

Performing research of potential claims is much faster and easier with a computer. A person may simply query a keyword or phrase and have numerous case citations available at the touch of a button. What could take days manually searching through volume after volume of cases could, literally, be done in a matter of minutes with a computer and a CD-ROM collection of case reporters. In order for a pro se prisoner to benefit from this, however, the prisoner must first have access to the computer.

Prisoners in Florida are not allowed to use the computers in the law libraries for research purposes.[159] A pro se prisoner needs to know the name and citation of the case he wants to read. He must then give the case citation to a law clerk. The law clerk, when he gets around to it, will then pull up the case on the computer, and the pro se prisoner may then read the case off the computer screen and take notes. At no time during this process is the pro se prisoner allowed to touch the keyboard;[160] the pro se prisoner must have a law clerk available to scroll the text up or down.[161] The law library may have three or four computers in it, but *only one is* designated for use by the prisoners who do not work in the law library.[162]

When a prison (like the one where I am housed) has over 1000 prisoners, plus the 350–400 prisoners at a work camp,[163] one computer is woefully inadequate to accommodate the needs of the prisoners attempting to comply with AEDPA. There have been times when I spent an entire day in the law library and was only able to read two or three cases.

Other times I was unable to read *any* federal cases. Needless to say, when attempting to comply with AEDPA, it is of the utmost importance that a pro se prisoner be able to read federal case law, especially given that AEDPA created a limitation which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...[164]

It is impossible to determine if something satisfies this requirement if one cannot read "established Federal law, as determined by the Supreme Court of the United States."

Prisoners who seek to challenge federal convictions are severely disadvantaged by the law library collection in the F.D.O.C. when attempting to comply with AEDPA. Numerous state prisoners also have consecutive federal sentences.[165] There are also federal prisoners being housed in state prisons under intergovernmental agreements.[166] Because the F.D.O.C. prison law libraries only have federal statutes concerning habeas corpus and prisoners' rights,[167] these prisoners cannot even read the federal statutes under which they were convicted.

Prisons have limited budgets and therefore may not be able to afford to provide prisoners with all-inclusive law libraries and more adequately trained law clerks. But it is not at all obvious that some very helpful reforms would cost the state money.[168] Prisoners, such as myself, are not requesting everything available concerning criminal law, nor are we requesting college-trained law clerks—as nice as that would be.

It would not cost prison officials *any* more money to train prisoners with a minimum TABE score of 12.0 as law clerks than it would to train ones with a 9.0 grade level score. Nor would it cost any additional money to stop destroying legal materials that are already in existing law library collections when the law library has ample space to store those materials.

Whenever an inmate is placed in the law library as a law clerk and begins to demonstrate adequate skills, prison officials are quick to remove him from the law library. I have witnessed this and have been subjected to it personally. It would not cost any additional money to leave inmates with such skills in the law library.

Improving the training programs may cost additional money, but the additional costs should not be unreasonably burdensome since these expenditures may very well be offset by funds saved in other areas. For instance, how much does it cost the courts each year to entertain insufficient motions and dismiss them for prisoners to correct and re-file? Logically, better-trained prison law clerics could cut back on the number of such pleadings and could save the judiciary money and time, which could be used on other, legally sufficient filings.

A cost-effective solution could also be to thoroughly train ten to fifteen inmates and then use these inmates to teach the certification seminar. Inmates are already used in education departments at institutions to teach literacy courses.[169] The same could be done for the law clerk training program.

Another avenue that could be taken to resolve many problems is to repeal AEDPA. This would not cost prison officials any money and would help maintain the integrity of the judicial process.

4. Other Barriers Prisoners Face

If a pro se prisoner is fortunate enough to overcome the barriers discussed above, he still faces many hurdles while pursuing meaningful post-conviction relief and working to comply with AEDPA.

Gaining access to a prison law library is not as simple as walking into the law library and requesting legal books or assistance. All access must be obtained by submitting an "Inmate Request Form," which under prison regulations must "be responded to within 10 days, following receipt by the appropriate official.."[170] If a prisoner has a deadline[171] and is requesting priority access,[172] then the Inmate Request Form must be answered within three working days.[173]

The rules governing law library access for prisoners with deadlines are different from those governing prisoners without deadlines. Prisoners in open population[174] who do not have deadlines are expected to use the law library only during their off-duty hours.[175] Because access must be obtained through a written request form, and because prison officials are allowed up to ten days to answer written requests, a prisoner must request access well in advance. Therefore, the only "off-duty" hours the prisoner may request are the prisoner's regular

scheduled off days.[176]

It is the stated goal of prison officials to work prisoners at least forty hours per week.[177] The vast majority of prisoners participate in programs or jobs in which they get Saturdays and Sunday's off.[178] Prison law libraries in Florida are closed on Sundays and Mondays.[179] The majority of prisoners, therefore, only have access to the law library, its materials, and the assistance of law clerks one day per week—Saturday. That is approximately six hours of access if the prisoner is scheduled for both the morning and afternoon sessions. Conversely, access to the general library is unrestricted by such regulations. Any time a prisoner is off-duty and wants to go to the general library, all he needs to do is get a pass and go. If a prisoner gets a pass to go to the general library and attempts to use the law library, the prisoner can go to confinement for being in an unauthorized area, even though the general library and the law library are in the same room.

The lack of law library access is extremely problematic when considered in the context of AEDPA's time limitation. In a year, a prospective pro se prisoner may only have *fifty-two days* of law library access in which to learn complex legal procedures, research potential claims, and learn how to draft post-conviction motions.[180] No reasonable person can honestly believe that prisoners facing the problems described above will be able to prepare adequate post-conviction motions in compliance with AEDPA under such circumstances.

Prisoners who seek "priority access" are not in a much better situation. Priority access is a procedure which affords inmates greater access to libraries under certain specified circumstances.[181] As unbelievable as it may seem, an AEDPA deadline does *not* qualify a prisoner for priority access to the law library in Florida prisons.[182] Under prison regulations, AEDPA is recognized as a "deadline,[183] but "priority access shall be granted if the maximum time limit is *20 or fewer calendar days.*"[184] *Therefore*, because the AEDPA deadline is one year, priority access is unavailable for prisoners seeking to comply with AEDPA.

Furthermore, prisoners are routinely denied priority access if the time available to them to use the law library during their off-duty hours is more than six hours per week.[185] Pursuant to this practice, if a prisoner has an off-duty day that falls between Tuesday and Saturday, he may very well be denied priority access. To further frustrate matters, even if the prisoner qualifies for priority access, a law library supervisor "shall not excuse an inmate...from a work or program assignment to use the law library for more than one-half of the inmate's workweek."[186] Moreover, prisoners have restrictions placed on the use of their time while in the law library. Prisoners are not to be "excused from a work or program assignment solely for the purpose of drafting legal documents and legal mail; such activities shall be performed during off-duty hours."[187] This rule is enforced.

In 1998, while in the law library preparing an initial brief for the appeal of my state post-conviction motion, I was confronted by the law library supervisor concerning this "no drafting motions" regulation. The law library supervisor told me that if I was going to be drafting my brief, I would have to leave and return to work.[188] When I attempted to explain that I was using law library material, the Florida Rules of Court, to ensure that my brief was in compliance with the appellate court's filing requirements, I was ordered to leave the law library or risk receiving a disciplinary report and being sent to confinement for disobeying institutional rules and regulations. I was informed that drafting my brief was not "research" and was prohibited in the law library, even using the Florida Rules of Court.[189]

When an inmate does acquire law library time and is actually in the law library, obtaining assistance from one of the law clerks still may be quite difficult.

While prison officials have adopted regulations concerning prisoners' access to the courts, some states actually *prohibit* prison law library services from assisting a prisoner during the pendency of his direct appeal. In *Douglas v. California,* the Supreme Court mandated appellate counsel for indigent prisoners.[190] This requirement, while essential for quality appellate review,[191] actually prevents some prisoners from being assisted by prison law clerks while their appeals are pending. In Florida, a prospective pro se prisoner will not be allowed to receive such guidance from the inmate law clerks while the prisoner has a direct appeal pending.

This position of the F.D.O.C. is demonstrated by an e-mail communication between two F.D.O.C. officials, Susan Hughes and Barry Rhodes.[192]

On December 11, 2001, Ms. Hughes e-mailed Mr. Rhodes about a research aide who had requested permission to send a "status report" to an inmate's attorney. The inmate, who was illiterate, was represented by the attorney on direct appeal, but had been working with the aide on a post-conviction motion while the direct appeal was pending. Mr. Rhodes responded as follows:

> If the inmate has an attorney representing him/her on a case we are not to be involved what-so-ever in the research-assistance advice cycle....
>
> EXCEPTION Some inmates will tell us they are actually writing the court

> document to file "pro se" and want to send the document to a lawyer just to review....We can instruct the inmate to obtain a letter from the lawyer stating that the inmate is acting on his own and filing pro se. Then the research aide can help the inmate.
>
> However, when an inmate is represented by an attorney we must continue to: retrieve research materials from the shelf for the prisoner; provide appropriate and required forms; and provide supplies such as paper, pen, and envelopes per the rule....
>
> If the lawyer is the prisoner's attorney of record—so be it. In that case instruct the aide to stop assisting the prisoner.[193]

As demonstrated by the foregoing communication, a prospective pro se prisoner is unable to obtain assistance from prison law clerks to begin preparing for eventual post-conviction proceedings while he has an attorney pursuing direct appeal issues on his behalf. Once the direct appeal process is complete, and AEDPA's one-year time period has begun, a prisoner may use prison law clerks and any guidance they may provide.

Even after the direct review is finished, the very first piece of information given to a prisoner concerning post-conviction remedies is incomplete. When prisoners in Florida are notified by their court-appointed appellate counsel that their direct appeals have been denied, they receive a standardized form letter that contains the following statement concerning post-conviction remedies and judicial time periods:

> I should like to advise you . . . that you may file a motion to mitigate or reduce your sentence. Such motion is filed with the trial judge; it must be *both* filed with the trial judge and heard within sixty (60) days after the decision of the district court [on appeal] becomes final. In informing you of this possible remedy, I make no assessment as to whether it would be successful or not. However, I did feel you should be advised since there is a specified time period for filing a motion to mitigate.
>
> You also have the right to file a motion for post-conviction relief under the Florida Rule of Criminal Procedure 3.850. A Rule 3.850 motion is filed in the trial court, and must be filed within two years of the date that the conviction became final . . . . If a Rule 3.850 motion is filed and denied, you would have the right to appeal from the order denying post-conviction relief within 30 days of that order ....[194]

For a pro se prisoner to comply with AEDPA, it is of the utmost importance for the prisoner to be made aware of the one-year time limitation. It has been my experience that court-appointed appellate counsel in Florida, for some unexplainable reason, neglect to inform the prisoner of the existence of a time limitation for seeking federal habeas relief.[195] As a result, prisoners begin preparing for state post-conviction remedies under the mistaken belief that they may use the entire *two-year* period before filing their post-conviction motion in the state court without missing any important deadlines.

I have been asked many times by prisoners who are out of time for seeking federal habeas review, "How can I have only one year to file a federal habeas corpus when I can't file it until after I finish my state remedies, and I have two years to file state post-conviction motions? Should my federal time not begin *after* I finish with my state post-conviction remedies?" Such a situation does not seem logical, but it is the situation.

V. THE END RESULT OF AEDPA

AEDPA has resulted in what could be considered an affront to the very dignity and credibility of the judicial system. In numerous cases, federal review of the constitutionality of a prisoner's conviction and sentence has been barred simply because the prisoner is uneducated, mentally ill, or indigent. Because of AEDPA's time limitation, inadequate and inaccessible prison law libraries, under-trained and poorly chosen prison law clerks, and a host of potential education and mental health issues, many pro se prisoners are simply unable to obtain

federal habeas review of constitutional violations.[196]

Recall the person I described in the introduction who accepted a plea based on his attorney's explicit assertion that he would be released from prison after serving a certain number of years, only to learn too late that, under the plea, he would never be eligible for release from prison. Or imagine a person being told to take a plea by his attorney because, according to the attorney, the defense the person wished to pursue was not allowed under state law, when in fact it was an allowable defense and was supported by competent medical evidence. A person should not be prevented from obtaining federal habeas review of claims such as these simply because he was one of the prisoners detailed earlier and could not afford to hire an attorney to pursue post-conviction claims. Unfortunately, in the *real system* of pro se litigation, this is not uncommon.

The sad fact of the matter is that I am an indigent prisoner with such claims who is time-barred by AEDPA.[197] And I am not alone. There are many of us in this situation.[198]

On June 10, 1995, I was arrested and charged with, among other things, robbery while armed with a firearm and attempted first degree murder of a law enforcement officer.[199] The charged crimes also occurred on June 10, 1995. I do not deny committing the acts for which I was arrested. I was se verely intoxicated on drugs and alcohol at the time the events happened. I do not wish to have my voluntary intoxication excuse my conduct. My entire defense concerning my intoxication was that I lacked the "specific intent"[200] required under Florida law for these offenses[201] and that I should have been charged instead with grand theft and attempted second degree murder.[202] The attorney who was appointed to represent me misinformed me that voluntary intoxication could not be used as a defense in Florida and told me that if this was the defense I was claiming, I should plead guilty.[203]

I pled guilty to robbery while armed with a firearm and attempted first degree murder of a law enforcement officer based on my court-appointed counsel's advice. The agreed-upon sentence, as explained to me by my counsel, was that I would be sentenced to life in prison for each offense—to be served concurrently—and that I would be released on parole after serving, at the most, twenty-five years. This, however, was not true. According to the Florida Parole Commission, I "will serve the remainder of [my] natural life in prison unless [I am] granted clemency."[204]

Later, my defense counsel admitted:

> I specifically advised the defendant, Thomas C. O'Bryant, that he could expect to be eligible for release under the sentences...after 25 years....I am certain that the possibility of being eligible for release, after 25 years, was a major factor in the defendants [sic] plea....It has now been explained to me concurrent life sentences imposed upon Count II, for Armed Robbery, is being construed to prohibit any possibility of parole. The defendant was never advised in this plea that the *negotiated* sentence would prohibit parole.[205]

When I raised this matter as a claim of ineffective assistance of counsel and as an involuntary plea (without a full understanding of the consequences), the trial court denied the claim and the appellate court affirmed the denial without comment.[206]

The Supreme Court has long held that since a guilty plea necessarily entails a defendant foregoing numerous constitutional protections—the right against self-incrimination, the right to a jury trial, the right to confront one's accuser—the guilty plea may only be upheld if it was voluntarily, knowingly, and intelligently made.[207] A critical component of the plea being "knowing" is that the defendant must have a full understanding of the consequences of the plea.[208] When a defendant enters into a plea based upon incorrect or incomplete information from his defense counsel, the prosecution, or the judge, how can the plea have been made "knowingly"? When the state courts refuse to abide by this federal constitutional doctrine, a federal court should not be divested of its authority to review the case because of an unreasonable time limitation, such as the one created by AEDPA.

My case is *not* an isolated incident. As a "jailhouse lawyer," I have encountered many prisoners who are time-barred by AEDPA despite having valid claims of substantial constitutional violations. This includes prisoners who were willing to accept responsibility for their unlawful conduct and entered a plea to a certain charge or sentence, but learned after being incarcerated that the sentence imposed was *not* the sentence they agreed to. It also includes prisoners who remain incarcerated for crimes to which others have confessed, defendants being prohibited from cross-examining prosecution witnesses concerning their motives to fabricate testimony,[209] fabricated "confessions" of the defendant being presented to the jury,[210] etc. In all of these situations, the individuals had to proceed pro se be-cause they could not afford to hire post-conviction counsel, and because of AEDPA, they were unable to obtain federal review.

VI. CONCLUSION

Congress should repeal AEDPA's habeas corpus provisions. Even with-out AEDPA, the entire system seems to prevent indigent prisoners from obtaining meaningful review of constitutional violations: undereducated prisoners, prisoners with mental disorders, unreliable memories of trial court proceedings, under-trained and under-educated law clerks, "psych inmates" working as law clerks, law libraries with meager resources, restricted access to these law libraries, law clerks, and jailhouse lawyers—the list goes on. Combine these problems with an unreasonable and unnecessary time limitation and a prohibition against successive habeas petitions, and the writ of habeas corpus has truly evolved into the "Great Unobtainable Writ."[211] Surely this is not what the Founding Fathers envisioned the writ of habeas corpus to be when they proclaimed that it obviated the need for the Bill of Rights.[212]

When obtaining a conviction against or imposing a sentence upon a defendant for his unlawful conduct, it is of the utmost importance that the law and constitutional safeguards be followed. Because of AEDPA, many of us in prison are not able to obtain the federal review necessary to ensure that this basic principle is followed. A Congressional review and reconsideration of the habeas provisions of AEDPA is justified, warranted, and necessary.

ENDNOTES

• I am an inmate in the Florida Department of Corrections, Inmate ID #0-124004. From 1997 through 2000, I educated myself in the law. In 2001, I completed a paralegal correspondence course through the University of Florida.

In this Article, I use some footnotes to define terms that are unnecessary for the legal community. These footnotes are included for the benefit of fellow inmates and pro se litigants.

I would like to thank Rachel Wainer Apter, Audrey Bianco, Eun Young Choi, Daniel Farbman, John Lavinsky, Scott Levy, Lauren Robinson, Jocelyn Simonson, and Prashant Yerramalli at the *Harvard Civil Rights-Civil Liberties Law Review* for their editorial assistance and their help in locating some of the authorities used in this Article. I would also like to acknowledge the many *CR-CL* staff members who provided substantive research assistance for this Article. Due to my incarceration, I have a limited amount of research material available to me. Without their assistance, this Article would not have been possible.

[1] This hypothetical situation is based on the case of Kenneth Brian Victoria. *See* State v. Victoria, Case No. 1986-6167 (Fla. Cir. Ct. Apr. 3, 1987).

[2] A pro se litigant is "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer." BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

[3] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253—2255 (1994) and adding 28 U.S.C. §§ 2261—2266 (2000)). Mr. Victoria, for example, has sought judicial relief pro se, but any federal review sought would be untimely under AEDPA. He has been in prison for twenty years, is currently housed at DeSoto Correctional Institution and is serving a life sentence. *See* Fla. Dep't. of Corr., Inmate Population Information Detail, http://www.dc.state.fl.us/appcommon/searchall.asp (last visited Apr. 22, 2006).

[4] A jailhouse lawyer is "a person who has taught himself or herself law while serving time, is knowledgeable about technical legal matters, and gives legal advice, esp. to fellow prisoners." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1022 (1996).

[5] *See* Transcript of Plea and Sentencing Hearing, State v. Richards, No. 95-92-CF (Fla. Cir. Ct. Jan. 25, 1996); Second Amended Information, State v. Richards, No. 95-92-CF (Fla. Cir. Ct. Sept. 15, 1995).

[6] For a description of habeas corpus, see *infra* Part II.

[7] Indigent prisoners do not have a right to court-appointed counsel for pursuing collateral post-conviction motions. *See* Murray v. Giarratano, 492 U.S. 1, 12 (1989) (Rehnquist, C.J., plurality opinion) (no right to counsel in state post-conviction proceedings for death row inmate); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no right to counsel in state post-conviction proceedings).

[8] The *Harvard Civil Rights-Civil Liberties Law* Review's policy is to use the feminine article. Since my experience is with all-male prisons, and because most prisoners are male, I will use the masculine.

[9] *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (referring to habeas corpus as the "Great Writ"). "Habeas corpus" is a Latin phrase meaning "that you have the body."
BLACK'S LAW DICTIONARY, *supra* note 2, at 728.

[10] U.S. CONST. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed").

[11] THE FEDERALIST No. 84, at 345 (Alexander Hamilton) (Buccaneer Books 1992).

[12] Common law is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." BLACK'S LAW DICTIONARY, *supra* note 2, at 293.

[13] See Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

[14] *See* U.S. CONST. art. 1, § 9, cl. 2 (the Suspension Clause) ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[15] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (codified as amended at 28 U.S.C. § 2241 (1948)).

[16] *Id.* ("[W]rits of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the *United States*, or are committed for trial before some court of the same ... ") (emphasis added); *see also Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845).

[17] *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 197 (1830).

[18] *See Ex parte* Merryman, 17 F. Cas. 144, 151-52 (No. 9,487) (C.C.D. Md. 1861). In response to Chief Justice Taney's protest, Congress soon thereafter delegated the authority to suspend the writ. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265 (1970). Including the suspension by Lincoln, codified by Congress in the Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, the Great Writ has only been suspended four times. Limited suspensions were invoked in 1871 and 1905 by Presidents Ulysses S. Grant and Theodore Roosevelt, respectively. *See* WILLIAM F.

DUKER. A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 178 n.190 (1980); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. 14–15 (suspension under Grant); Act of July 1, 1902, ch. 1369, 32 Stat. 692 (suspension under Roosevelt). The most recent suspension took place in Hawaii in 1941, when territorial governor Joseph B. Poindexter suspended the writ following the attack at Pearl Harbor. *Duncan v. Kahanamoku*, 327 U.S. 304, 307–08 & nn.1–2 (1946). Pursuant to Section 67 of the Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141 (1900), Poindexter suspended habeas corpus, placed Hawaii under martial law, and relinquished civilian gubernatorial and judicial authority to U.S. Army General Walter C. Short. *Kahanamoku*, 327 U.S. at 353–54 & n.6. General Short closed all civilian courts and created military tribunals that had the power to try civilians for violating territorial or federal law, as well as violating orders of the military government he had established. *See* Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospective on Martial Law in Hawaii*, 19 HAWAII L. REV. 477, 487–88 (1997). This governmental regime lasted until October 1944. *Id.* at 488, 611. In *Duncan v. Kahanamoku*, this habeas suspension was ruled illegal, not unconstitutional, on the basis that the Organic Act's authorization of martial law did not include the power to supplant civilian courts with military tribunals for trials of civilians. 327 U.S. at 322-24.

[19] *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1869).

[20] Act of Feb. 5, 1987, ch. 28, § 1, 14 Stat. 385 ("[T]he several courts of the United States, and the several justices and judges of such courts...shall have power to grant writs of habeas corpus in *all* cases where *any* person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States ....") (emphasis added).

[21] The provisions from the Act of 1867 did not change in any important way until 1948, when they were codified in 28 U.S.C. §§ 2241-2255. *See* Act of June 25, 1948, ch. 153, § 2241, 62 Stat. 964, 964–65. Although the revision did not significantly change the grounds for challenges to detention or the prisoners to whom the writ extended, it created a new section, § 2254, dealing with challenges to custody from state court. *See* RICHARD H. FALLON JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1288 (5th ed. 2003). This structure remained for nearly a half-century, with only small alterations, until the passage of AEDPA in 1996. *See id.*

[22] The roots of habeas corpus are usually attributed to Clause 39 of the Magna Carta: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." MAGNA CARTA CH. 39 (1215).

[23] A "statute of limitations" is a statute establishing a maximum period of time in which an action may be brought. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 1450.

[24] *See* Harris v. Nelson, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers"); United States v. Smith, 331 U.S. 469, 475 (1947) ("habeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time"); *see also* Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2127-28 (2002).

[25] None of the amendments mentioned in this Part included any sort of prohibition on filing successive habeas applications. For a review of other amendments, see 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 69—78 (4th ed. 2001).

[26] *Compare* 142 CONG. REC. S3454, 3459 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("[Habeas corpus] is being abused all over the country."), *with* 142 CONG. REC. S3427, 3439 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan) ("I make the point that the abuse of habeas corpus...is hugely overstated.").

My assertion that Senator Hatch's belief is "mistaken" is well-founded. In fact, between 1980 and 1996, the per-prisoner habeas filing rate for state and federal prisoners declined by forty-seven percent. *See* JOHN SCALIA, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURT, 1980—1996, at 4–5 (1997). According to statistics from 1995, most federal habeas petitions were terminated in district court in less than one year. *Id.* at 7. For an explanation of the problems with restricting successive habeas corpus petitions, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002).

[27] President William J. Clinton, Statement on Antiterrorism Bill Signing (Apr. 24, 1996) ("I have today signed into law...the 'Antiterrorism and Effective Death Penalty Act of 1996.'").

[28] *See* 28 U.S.C. § 2244(d)(1)—(2) (2006) (AEDPA's new time limitation); 28 U.S.C. § 2244(b) (2006) (AEDPA's new restrictions on successive petitions).

[29] An amendment is an alteration by modification, deletion, or addition. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 89-90.

[30] 142 CONG. REC. S3454, 3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy).

[31] Stevenson, *supra* note 26, at 701.

[32] *See, e.g.*, *28* U.S.C. § 2339B (2006) (prohibition on international terrorism fundraising); 28 U.S.C. § 2332(d) (2006) (prohibition on assistance to terrorist states); 18 U.S.C. § 3663A (2006) (mandatory victim restitution).

[33] 142 CONG. REC. E638-01 (statement of Rep. Young) ("I strongly feel this legislation is a knee-jerk reaction to a most heinous crime.").

[34] Editorial, *Grave Trouble for the Great Writ*, N.Y. TIMES, Apr. 8, 1996, at A14.

[35] 142 CONG. REC. S3352, 3353 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

[36] 142 CONG. REC. S3454, 3462 (daily ed. Apr. 17, 1996) [hereinafter Feingold Statement] (statement of Sen. Feingold).

[37] 142 CONG. REC. S3352, 3357 (daily ed. Apr. 16, 1996) (statement of Sen. Biden) ("Remember, folks, you already have to be in jail, convicted of a crime, in order to be able to file one of these [habeas] petitions ...").

[38] Feingold Statement, *supra* note 36.

[39] 28 U.S.C. § 2244(d)(1) (2006) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court").

[40] An appellate court is a court with jurisdiction to review decisions of lower courts or administrative agencies. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 378.

[41] 28 U.S.C. § 2244(b) (2006).

[42] To appeal is "[do seek review (from a lower court's decision) by a higher court." BLACK'S LAW DICTIONARY, *supra* note 2, at 106.

[43] 28 U.S.C. § 2253 (2006).

[44] Exhaustion of remedies refers to taking advantage of all available remedies. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 613–14.

[45] 28 U.S.C. § 2254(b)-(c) (2006).

[46] 28 U.S.C. § 2254(d) (2006).

[47] 28 U.S.C. §§ 2261-2266 (2006).

[48] 28 U.S.C. § 2244(d)(2) (2006). ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

[49] In *Artuz v. Bennett*, the U.S. Supreme Court examined AEDPA's tolling provision and explained that a "properly filed" state post-conviction motion was one that complied with applicable filing requirements. 531 U.S. 4, 9–10 (2000).

[50] *See* Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) ("[T]he statute of limitations for a habeas application challenging a resentencing court's judgment begins to run on the date the resentencing judgment becomes final and not the date the original judgment becomes final.").

[51] In 1995, prior to the passage of AEDPA, only 1.2% of state prisoners' habeas petitions disposed of in U.S. District Courts resulted in judgments for the inmate. SCALIA, *supra* note 26, at 6. The percentage was only slightly higher for federal prisoners. *Id.*

[52] Some procedures that I had to teach myself include: types and availability of pre-trial motions, discovery procedures, rules of evidence,

procedures for suppression of inadmissible evidence, jury selection procedures, procedures for direct and cross-examination of witnesses, types of objections, types of motions available during trial, procedures for re-questing curative instructions or mistrials, post-trial motions, sentencing procedures, rules of appellate procedure, rules governing state post-conviction procedures, and rules governing federal post-conviction procedures.

[53] This includes understanding and developing trial strategies and trial tactics, coherent theories of defense, etc.

[54] For example, this could include: the "fruits of the poisonous tree" doctrine, exclusionary rules, good-faith exceptions, fundamental/plain error analysis, harmless error analysis, Mansfield Doctrine, res judicata, last antecedent rule, express mention/implied exclusion, ejusdem generis, stare decisis, etc.

[55] A brief is "[a] written statement setting out the legal contentions of a party in litigation, esp. on appeal." BLACK'S LAW DICTIONARY, *supra* note 2, at 204. A motion is "[a] written or oral application requesting a court to make a specified ruling or order." *Id.* at 1036.

[56] Unfortunately, I am one such pro se prisoner who is unable to seek federal review because of AEDPA's time limitation.

[57] These assertions are based on my experiences as a jailhouse lawyer.

[58] In contrast to an indigent prisoner, an affluent free citizen may simply retain an attorney to pursue legal remedies on his behalf.

[59] 372 U.S. 477, 481 (1963).

[60] 360 U.S. 252, 257—58 (1959).

[61] 351 U.S. 12, 19—20 (1956). The Supreme Court has only rejected an indigent defendant's claim to transcripts where an adequate alternative was available but not used, *see* Britt v. North Carolina, 404 U.S. 226, 230 (1971), or because the request was plainly frivolous and a prior opportunity to obtain a transcript had been waived. *See* United States v. MacCollom, 426 U.S. 317, 328–29 (1976).

[62] 404 U.S. 15. 15 (1971) *(aff'g* 319 F. Supp. 105 (N.D. Cal. 1970)).

[63] 312 U.S. 546, 549 (1941).

[64] 393 U.S. 483, 490 (1969).

[65] 430 U.S. 817, 828 (1977).

[66] 5 18 U.S. 343, 356 (1996).

[67] The "myth system" and "real system" to which I refer are similar to the "myth system" and "operational code" described by Professors Reisman and Schrieber. *See W. Mi*-CHAEL REISMAN & AARON M. SCHRIEBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 23–35 (1987).

[68] *See* Gideon v. Wainwright, 372 U.S. 335, 339–42 (1963); Powell v. Alabama, 287 U.S. 45, 71 (1932).

[69] See Halbert v. Michigan, 125 S. Ct. 2582, 2593–94 (2005); Douglas v. California, 372 U.S. 353, 357 (1963).

[70] *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

[71] *Note, Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005).

[72] *Id.*

[73] *Id. at* 1735.

[74] Johnson v. Avery, 393 U.S. 483, 487 (1969) (citing Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347–48, 360–61 (1968)).

[75] FLA. DEP'T OF CORR., ANNUAL REPORT 2003-2004 M23, *available at* http://www. dc.state.fl.us/pub/annual/0304/pdfs/education.pdf [hereinafter ANNUAL REPORT 2003-20041. The TABE is a standardized test that assesses a person's general education level in math, reading, and language comprehension skills. A test score reflects the person's approximate grade level. For example, a TABE score of 5.0 means the person's approximate level of education in that area is a beginning fifth grade level. The highest score achievable on the TABE is a 12.9 grade level, which indicates an education level of at least a high school graduate. *Cf.* Sys. for Adult Basic Educ. Support, *Glossary of Useful Terms*, http:// www.sabes.org/assessment/glossary.htm (last visited Apr. 22, 2006).

[76] ANNUAL REPORT 2003-2004, *supra* note 75, at M24.

[77] FLA. DEPT CORR., PROCEDURES MANUAL 501.106 (2002).

[78] *See* ANNUAL REPORT 2003-2004, *supra* note 75, at M23.

[79] A National Alliance on Mental Illness (NAMI) fact sheet updated in January 2001 indicates that approximately 5.4% of the U.S. population suffers from mental illness. Nat'l Alliance on Mental Illness, *About Mental Illness*, http://www.nami.org/helpline/factsand figures.html (last visited Apr. 22, 2006) *(cited in* SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS n. 12 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf). The American Psychiatric Association has reported that one out of every five (twenty percent) inmates in the U.S. prison population suffers from serious mental illness. AM. PSYCHIATRIC ASS'N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS xix (2d ed. 2000) *(cited in* ABRAMSKY & FELLNER, *supra*, at n.13). This disproportionate rate of mental illness was confirmed in a telephone interview with my brother Sid E. O'Bryant, Ph.D. Telephone Interview with Sid E. O'Bryant, Ph.D., Assistant Professor, Dep't of Neuropsychiatry and Behavioral Scis., Texas Tech University Health Science Center, in Lubbock, Tex. (Sept. 3, 2005).

[80] PAULA M. DITTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999) *(cited in* ABRAMSKY & FELLNER, *supra* note 79, at n.16), *available at* http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm.

[81] 1 NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 25 (2002) *(cited in* ABRAMSKY & FELLNER, *supra* note 79, at n.15), *available at* http://www.ncchc.org/stbr/Volume I/Health%20Status%20(vol%201).pdf. Dysthymia is "morbid anxiety and depression accompanied by obsession." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 712 (1981).

[82] *See* ALLEN J. BECK & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 4 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf. Psychotropic medications are medications prescribed by a psychiatrist that "affect mental activity, behavior, or perception." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY, *supra* note 4, at 1562.

[83] BECK & MARUSCHAK, *supra* note 82, at 1.

[84] *See generally* JERROLD G. BERNSTEIN, HANDBOOK OF DRUG THERAPY IN PSYCHIATRY 266–97 (3d ed. 1995); S. J. ENNA & JOSEPH T. COYLE, PHARMACOLOGICAL MANAGEMENT OF NEUROLOGICAL AND PSYCHIATRIC DISORDERS 22–24 (1998); Joseph F. Goldberg & Katherine E. Burdick, *Cognitive Side Effects of Anticonvulsants*, 62 J. CLIN. PSYCHIATRY (SuPP. 14) 27–33 (1998); Michael Kolber et al., *Adverse Events with Zyban (Bupropion)*, 169(2) CAN. MED. Ass'n J. 103–04 (2003); Oriano Mecarelli et al., *Clinical, Cognitive, and Neurophysiological Correlates of Short Term Treatment with Carbamazepine, Oxcar-bazepine, and Levvetiracetam in Healthy Volunteers*, 38 ANNALS PHARMACOTHERAPY 1816—22 (2004); J. D. Vanderkooy, *Antidepressant Side Effects in Depression Patients Treated in a Naturalistic Setting: A Study of Bupropion, Moclobemide, Paroxetine, Sertraline, and Venlafaxine*, 47(2) W. CAN. J. PSYCHIATRY 174—80 (2002).

[85] 430 U.S. 817, 828 (1977).

[86] *See* FLA. ADMIN. CODE ANN. r. 33-501.301(3)(e) (2005) ("Inmates who are illiterate or have disabilities that hinder their ability to research the law and prepare legal documents and legal mail, and need research assistance, shall be provided *access* to the law library and to inmate law clerks....Upon receipt of [a]...request...the law library supervisor shall schedule the inmate for *a visit* to the law library or a *visit* with an inmate law clerk.") (emphasis added); *id.* at r. 33-501.301(7)(c) ("[M]ajor and minor collection law libraries shall be assigned inmates as inmate law clerks to assist inmates in the research and use of the law library collection, and in the drafting of legal documents....Institutions shall assign additional inmate law clerks to the law library as needed to ensure that illiterate and impaired inmates are provided research assistance.").

[87] On June 10, 1995, while on various drugs and alcohol, I robbed a motel clerk and was involved in a shootout with police. I eventually pled guilty to robbery while armed with a firearm and attempted first degree murder of a law enforcement officer, and was sentenced to two concurrent life sentences. *See* Transcript of Plea and Sentencing Hearing, *supra* note 5, and accompanying text.

[88] Wellbutrin is an antidepressant that was used to treat my severe depression. Cogentin was prescribed to me in an attempt to offset the side effects of the other medications. This effort failed. If anything, the side effects I was experiencing increased while I was taking Cogentin. Tegretol was prescribed to me for treatment of severe mood swings. Loxitane is an antipsychotic medication that was given to me because of the hallucinations I was experiencing. *See generally* MANUAL OF CLINICAL PSYCHOPHARMACOLOGY (5th ed. 2005).

I was severely abusing drugs and alcohol at the time of my arrest. The majority of my mental health issues at the time, I believe, were attributable in part to withdrawal from the illegal drugs and alcohol.

[89] My thoughts were more coherent. I could concentrate on things and could remember events. I was not disoriented.

[90] A total battery TABE score is the cumulative average of all areas of the TABE test. *See* ANNUAL REPORT 2003-2004, *supra* note 75, at M23.

[91] FLA. STAT. § 924.066(3) (2005) (effective July 1, 1996) ("A person in a noncapital case who is seeking collateral review under this chapter has no right to a court-appointed lawyer.").

[92] An inmate law clerk is a prisoner who is given a job assignment in a prison law library and who has been "trained" by prison officials to provide assistance to other inmates in preparing and/or pursuing legal matters. *See* FLA. ADMIN. CODE ANN. r. 33-501.301(2)(e) (2005).

[93] Affidavit of Christopher Todd Benton at 2 (Sept. 29, 2004), O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. 2003) (submitted in support of claim of entitlement to equitable tolling of AEDPA's one-year time limitation) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

[94] *See id.* at 3 ("After repeated attempts [sic] of trying to assist Mr. O'Bryant and learning through trial and error that he was unable to prepare [sic] any meaningful post-conviction [motions] I approached my Supervisor Ms. Rhyans [sic] and attempted to have a law clerk assigned to handle his case, unfortunately, Mr. O'Bryant scored high enough on his education testing that resulted in him not being entitled to have a law clerk assigned to handle his case.").

[95] *See* Petitioner's Notice of Filing Supplemental Documentation, O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. Sept. 29, 2004) (showing multiple drug prescriptions for psychosis) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review). These medical records show that I was suffering from psychosis for approximately nine of the nineteen months that I took to file my first state post-conviction motion on November 7, 1997. By this date, my AEDPA clock had expired.

[96] Affidavit of Dr. Judith R. O'Jile, O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. Jan. 27, 2005) (submitted as Exhibit B by petitioner) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

[97] *See* AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (effective Apr. 24, 1996).

[98] *See* Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("In the context of AEDPA's 1-year limitations period...the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA").

[99] I also believe there are a large number of inmates who are being overmedicated by prison officials. I believe this was my situation. Instead of increasing my medications, I believe I would have been better off if provided counseling to go along with the medications I was already receiving, with the goal of eventually weaning me off psychotropic medication altogether.

[100] From ten years worth of personal observations and experience as a pro se litigant and jailhouse lawyer, I have observed that an appeal in the Florida appellate courts normally takes approximately ten to twelve months.

[101] It is noteworthy to mention that some proceedings, such as depositions, are routinely conducted in the absence of the defendant, who is the eventual pro se litigant.

[102] *See* Griffin v. Illinois, 351 U.S. 12 (1956).

[103] Over the years, I have assisted in *numerous* attempts by prisoners to obtain copies of their records of court proceedings. Those who did not have a direct appeal were consistently told by the clerks of the trial courts that they would have to pre-pay to get the records and that the fee would be up to $4 per page. Those who did pursue a direct appeal were consistently told that they were only entitled to one free copy, that the copy would be furnished to their appellate counsel, and that they could request the copy from appellate counsel when their appeal was finished.

[104] *See, e.g.*, Hansen v. United States, 956 F.2d 245, 248 (11th Cir. 1992) ("We do not agree, however, that this right [to free trial court records] extends to access to the record for the purpose of *preparing* a collateral attack on a conviction.").

[105] *See* Day v. Crosby, 391 F.3d 1192, 1 193 (11th Cir. 2004) ("Day's third argument was that the state public defenders withheld his trial transcripts for 352 days, and the delay cost him time in which he could have worked towards filing his appeals.").

[106] Bounds v. Smith, 430 U.S. 817, 822 (1977) (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)).

[107] ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 21 (Harvard Univ. Press 1996) (1979). This particular work concerns eyewitness testimony of events and the identification of a suspect by the witness.

I know of no studies concentrating on the accuracy or reliability of a defendant's memory of trial proceedings. However, a defendant witnessing his criminal trial might well go through the same memory process as an individual witnessing a crime, and each stage of his memory process would be subject to the same factors. The reasoning set forth in LOFTUS, *supra*, therefore would apply to a criminal defendant as well.

[108] *See id.* at 21, 32.

[109] *See id.* at 54, 64.

[110] ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL & CRIMINAL 31—32 (1987).

[111] Interview with Teddy Sean Stokes, Inmate in Holmes Corr. Inst., Bonifay, Fla. (Oct. 18, 2005) [hereinafter Stokes Interview]. Stokes told me:

> There were times during my trial that I thought I was gonna faint. It felt like I was in a bad dream. My lawyer never told me what to expect, so I was getting hit with so much stuff I'd never heard before that I couldn't keep up with everything. During recess a couple of times, when I was in the holding cell, I thought I was gonna vomit I was so stressed out, you know, not knowing what the jury was thinking about this.

Id.

[112] This "life or death" assertion is not an exaggeration. If the State is seeking the death penalty, these complete strangers will decide whether the State should kill the defendant for his alleged actions.

[113] *See* Stokes Interview, *supra* note 111.

[114] Interview with Donald D. Wood, Inmate in Holmes Corr. Inst., Bonifay, Fla. (Oct. 15, 2005).

[115] This assertion is based on my own personal experience, as well as my years of experience as a jailhouse lawyer.

[116] I have even experienced this myself after receiving the transcripts of a state court evidentiary hearing conducted in my own case on November 15, 2000.

[117] This is especially true of situations in which proceedings were held in the absence of the defendant. For instance, imagine that a witness makes a statement at a deposition conducted without the defendant present. At trial, the witness's testimony is inconsistent with the prior statement and the defense counsel fails to impeach the witness. The defendant will not be aware of the inconsistency because he was not at the deposition. Therefore he will not know to research the potential "ineffectiveness of counsel" claim until he receives the record. If the defendant has already filed a state post-conviction motion, he may be prohibited under state filing requirements from raising the claim in a successive motion, and the claim is now waived or barred from federal review because it was not exhausted in state court proceedings. This is not a far-fetched or unreasonable scenario, but is *rather one* I have seen.

[118] 430 U.S. 817, 830–32 (1977) ("[W]hile adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here...does not foreclose alternative means to achieve that goal....[A] legal access program need not include any particular element we have discussed, and we encourage local experimentation.").

[119] 518 U.S. 343, 356 (1996).
[120] *Id.*
[121] *Id.* at 356–57. It is worth mentioning that, from my observation, shortly after the Supreme Court handed down its decision in *Lewis*, the F.D.O.C. began destroying research materials that were already contained in the law libraries, stopped providing certain periodicals, and reduced the number of hours each week that the law libraries were required to be open.
[122] *See* FLA. ADMIN. CODE ANN. r. 33-501.301(7)(e) (2005) (law clerk training pro-gram).
[123] *See supra* notes 118–121 and accompanying text.
[124] In all fairness to inmate clerks, I must say that some of them do try to do what they can, and some are competent in the law. For the most part, though, these clerks do not provide adequate assistance to inmates attempting to pursue meaningful state post-conviction remedies or to comply with AEDPA.
[125] FLA. ADMIN. CODE ANN. r. 33-501.301(7)(d)(l)-(4) (2005).
[126] *See id.* This section of the Florida Administrative Code covers the only qualifications to become a certified law clerk. There is no mention of any mental health criteria.
[127] Such inmates may be experiencing the common side effects of psychotropic medications as mentioned in Part IV.B, *supra*. Also, inmates with diagnosed mental disorders may be prone to psychotic episodes and in need of psychiatric intervention without warning.
[128] When Inmate Harold Bush was informed that he was going to the law clerk training seminar at A.C.I., prison officials told him that the seminar was being held at A.C.I. for the purpose of certifying some "psych inmates." I personally heard prison officials inform inmate Bush of this. A "psych inmate" is an inmate who has been diagnosed as mentally disordered by prison mental health staff and is being treated with psychotropic medications.
[129] *See supra* notes 118—121 and accompanying text.
[130] *See supra* text accompanying notes 110-112.
[131] This information concerning the length of the seminar was provided by inmate Sean Russell, who attended the seminar at Wakulla Correctional Institution in June 2005, and inmate Harold Bush, who attended the seminar at A.C.I. in November 2005. Interview with Harold Bush, inmate, Holmes Correctional Institution, Bonifay, Fla. (Dec. 7, 2005); Inter-view with Sean Russell, inmate, Holmes Correctional Institution, Bonifay, Fla. (Nov. 11, 2005) [hereinafter Russell interview]. My assertion about the seminar covering only a small portion of the legal matters necessary to provide quality assistance is based on my interviews with Russell and Bush, as well as my examinations of the law clerk training manuals used over the years by the F.D.O.C.
[132] *See* FLA. ADMIN. CODE ANN. r. 33-501.301(7)(e)(1) (2005).
[133] I questioned Mr. Russell about the law clerk training seminar and its final exam on Friday, November 11, 2005. I also asked him for his opinion on the quality of the seminar and the difficulty level of its final exam. In response, Russell laughed and stated, "It's a complete joke. Any moron can pass it." Russell interview, *supra* note 131.
[134] When I was explaining this to the certified law clerk, I asked him to get "The Blue-book." His response was that I needed to be more specific and give him the book's title because there were several books in the law library that were blue. I told him "The Blue-book" was the title. He claimed that there was no legal book or citation book with such a name.
[135] *See supra* notes 118–121 and accompanying text.
[136] Some prisoners, such as myself, acquired legal knowledge through a combination of all of these methods.
[137] Johnson v. Avery, 393 U.S. 483, 490 (1969).
[138] *See, e.g.*, FLA. ADMIN. CODE ANN. C. 33-210.102 (2005).
[139] *Id.* at r. 33-210.102(12).
[140] *See id.* at r. 33-602.203(1)(b) ("Any item or article not originally contraband shall be deemed contraband if it is passed from one inmate to another without authorization"); *id.* at r. 33-602.201(7)(a) (impounded property) ("If the property...does not belong to the inmate in possession of the property, an investigation shall be conducted to determine if the owner of the property knowingly permitted the use of the property. If so, the property shall be handled as contraband.").
[141] *Id.* at r. 33-210.102(12).
[142] *See supra* note 140.
[143] F.D.O.C. Charging Disciplinary Report Log #107-050088 states:

> On Tuesday, January 18. 2005...myself [Sergeant Michael S. White] and Officer [Mitchell] Finch were conducting a routine search of cell H-2107, housing Inmate O'Bryant....During the search of Inmate O'Bryant's property, legal work be-longing to Inmate Martin, Richard...was found. The shift OIC was notified for appropriate action. Inmate O'Bryant remains in disciplinary confinement pending the charge 3-12 possession of any other contraband.

See also F.D.O.C. Charging Disciplinary Report Log #107-050463.
[144] F.D.O.C. Disciplinary Hearing Worksheet Log #107-20050463. Disciplinary confinement is segregation/isolation. An inmate is locked in a cell with no out-of-cell recreation for the first thirty days; is only allowed to shower Mondays, Wednesdays, and Fridays; and is denied telephone/television privileges, any reading material, with the exception of a Bible, and numerous other privileges. *See* FLA. ADMIN. CODE ANN. r. 33-602.222 (2005).
[145] F.D.O.C. Disciplinary Report Hearing Information Log #107-050088. Incentive gain time, also called "good time," is early release credits. One day of gain time represents one day earlier an inmate is released from prison. For the full regulations governing incentive gain time, see FLA. ADMIN. CODE ANN. r. 33-601.101 (2005).
[146] I was told this by the Disciplinary Hearing Team for Disciplinary Report Log #107-050463 on April 7, 2005.
[147] *See* FLA. ADMIN. CODE ANN. r. 33-601.314 (2005).
[148] *Id.* at r. 33-601.101(5)(a).
[149] *Id.* at r. 33-601. 101(5)(a)(2).
[150] Administrative confinement is not "disciplinary" in nature. As opposed to disciplinary confinement, inmates in administrative confinement are allowed reading material and radios. *See id.* at r. 33-602.220. This is about the only difference.
[151] A disciplinary hearing is a hearing where an inmate appears before a classification officer and a security officer (lieutenant rank or above) and enters a plea of guilty, not guilty, or no contest, and is allowed to make a statement on his behalf concerning the alleged rule infraction. *Id.* at r. 33-601.307. These hearings are often referred to by inmates as "DR Court" (DR stands for disciplinary report) or "Kangaroo Court."
[152] *Id.* at r. 33-501.301(1).
[153] *See* Lewis v. Casey, 518 U.S. 343, 356 (1996). It needs to be pointed out that *Lewis* was argued before the Supreme Court on November 29, 1995, and was decided on June 24, 1996. Therefore, when the Court rendered its decision in this case, which was based on the fact that any "actual harm" suffered by the inmates was not "systemwide," the implications of AEDPA and its systematic effects on prisoner litigation were not before the Court for consideration. This fact alone should warrant the Court revisiting the issue of "adequate" libraries and assistance.
[154] Bounds v. Smith, 430 U.S. 817, 828 (1977).
[155] SCALIA, supra note 26, at 14 (citing ROGER A. HANSON & HENRY W. K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995)).
[156] In *Strickland*, the Supreme Court established a two-prong test to determine whether a criminal defendant's Sixth Amendment right to the effective assistance of counsel has been violated. 466 U.S. 668 (1984). With regards to the first prong—the performance prong—the defendant must show that defense counsel's representation fell below an objective level of reasonableness. *See id.* at 680-81. In the second prong—the prejudice prong—the

defendant must show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the results of the proceedings would have been different. *Id.* at 694.

[157] FLA. ADMIN. CODE ANN. r. 33-501.301(2)(1) (2005).

[158] The prison where I am currently housed, Holmes Correctional Institution, is one of the prisons in Florida that, at the time of this writing, has a CD-ROM collection of federal case reporters in its law library.

[159] In all the time I have been in prison and used the law libraries, I have never been allowed to use a computer, even though I have requested to do so on numerous occasions.

[160] FLA. DEP'T. CORR. PROCEDURES MANUAL 501.107 (2003). The only inmates allowed to touch computers are the ones who have job assignments that require them to have the use of a computer. In order for a prisoner to get on a computer, his work supervisor must submit an "Inmate PC Usage Request Approval," and the request must be approved by the warden, the chief of security, and the classification supervisor. FLA. DEP'T. CORR. FORM DC6-109 (2000). Therefore, even for the sake of convenience or expediency, the law library supervisor is not authorized to make exceptions to this absurd practice. *[Editor's Note:* The Florida Department of Corrections declined the requests of the *Harvard Civil Rights-Civil Liberties Law Review* to obtain a copy of this manual (e-mail on file with the Harvard Civil Rights-Civil Liberties Law Review).]

[161] As ridiculous as it may seem to require that a law clerk scroll a page for the prisoner, this rule is made even more onerous by the fact that the law clerks are not always available because of their other duties (making photocopies, pulling books off the shelves for other inmates, filing papers, etc.) and the prisoner may have to wait for quite a while just to have a page scrolled for him.

[162] This assertion is based on my personal experience and observations at Holmes Correctional Institution.

[163] A "work camp" is the unit of the prison that houses lower custody prisoners, the majority of whom work outside the prison fences. FLA. ADMIN. CODE ANN. r. 33-501.301(3) (0(2) (2005) provides that work camp prisoners must use the same law library facilities as the prisoners housed at the main unit.

[164] 28 U.S.C. § 2254(d) (2006).

[165] I have helped a few such prisoners during my years as a jailhouse lawyer.

[166] For instance, Intergovernmental Agreement 98-188 is an agreement between Florida and the federal government to exchange prisoners prosecuted under joint state/federal drug task forces. *Cf.* FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 7 (2000), *available at* http://www.bop.gov/news/PDFs/soboo.pdf.

[167] *See* FLA. ADMIN. CODE ANN. r. 33-501.301(2)(1), (5)(a) (2005).

[168] Because of my incarceration I am unable to perform empirical research to prove that alternative solutions would be cost-free. My assertions that some of my suggestions would be cost-free, however, are logical.

[169] FLA. DEP'T. CORR. PROCEDURES MANUAL 501.107 (2003).

[170] FLA. DEP'T. CORR. FORM DC6-236 (2000) (back of form). An Inmate Request Form is a form used by inmates to ask prison officials questions, to schedule appointments, or to initiate a complaint against a staff member.

[171] A deadline is "any requirement imposed by law, court rule or court order that imposes a maximum time limit on the filing of legal documents with the court." FLA. ADMIN. CODE ANN. r. 33-501.301(2)(b) (2005).

[172] "Priority access" is self-explanatory. An inmate who has an upcoming deadline is given a higher priority when scheduling time in the law library than an inmate who does not have an upcoming deadline. *See id.* at r. 33-501.301(2)(q).

[173] *Id.* at r. 33-501.301(3)(f) ("Department staff shall respond to a request for special access to meet a deadline within 3 working days of receipt of the request, not including the day of receipt.").

---

[174] "Open population" inmates are inmates who are housed in the general inmate population, as opposed to those who are segregated from other inmates because of special medical conditions, a heightened need for protection, security concerns, or disciplinary action. *See id.* at r. 33-501.301(2)(o).

[175] *Id.* at r. 33-501.301(3)(g). "Off-duty" hours are the hours during which an inmate is not at work at his assigned job or participating in an assigned program, such as education, drug rehabilitation, or pre-release programs.

[176] When a prisoner submits an Inmate Request Form seeking law library access, the prisoner must specifically state on the request form that the desired days are his off-duty days—not off-duty *hours—or* the request will be returned instructing the prisoner to resubmit the request stating his assigned off-duty days.

[177] FLA. ADMIN. CODE ANN. r. 33-601.201(1) (2005) ("It is the continuous goal of the department that inmates in work assignments work at least 40 hours per week.").

[178] Such jobs and programs include inside grounds (cutting grass, picking up trash, sweeping sidewalks), maintenance (plumbing, roofing, painting, electrical work, carpentry), orderly work, educational classes, or staffing the classification or property rooms.

[179] In my experience, these have been the standard hours for libraries and law libraries in the F.D.O.C.

[180] Fifty-two days is an estimate based on one day of library access per week. This assumes that the library will not be closed on an inmate's off-duty day because of inclement weather, staff shortage, buffing or waxing of the floors, the librarian taking a day off, etc. This also assumes that the prisoner is able to get into the law library each week. The number of prisoners allowed in the law library at any given time is limited by the state fire code. In all of the prisons in which I have been incarcerated, library capacity has been limited to approximately sixty people, which includes library workers, law library workers, general library prisoners, and law library prisoners. Therefore, only about thirty to thirty-five prisoners are allowed access to the law library at any given time. With prisons housing over 1000 inmates, regular access to the law library on an off-duty day each week is far from guaranteed.

[181] FLA. ADMIN. CODE ANN. r. 33-501.301(2)(q) (2005).

[182] In 1997 and 1998, while assigned a job in the law library at Washington Correctional Institution, I tried numerous times to register prisoners who had three or four months left to file post-conviction motions for priority access. I was told repeatedly that these prisoners did not qualify for priority access because they had more than twenty days remaining to file their motions. In the years since, I have witnessed many other prisoners denied priority access because AEDPA's one-year time frame exceeds F.D.O.C.'s twenty-day requirement.

[183] FLA. ADMIN. CODE ANN. r. 33-501.301(2)(6) (2005).

[184] *Id.* at r. 33-501.301(3)(f)(1) (emphasis added).

[185] Florida regulations provide that inmates in open population shall be given priority access to the law library and be excused from work only "when the inmate demonstrates an exceptional need for it. The inmate bears sole responsibility for proving why additional research time in the law library should be provided." *Id.* at r. 33-501.301(3)(f)(2). Prison regulations do not state what burden the prisoner carries to prove exceptional need. However, it is my understanding and experience that Chapter 33-501.301(1)(2) of the Florida Administrative Code used to declare inmates with six or more off-duty hours ineligible for priority access, and, as a result, prison officials in the F.D.O.C. continue to deny priority access to inmates with more than six hours off-duty time.

[186] *Id.* at r. 33-501.301(3)(f)(2). Since prisoners have five-day work weeks, law library supervisors will not allow a prisoner more than two days of priority access per work week, if they are allowed any days at all.

[187] *Id.* at r. 33-501.301(3)(g). This rule has been interpreted by prison officials at the seven prisons where I have been housed to mean that no inmate is allowed to use law library time to draft legal documents, regardless of whether they are in the law library on "priority access" or on off-duty hours.

[188] My job assignment at the time was "houseman." I was responsible for sweeping the floor in my housing unit (there were about ten inmates assigned to this task). My job assignment had been completed, and my work supervisor had given me the afternoon off. Therefore, there was not any work for me to return to.

[189] Fortunately, another prisoner in my housing unit had a copy of the Florida Rules of Court, which he let me use. I had to be careful not to let a guard or

officer see me with the book. Because it belonged to another prisoner, it became "contraband" each time it was in my possession; if caught with it, I could have been sent to confinement, and the book could have been confiscated. *See supra* note 140.

[190] 372 U.S. 353 (1963).

[191] *See* Halbert v. Michigan, 125 S. Ct. 2582, 2593 (2005) ("Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals...who have little education, learning disabilities, and mental impairments.").

[192] Susan Hughes was the Library Program Administrator at the Apalachee Correctional Institution in 2003. See FLORIDA LIBRARY DIRECTORY WITH STATISTICS 152 (listing of Institutional Libraries), *available at* http://dlis.dos.state.fl.us/bld/Research_Office/2003LibraryDirectory/2003InstitutionalLibraries.pdf. Barry Rhodes is a Research and Training Specialist with the F.D.O.C. Bureau of Program Services, *See* CORRECTIONAL COMPASS: THE OFFICIAL NEWSLETTER OF THE FLORIDA DEPARTMENT OF CORRECTIONS, Oct. 2001, at 12, *available at* http://www.dc.state.fl.us/pub/compass/0110/Compass_OctOl.pdf. Mr. Rhodes is responsible for overseeing the F.D.O.C. Law Library Services and for training inmates as "research aides" or "law clerks."

[193] E-mail from Barry Rhodes to Susan Hughes (Dec. 11, 2001, 09:22 EST) (on file with author). Mr. Rhodes forwarded this e-mail to the librarians, who in turn posted a copy of it on the bulletin boards in the prison law libraries for the inmates to see. I have personally seen this e-mail posted in five different prison law libraries. I was given a copy of this e-mail by the librarian at Okaloosa Correctional Institution in 2002.

[194] Letter from Valerie Jonas, Assistant Public Defender, to Inmate Oriel Bernadeu (Apr. 26, 2005) (on file with the author).

[195] I have read literally hundreds of letters over the years from court-appointed appellate attorneys informing prisoners of the denial of an appeal and the availability of state post-conviction motions. In all of the letters I have read, I have *never* read one in which the attorney informed the prisoner that he only had one year to file a federal habeas corpus application.

[196] *See generally* Part IV, *supra*.

[197] O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. Jan. 27, 2005).

[198] Interview with Inmate Victoria, Holmes Correctional Institution, Bonifay, Fla. (June 10, 2005) (discussing Florida v. Victoria, No. 1986-6167 (9th Fla. Cir. Ct. Apr. 3, 1987)); Interview with Inmate Hall, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Hall, No. 87-4472-CC (7th Fla. Cir. Ct. originally sentenced to death on March 22, 1989; resentenced to life without parole on May 10, 1991), regarding alleged misinformation from defense counsel that a particular expert witness would not be able to testify during the guilt/innocence phase of trial, but rather only at penalty phase); Interview with Inmate Walters, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Walters, No. CRC 01-15818CFANO-K (6th Fla. Cir. Ct., date unavailable), regarding alleged misinformation concerning the elements of the charged crime); Interview with Inmate Durbin, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Durbin, No. 2001-CF 001173A (1st Fla. Cir. Ct. Mar. 18, 2001), regarding defense counsel's assurance to the defendant that he would receive a suspended sentence of five to nine years if he plead guilty since it was his first offense; instead, he received fifteen years in prison).

[199] *See* O'Bryant v. State, 765 So. 2d 745, 746 (Fla. Cir. Ct. 2000).

[200] In Florida, crimes are divided into two categories: "specific intent" crimes and "general intent" crimes. Specific intent crimes require the offender to have the mental capacity to form an intent to commit an offense. *See* FLORIDA CRIMINAL PRACTICE AND PROCEDURE §11.15 (2005).

[201] *See* Penn v. State, 825 So. 2d 456, 457 (Fla. 2002) (noting first-degree murder is a "specific intent crime"); Gentry v. State, 437 So. 2d 1097 (Fla. 1983) (holding that if specific intent is required for a crime, it is also required for a charge of attempting to commit that crime); Parrish v. State, 892 So. 2d 1199, 1200 (Fla. Dist. Ct. App. 2005) (noting that armed robbery is a specific intent crime).

[202] *See* Brown v. State, 790 So. 2d 389, 391 (Fla. 2000) ("[T]he crime of attempted second-degree murder is a general intent crime."). At the time of the offenses in my case, I had been awake for four days and was heavily consuming drugs. I was snorting and smoking cocaine, smoking marijuana, taking LSD, and consuming large amounts of alcohol. Because of this, I lacked the "specific intent" to commit the charged offenses. I did have the "general intent" necessary to charge me with the lesser offenses. Therefore, I should have been charged with the lesser offenses. In fact, in 1995, grand theft was also a "specific intent" crime in Florida. *See* Linehan v. State, 442 So. 2d 244, 251 (Fla. Dist. Ct. App. 1983). Therefore, I should have been charged with an even lesser offense than grand theft.

[203] *See* Lineham v. State, 476 So. 2d 1262, 1264 (Fla. 1985) ("[This court has long recognized voluntary intoxication as a defense to specific intent crimes."). *But see* FLA. STAT. §775.051 (2005) (prohibiting voluntary intoxication as a defense to specific intent crimes as of October 1999, three years after my trial).

[204] Affidavit of David E. Roberts, Florida Parole Commission (June 13, 2003), O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. 2005) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

[205] Affidavit of Donald K. Rudser (Oct. 15, 1997), Florida v. O'Bryant, No. 95-92 (Fla. Cir. Ct. May 5, 1998) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

[206] Florida v. O'Bryant, No. 95-92 (Fla. Cir. Ct. May 5, 1998) (order denying grounds one through six and ground eight of motion for post-conviction relief); Florida v. O'Bryant, No. 95-92 (Fla. Cir. Ct. June 29, 1998) (order denying ground seven); O'Bryant v. Florida, 765 So.2d 745 (Fla. Dist. Ct. App. 2000) (remanding for evidentiary hearing on ground three (voluntary intoxication defense) and ground six (penalty authorized by statute) and affirming denial on grounds of the misinformation of parole eligibility and the influence of psychotropic drugs on plea). On remand, the trial court denied relief even though defense counsel acknowledged he told me I could not use a defense of voluntary intoxication (which was allowed and applicable). Transcript of Proceedings at 49-55, Florida v. O'Bryant, No. 95-92 (Fla. Cir. Ct. Dec. 3, 2000), *reh'g denied*, 826 So.2d 289 (Fla. Dist. Ct. App. 2002) (decision without published opinion).

[207] Brady v. United States, 397 U.S. 742, 748 (1970).

[208] *See id.*

[209] *See, e.g.*, Wood v. Hamilton, No. 4:05-cv-00254-MP-AK (N.D. Fla. Sept. 22, 2005).

[210] *See, e.g.*, Rock v. Crist, No. 05-20899 (S.D. Fla. Nov. 14, 2005).

---

[211] Prior to AEDPA, in 1995, 58.7% of the habeas corpus petitions filed in U.S. district courts by state prisoners were dismissed, while only 1.2% resulted in judgments for the inmate. SCALIA, *supra* note 26, at 6. Considering the reality of pro se litigation, it is no wonder the foregoing percentages are so dismal. I have been unable to learn the exact percentages post-AEDPA, but based on years of personal experience with prisoner litigation, I believe the number of dismissals has increased and the grants of relief decreased. After all, the reality of indigent pro se litigation from a prison setting has remained unchanged, and indigent prisoners are now provided even less time to file their pro se motions.

[212] *See* THE FEDERALIST No. 84, *supra* note 11.

[Note: The foregoing article was originally published in the Harvard Civil Rights-Civil Liberties Law Review, Vol. 41, No. 2, Summer 2006, and is reprinted here with permission.]

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Article 1, §16 of the Florida Constitution and the Sixth Amendment to the United States Constitution, individually and collectively, guarantee an accused the right to a jury trial in a criminal case. Included in this right is an entitlement to an impartial jury. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S., 145, 149 (1968), the failure to accord a defendant a fair hearing violates the minimum standards of due process. Morgan v. Illinois, 504 U.S. 719, 727 (1982). As such, a juror should be dismissed for cause where there is reasonable doubt as to his or her impartiality. Juede v. State, 837 so.2d 1114 (Fla. 4th DCA, 2003). Sometimes, though, biased jurors inadvertently end up serving on a criminal jury. If trial counsel mistakenly fails to challenge an actually biased juror, it can amount to ineffectiveness of counsel that is sufficient to require a new trial.

The applicable test with regard to juror bias is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. Lusk v. State, 446 So.2d 1038, 1041 (1984). On direct appeal, the erroneous denial of a preserved cause challenge is reversible error. Carratelli v. State, 915 So.2d 1256 (Fla. 4th DCA, 2005). But, when the failure to raise or preserve a cause challenge arises in a postconviction relief claim, the question of prejudice is central to the outcome. Id. at 1258. In order to prevail on a claim that counsel was ineffective for failing to challenge a juror for cause, the two pronged test enunciated in Strickland v. Washington, 466 U.S. 668 (1984) must be satisfied.

In order to demonstrate ineffective assistance of counsel a defendant must prove both that his counsel performed deficiently and that the performance actually prejudiced the defendant. Strickland v. Washington, 466 U.S. 668 (1984). The two prongs of the ineffectiveness inquiry are independent of one another, and thus, must both be proved to establish a claim of ineffective assistance of counsel. Id. at 697. If a defense attorney somehow allows an actually biased juror to remain on a jury, the first prong of the *Strickland* test may be satisfied. The determining factor with regard to the prejudice prong will be whether trial counsel had a reasonable tactical decision for allowing the biased juror to remain.

When a lawyer's alleged incompetence involves the failure to exercise or preserve a juror challenge for cause, the proper inquiry for determining the prejudice prong of *Strickland* is "whether the failure to preserve a challenge to a

juror by sufficiently bringing the objection to the judge's attention 'resulted in a biased juror serving on the jury.'" Carratelli v. State, 915 So.2d 1256 (Fla. 4th DCA, 2005) *decision approved by* Carratelli v. State, 32 F.L.W. S390 (Fla. July 5, 2007). The nature of the juror's bias should be patent from the face of the record. Carratelli at 1260. Thus, to satisfy the prejudice prong of Strickland, a defendant must show that a juror who served on the jury was actually biased against him. Id. For example, a juror's statement that a defendant would be required to introduce evidence to convince her the defendant was not guilty pointedly demonstrates the juror's preconceived opinion of guilt and consequently requires the defendant to prove his innocence rather than requiring the state to prove his guilt. Hamilton v. State, 547 So.2d 630 (Fla. 1989). A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. Id. quoting Hill v. State, 477 So.2d 553, 556 (Fla. 1985).

The Carratelli court noted that "[f]rom a practical standpoint, a jury selection error justifying postconviction relief is so fundamental and glaring that it should have alerted a trial judge to intervene, even in the absence of a proper objection, to prevent an actually biased juror from serving on the jury, thereby irrevocably tainting the trial." Id. at 1261. Thus, if it can be demonstrated from the jury selection transcripts that an actually biased juror was mistakenly, inadvertently, or unreasonably allowed to remain on a jury, both prongs of the *Strickland* analysis will be adequately demonstrated. In such case the judgment and sentence should be vacated and a new trial should be granted.

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.

Issue Of Imposing Higher Sentences For Crack Cocaine To Be Reviewed By The US Supreme Court

On June 12, 2007, the US Supreme Court agreed to review the issue of judges being required to impose longer sentences for crack cocaine vs cocaine powder.

The Court said it will hear a case of a veteran of the first Iraq war, Derrick Kimbrough, who was sentenced to 15 years in federal prison for dealing in crack and powder cocaine and who was also in possession of a firearm in Virginia.

Kimbrough received a shorter sentence than the required federal sentencing guidelines of 19 to 22 years. The sentencing US District Judge said the later sentence range was "ridiculous."

"This case is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice in this case," said the US District judge.

"Is clearly long enough under the circumstances. As a matter of fact, it's the court's view that it's too long, but the court is bound by the mandatory minimums of 10 years on three of these counts," added the judge while referring to the 15 year sentence.

The government has sought appeal and the White House has asked the Supreme Court to deny review in Kimbrough's case.

Judges from the Fourth US Appeals Court have expressed their opinion that lower court judges have no discretion to sentence offenders below the guidelines, "based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." ■

Lawsuit Filed Against DOC's Faith – Based Contract

During the month of May, 2007, a lawsuit was filed against FDOC's faith-based contract in Leon County circuit court. The suit claims that agreements with two faith-based contractors to provide transitional housing programs for released prisoners are unconstitutional.

The constitutional challenge is based on a provision in the Florida Constitution that prevents state revenue from being used to aid "any church, sect, or religious denomination or in aid of any sectarian institution."

The suit was brought by the Council for Secular Humanism and two private citizens. The relief being sought by the Plaintiffs is for DOC contracts with religious groups, Prisoners of Christ, Inc. and Lamb of God Ministries, to be held unconstitutional and be discontinued.

Allegations in the suit argue that DOC pays Jacksonville-based Prisoners of Christ and Okeechobee-based Lamb of God to provide "faith-based substance abuse post-release transitional housing" for prisoners who are released from prison.

DOC's response asserts that the contracts challenged aren't unconstitutional as a matter of law because they specifically called for the state funds to go only for secular purposes.

During a brief statement, Robby Cunningham, a spokesman for the DOC, called attention to relevant parts of the contract that states that ventors shall "ensure that state funds are used for the sole purpose of furthering the secular goals of criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism."

Furthermore, the faith-based groups cannot deny admission to the program based on a participant's belief, Cunningham stated. Moreover, the contract states "the program shall not attempt to convert an offender toward a particular faith or religious practice."

No ruling has been made by the Leon County circuit court on the lawsuit. ■

Correctional Officer Found Slain

Authorities are investigating the shooting death of a FDOC correctional officer found on June 8, 2007, lying on the floor of her living room.

Tyvon Nichole Whitford, 25, was an employee at the Gainesville Correctional Institution, where she had worked for several years. It did not appear that her job as a correctional officer was related to her death, said Putnam County Sheriff's Maj. Keith Riddick.

Whitford's five year old son was apparently in the house when the incident took place. Authorities believe that Whitford was about six months pregnant when she was killed.

Police investigators are saying that they have no leads in the case. The case is "a horrible mystery," Riddick said.

Whitford was struck by a single gunshot in the upper torso, the sheriff's office reported. Two 911 calls were made from her house, but officials would not give further details about the calls. Only that one call was made by her boyfriend, who claims he found Whitford dead when he came to her home.

"We mourn the loss of our fellow officer, as we do the loss of her soon-to-be-born child. We will do all that we can to assist law enforcement as they investigate this tragic death. She and her loved ones will be in our prayers," said the secretary of DOC, Jim McDonough, in a brief statement on June 9, 2007. ■

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.

U.S. SUPREME COURT

Erickson v. Pardus, 20 Fla. L. Weekly Fed. § 317 (6/4/07)

William Erickson, a Colorado state prisoner, had filed a 42 USC section 1983 petition alleging that his Eighth and Fourteenth Amendment protections against cruel and unusual punishment had been violated.

The allegations in Erickson's suit, in part, were that prison officials removed him from a hepatitis C treatment program, after he had begun treatment, and such was causing irreversible damage to his liver, and may even cause his death without the continued treatment.

Deeming such allegations to be "conclusory," the Court of Appeals for the Tenth Circuit had affirmed the District Court's dismissal of Erickson's complaint, and Erickson sought certiorari review in the Supreme Court.

On review, it ws held that such allegations made by Erickson were sufficient to meet the liberal pleading standards set forth by Rule 8(a)(2). *Therefore, the case should not have* been dismissed on the ground that allegations of harm were too conclusory.

Accordingly, Erickson's certiorari was granted and the judgment of the Court of Appeals was vacated. The case was remanded for further proceedings that would be consistent with the opinions that were held in the review of the case.

Fry v. Pliler, 20 Fla. L. Weekly Fed. § 333 (6/11/07)

On review from John Francis Fry's certiorari petition, the Supreme Court held that in a 28 USC section 2254 proceeding a federal court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the *Brecht v. Abrahamson*, 507 U.S. 619 (1993), "substantial and injurious effect" standard. This is whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 .s. 18 (1967).

Brendlin v. California, 20 Fla. L. Weekly Fed. § 365 (6/18/07)

Bruce Edward Brendlin presented the United States Supreme Court with an issue of whether a passenger in a car, like the driver, when police have made a traffic stop, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

In Brendlin's case, officers had stopped a car to check its registration without reason to believe it was being operated unlawfully. One of the officers recognized Brendlin, the passenger in the stopped car, as being a parole violator. Upon verifying such, the officers arrested him, searched him, the driver, and the car, finding various drug contraband.

Charged with possession and manufacture of that contraband, Brendlin had sought to suppress the evidence obtained in searching his person and the car, arguing that the officers lacked probable cause or reasonable suspicion to make the stop, which was an unconstitutional seizure of his person.

The trial court denied the motion to suppress, but a State appellate court reversed, opining that Brendlin was seized by the stop, which it held was unlawful.

Subsequently, on review from the State's supreme court, it was held that suppression was unwarranted, reversing the appellate court's opinion. It was reasoned that a passenger was not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority.

On certiorari review to the United States Supreme Court, it was held that a passenger, like the driver, is seized for fourth Amendment purposes and so may challenge the stop's constitutionality. Any reasonable passenger would have understood that the officer was exercising control to the point that no one in the car was free to depart without police permission.

Therefore, the California State Supreme Court's decision was vacated, and Brendlin's case was remanded for further proceedings consistent with the above opinion.

FLORIDA SUPREME COURT

In Re: Standard Jury Instructions In Criminal Cases,
32 Fla. L. Weekly § 183 (Fla. 5/3/07)

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) submitted new instructions and proposed changes for the standard jury instructions in criminal cases.

The Committee proposed amendments to standard jury instructions 28.9, No Valid Driver's License, and 28.11, Driving While License Suspended, Revoked or Canceled with knowledge. Further, it proposed two new standard jury instructions, 28.9(a), No Valid Commercial Driver's License, and 28.11(a), Driving While License Revoked as a Habitual Traffic Offender.

After comments were received and errors corrected, the Supreme Court authorized the publication and use of the instructions, and was effective when the opinion became final.

[Note: A complete view of the changes and new instructions can be seen in 32 Fla. L. Weekly, at § 184 through § 186, Issue number 18, the May 4, 2007 edition.]

State v. Weaver, 32 Fla. L. Weekly § 216 Fla. 5/10/07)

In Gregory Carnell Weaver's appellate court case, *Weaver v. State*, 916 So.2d 895, 898-99 (Fla. 2d DCA 2005), the appellate court certified a question to the Florida Supreme Court, which it had excepted for review.

The Second District Court of Appeal had opined that the "trial court commit[s] fundamental error when it instructs a jury regarding both 'bodily harm' battery on a law enforcement officer and 'intentional touching' battery on a law enforcement officer when the information charged only one form of the crime and no evidence was presented nor argument made regarding the alternative form.

Subsequent to its review and a short discussion on the appellate court's opinion, the Supreme Court concluded that the Second District was incorrect. Therefore, that opinion was quashed.

Reeves v. State, 32 Fla. L. Weekly § 239 (Fla. 5/17/07)

The Fifth District Court of Appeal in Leroy Reeves' appeal, *Reeves v. State*, 920 So.2d 724 (Fla. 5th DCA 2006), had opined that when multiple crimes arise out of the same criminal episode, a sentence under the Prison Release Reoffender statute can be followed by a Criminal Punishment Code sentence that is not enhanced beyond the statutory maximum.

That opinion however, was expressly and directly in conflict with the Second District's in *Rodriguez v. State*, 883 So.2d 908 (Fla. 2d DCA 2004), thus, Reeves sought, and was granted, review of the conflicting opinion in the Florida Supreme Court.

On review and subsequent to a lengthy discussion about the issue, the decision made by the Fifth District in Reeves' case ws approved, and the Second District's in *Rodriguez* was disapproved.

McDonald v. State, 32 Fla. L. Weekly § 242 (Fla. 5/17/07)

In Roy McDonald's case, the Florida Supreme Court had granted the review of the Fourth District's decision in *McDonald v. State*, 912 So.2d 74 (Fla. 4th DCA 2005), in which it certified conflict on two issues.

First, the Fourth District certified conflict with the decisions of the Second District in *Hall v. State*, 837 So.2d 1179, 1180 (Fla. 2d DCA 2003), and *Helms v. State*, 890 So.2d 1256 (Fla. 2d DCA 2005), on the issue of whether the mandatory minimum sentence under the PRR statute must be imposed concurrently with a lesser mandatory minimum sentence under the 10-20-Life statute. Second, the Fourth District certified conflict with the decision of the Third District in *Frazier v. State*, 877 So.2d 838 (Fla. 3d DCA 2004), on the issue of whether the mandatory sentence for first-degree robbery with a firearm under the PRR statute is thirty years or life in prison.

The Supreme Court approved the Fourth District's decision in *McDonald* and held: (1) that a mandatory minimum 10-20-Life sentence must be imposed concurrently with a PRR sentence even when the 10-20-Life sentence is the lesser sentence and (2) that the mandatory sentence for first-degree robbery with a firearm under the PRR statute is life in prison.

Accordingly, the decisions in *Hall* and *Helms* were disapproved as to the first conflict issue. To the extent it conflicts with *McDonald*, the decision in *Frazier* was disapproved as to the second conflict issue.

DISTRICT COURTS OF APPEAL

Gee v. State, 32 Fla. L. Weekly D1028 (Fla. 1st DCA 4/19/07)

Michael D. Gee petitioned for a writ of prohibition, where he contended that his right to a speedy trial under the Interstate Agreement on Detainers, section 941.45, Florida Statutes, (IAD) was violated.

Gee was a Georgia State prisoner when he made a request to be returned to Nassau County, Fla. for disposition of certain felony charges pending against him there. Article III (a) of the IAD provides for trial to be held within 180 days of receipt of the request by the clerk of the court. That 180 days had expired on January 9, 2007. Thus, Gee's attorney filed a motion to dismiss Gee's charges on speedy trial grounds on January 16, 2007, and the motion was denied.

At the hearing in the lower court on the motion, the State had argued that it was entitled to the "window of recapture' set forth in Florida Rule of Criminal Procedure 3.191(p). Under that rule subdividion, the defendant must file a "notice of expiration of speedy trial time" and, within five days thereafter, the court shall hold hearing. If it is found that the defendant is correct, the State shall have ten days to bring the defendant to trial. Without a proper "notice of expiration of speedy trial time" the

defendant is not entitled to discharge on speedy trial grounds. *See, State v. McCullers*, 932 So.2d 373 (Fla. 2d DCA 2006).

Gee argued that the "window of recapture" did not apply, and proper procedure was followed in reliance of the IAD. the appellate court, however, opined that Rule 3.191(p) did apply, citing, *Vining v. State*, 637 So.2d 921 (Fla. 1994) and *State v. Garza*, 807 So.2d 790 (Fla. 2d DCA 2002). It was further noted that the opinion was bolstered by the fact that IAD itself contained no procedural provisions for enforcement of the act's right to speedy trial in the circuit court.

Therefore, it opined that the lower court did not err in denying Gee's motion to dismiss. Gee's petition was denied.

Morton v. Fla. Dept. of Corrections, 32 Fla. L. Weekly D1041 (Fla. 1st DCA 4/19/07)

Larry S. Morton petitioned for writ of certiorari following the lower court's denial of his mandamus petition that challenged, in part, DOC's forfeiture of 18 years basic gain-time following revocation of his parole.

Morton's offenses occurred in October and December 1978, and he received 7 consecutive sentences totaling 85 years DOC. Upon entering DOC, he was awarded basic gain-time in a lump sum pursuant to the Correctional Reform Act of 1983. In 1998, Morton was released to parole supervision while serving the second consecutive sentence. After Morton's parole was revoked, DOC forfeited his gain-time pursuant to setion 944.28, Florida Statutes. Morton then exhausted his administrative remedies and then filed the mandamus petition. In the petition he argued DOC unlawfully forfeited the 18 years, because the gain-time statute in effect at the time of his offenses. The lower court disagreed and denied the mandamus petition.

Under *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990), it is shown that DOC was permitted to award basic gain-time on pre-1983 consecutive sentences. However, in *Waldrup* it was opined that it would violate the ex post facto clause if, after a crime had been committed, it increased the penalty attached to that crime. Id. at 691.

The appellate court opined that it was clear that Morton was disadvantaged by the DOC's reliance on the 1983 statute, treating his consecutive sentences as a single term for purposes of awarding and forfeiting basic gain-time in a lump sum. Accordingly, the DOC could not retroactively apply the 1983 statute to authorize the forfeiture of all basic gain-time on Morton's pre-1983 consecutive sentences without violating the ex post facto clause. *See, Avera v. Barton*, 632 So.2d 167 (Fla. 1st DCA 1994).

By not applying the correct law, it was concluded that the lower court departed from the essential requirements of law. Accordingly, Morton's petition was granted, and the lower court's order was quashed, in part, and remanded for further proceedings.

Garnett v. State, 32 Fla. L. Weekly D1065 (Fla. 2d DCA 4/25/07)

Daniel A. Garnett appealed a summary denial of his Rule 3.800(a), motion to correct illegal sentence, where he sought jail credit for time spent in an Ohio jail on a fugitive warrant issued by the Circuit Court for Pasco County, Florida.

The appellate court opined that such out-of-state jail credit is not credit that a defendant is entitled to receive as a matter of law, but is an issue that is within the inherent discretion of the sentencing court. *See, Kronz v. State*, 462 So.2d 450, 451 (Fla. 1985).

Because of the opinion above, the appellate court receded from its prior decisions in *Heuton v. State*, 790 So.2d 1204 (Gls. 2d DCA 2001), and the cases that followed that decision in *Redding v. State*, 848 So.2d 417 (Fla. 2d DCA 2003), and *Robbins v. State*, 799 So.2d 1093 (Fla. 2d DCA 2001), because they are in conflict with that opinion it made in *Garnett*.

It was reasoned that upon further consideration that was made due to Garnett's case, it was clear that in those prior cases the appellate court failed to focus on the requirement of an "entitlement" for purposes of rule 3.800(a). Under the holding of *Kronz*, such an entitlement does not exist for such out-of-state credit.

Accordingly, the lower court's order of denial was affirmed in Garnett's case.

Glenn v. State, 32 Fla. L. Weekly D1088 (Fla. 1st DCA 4/26/07)

Jamal Che Glenn appealed the summary denial of his Rule 3.853, motion for postconviction DNA testing, where the trial court's denial relied on language in section 925.11(1)(a), Florida Statutes (2005).

Section 925.11(1)(a) of the 2005 Statutes limited the right to file rule 3.853 motions to those who have been tried and found guilty of a felony, excluding those who entered a guilty or nolo contendere plea to such crimes. However, section 925.11(1)(a)2. was amended in 2006 to allow for such motions in cases where the defendant has entered such pleas. *See*: section 925.11(1), Fla. Stat. (2006); *Lindsey v. State*, 936 So.2d 1213 (Fla. 5th DCA 2006).

In light of the 2006 change in Florida law, Glenn's case was reversed and remanded for the lower court to address the merits of his motion pursuant to sections 925.11(2)(c)-(f), Florida Statutes (2006).

Harris v. State, 32 Fla. L. Weekly D1101 (Fla. 5th DCA 4/27/07)

Joshua Harris appealed the lower court's denial of his motion for judgment of acquittal as to his trafficking in 28 grams or more of cocaine offense.

The appellate court opined that evidence of Harris being a visitor in

the residence where officers discovered the cocaine and that such contents was within his "ready reach" was insufficient to establish that Harris was in constructive or actual possession of the cocaine. Further, the fact that Harris was in possession of a small amount of cocaine on his person was insufficient to establish that he had dominion and control of the cocaine found in the residence.

Accordingly, the trafficking offense was reversed and Harris' case ws remanded for the lower court to adjudicate him guilty of the lesser-included offense of possession of cocaine.

Smith v. McDonough, 32 Fla. L. Weekly D1136 (Fla. 4th DCA 5/2/07)

Glenn Smith presented an issue to the Fourth District Court of Appeal that challenged the Nineteenth Judicial Circuit Court, in Okeechobee County, non-final order transferring the venue of his lower court action to Leon County.

Smith's action in the Nineteenth Circuit challenged disciplinary confinement and gain time reduction imposed by officials at the Okeechobee Correctional Institution. The Nineteenth Circuit entered an order that transferred the venue of his actions without affording Smith any notice or opportunity to be heard. DOC confessed error based on that procedural ground.

Accordingly, Smith's case was reversed and remanded for the lower court to hold a hearing to determine whether, as Smith argued, his petitions sufficiently allege constitutional violations which qualify for the "sword-wielder" exception to the state's home venue privilege. *See*: *Barr v. Fla. Bd. of Regents*, 644 So.2d 333, 337 (Fla. 1st DCA 1994); *Hancock v. Wilkinson*, 407 So.2d 969 (Fla. 2d DCA 1981); *see also, Smith v. Williams*, 35 So.2d 844, 847 (Fla. 1948).

Hooks v. State, 32 Fla. L. Weekly D1136 (Fla. 4th DCA 5/2/07)

Brian Hook. Thomas Daugherty, and William Ammons petitioned the appellate court for writ of certiorari to quash the lower court's order that granted the State to test and unavoidably consume DNA evidence without the presence of a defense expert or a video camera to document the testing procedures.

The appellate court commented that the State had not committed any constitutional violation as to the unavoidable consumption of evidence during DNA testing, when done in good faith, does not violate due process. However, it was noted that several courts have stated that the better practice is for the State to notify the defense of such testing in order to give the defendant or representative a fair opportunity to be present during the testing. See: *Stipp v. State*, 371 So.2d 712, 714 (Fla. 4th DCA 1979); *State v. Atkins*, 369 So.2d 389 (Fla. 2d DCA 1979).

Therefore, the certiorari petition ws granted, quashing the lower court's order, and the case was remanded for an evidentiary hearing so the parties could demonstrate whether it is practicable to allow video taping or the presence of a defense expert during the testing process.

Vernon v. State, 32 Fla. L. Weekly D1259 (Fla. 2d DCA 5/11/07)

Len Shannon Vernon appealed an order that revoked his probation and argued that the lower court improperly concluded that he violated condition thirty-two of his probation requirements.

Condition thirty-two required that Vernon obtain drug and alcohol evaluations within thirty days and receive drug and alcohol treatment. It was alleged that Vernon violated this condition when he was unsuccessfully discharged from "DACCO," a drug treatment program.

Vernon argued that the probation order did not give him a specific time within which to complete a drug treatment program. *See*: *Anderson v. State*, 942 So.2d 1015, 1017-18 (Fla. 2d DCA 2006) (where it was held that a trial court may not revoke probation for failure to complete a drug treatment program if sufficient time in the probationary period remains for a probationer to complete the program and the probation order did not specify any time limit or within a certain number of attempts).

Only on this issue, Vernon's case was reversed for the lower court to strike the violation of condition thirty-two from the revocation order.

Donaldson v. State, 32 Fla. L. Weekly D1293 (Fla. 4th DCA 5/16/07)

Tedrick Donaldson sought a prohibition petition to the lower court that regarded an expiration of speedy trial notice he filed against charges from Indian River County, which had placed a detainer against him while he was serving sentences from Polk County.

The information on the Indian River County charge (armed robbery) showed that it had been filed in 2003. Thus Donaldson moved for discharge. However, he did this *without demand*, pursuant to Fla. R. Crim. P. 3.191(a).

The appellate court opined that Donaldson ws not entitled to such application under his circumstances, citing *Edwards v. Allen*, 603 So.2d 514 (Fla. 2d DCA) review denied, 613 So.2d 3 (Fla. 1992). Neither the detainer, nor the filing of the information, constituted an arrest for purposes of rule 3.191(a). Id. It was explained that, if the information had been filed in the Indian River County case, Donaldson could file a demand for speedy trial pursuant to rule 3.191(a), the petition was denied, without prejudice.

Castillo v. State, 32 Fla. L. Weekly D1294 (Fla. 1st DCA 5/17/07)

Douglas Castillo appealed the summary denial of his Rule 3.850 motion, where he had claimed ineffective assistance of trial counsel.

Castillo had been convicted of DUI manslaughter and DUI with great bodily harm. One of Castillo's claims in his motion was that his counsel had failed to pursue evidence that would have shown he was not intoxicated at the time of the accident. The alcohol content of his blood that was taken for testing two hours after the accident was due to alcohol he had drank near the time of the accident.

The appellate court opined that it ws error for the trial court to have summarily deny this claim. Castillo had stated a facially sufficient claim and it was found that the trial court attached no documents to its denial that refuted the claim. *See*: *Parker v. State*, 904 So2d 370, 376 (Fla. 2005).

Also, Castillo had claimed his counsel was ineffective in failing to object to testimony and medical records given by a nurse, who was not qualified as an expert, that Castillo had exhibited "Horizontal Gaze Nystagmus," a condition evidencing intoxication.

On that claim, the appellate court agreed that such an opinion testimony required an expert witness. *See*: *State v. Meador*, 674 So.2d 826, 836 (Fla. 4th DCA 1996). Furthermore, although medical records are admissible under the business records exception to the hearsay rule, *Love v. Garcia*, 634 So.2d 158, 159-60 (Fla. 1994), the Florida Supreme Court has opined that a judge should exclude such records when it has been shown that they are not trustworthy.

The lower court's order that summarily denied Castillo's motion was reversed and the case was remanded for an evidentiary hearing, or for attachment of records that refuel the claims.

Vega v. McDonough, 32 Fla. L. Weekly D1295 (Fla. 1st DCA 5/17/07)

Juan Fl Vega sought enforcement of a mandate that had been issued by the appellate court in *Vega v. McDonough*, 946 So.2d 548 (Fla. 1st DCA 1/9/07). In that case, Vega had sought certiorari review of the lower court's denial of his mandamus petition and its order authorizing a lien being placed on hid DOC prison account for cost and fees related to the petition's filing.

In *Vega, Id.*, the appellate court had affirmed the denial of the mandamus petition that challenged a disciplinary report, but it had found the lien to be in error. Thus, the case was remanded to have the lien order quashed. Upon remand, however, the lower court, sua sponte, opined that Vega's mandamus petition was a "mixed-petition" pursuant to *Schmidt v. McDonough*, 951 So.2d 797 (Fla. 2006), and therefore affirmed its own opinion in the placement of the lien against Vega's prison account.

In the appellate court, on Vega's motion for enforcement of its mandate, it was noted that it is well settled that a "trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so." *See: Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 328 So.2d 825 (Fla. 1975), citing *Cone v. Cone*, 68 So.2d 886 (Fla. 1953). Also, appellate courts will not reconsider a previous ruling and recall the mandate unless it is necessary to correct a manifest injustice. See: *Strazzulla v. Hendrick*, 177 So.2d 1 (Fla. 1965).

Therefore, it was ordered that the lower court shall, without delay, enter an order refunding $280.00 to Vega's prison account.

Norman v. State, 32 Fla. L. Weekly D1316 (Fla. 1st DCA 5/21/07)

David Norman sought certiorari review of the lower court's denial of his mandamus petition and the imposition of a lien against his prison account.

The appellate court denied Norman's certiorari petition as to the denial of his mandamus petition. In reviewing the imposition of the lien issue, it was opined that it found nothing in the record to indicate Norman requested relief from the lower court regarding its imposition of that lien.

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court [first] and the specific legal argument or ground... must be part of that presentation." *See: Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985). The appellate court also cited to a case where it had recently held that a proper motion is required in the lower court before it would consider argument regarding an erroneously placed lien on a prison account. *See: Kemp v. McDonough*, 32 Fla. L. Weekly D1126 (Fla. 1st DCA 4/30/07).

As a result, Norman's petition was denied in total.

Mitchell v. State, 32 Fla. L. Weekly D1387 (Fla. 4th DCA 5/30/07)

Charles Mitchell appealed his convictions for trafficking in cocaine and in marijuana, where he contended that the lower court erred in refusing to give the requested special jury instruction on constructive possession of cocaine.

The background of this case, in part, is where the authorities had responded to a home where a 911 call hang-up initiated from. After arriving, knocking on the door, and entering after hearing a female crying, the authorities secured the home. Upon their search of the home, in excess of twenty-five pounds of marijuana and over 400 grams of cocaine, with $29,000 in cash was found.

At trial, it was found that both the female, Ms. Salazar, and Mitchell jointly possessed the home. However, instead of the trial court giving the requested special instruction to the jury, it gave the standard one. Thus, Mitchell appealed.

On appeal, it was noted that the standard instruction did not explain to the jury what must be proven when the premises is in a defendant's joint rather than exclusive

possession. Thus, it was concluded that the special instruction of "constructive possession of cocaine" was necessary. That special instruction would have informed the jury that the elements of knowledge and ability to control may not be inferred from mere joint possession of the premises where the contraband was found, but must establish by an independent proof.

Therefore, it was concluded that the trial court was in error for denying the requested special instruction. Accordingly, Mitchell's convictions and sentence were reversed and the case was remanded for a new trial.

Lavallee v. State, 32 Fla. L. Weekly D1398 (Fla. 4th DCA 5/30/07)

Roger Lavallee argued on direct appeal that the trial court erred in allowing impermissible hearsay, by allowing the prosecution to introduce testimony that he had gloves and a screwdriver in his pockets when arrested immediately after the burglary he was charged and convicted of.

The appellate court opined that the trial court did err in allowing the introduction of the testimony where there was no evidence that Lavallee used or even attempted or intended to use the items found on his person to facilitate the burglary. *See: Shennett v. State*, 937 So.2d 287 (Fla. 4th DCA 2006).

In *Shennett*, it was found that "because of the admission of testimonial hearsay that violated the Sixth Amendment Confrontation Clause" Shennett's convictions were reversed.

It was also noted in Lavallee's case that the prosecution, in closing arguments at trial, bolstered the hearsay: "These are not items of a biker; these are items of a thief."

The appellate court opined that Lavallee's case was distinguishable from *Rebjebian v. State*, 44 So. 2d 81 (Fla. 1949). There, it was already known that Rebjebian had been attempting unlawful entry into the victim's home for some time. Thus, there was at least a modicum of relevancy to the items found on his person.

Accordingly, Lavallee's conviction and sentence for burglary was reversed and the case was remanded for a new trial.

Obara b. State, 32 Fla. L. Weekly D1406 (Fla. 5th DCA 6/1/07)

Tywan Obara presented the appellate court with an issue of whether the trial court violated his double jeopardy rights by recalling him after his sentencing hearing had concluded and resentencing him to a greater term than that earlier pronounced.

The appellate court concluded that jeopardy had attached to the earlier pronounced sentence, notwithstanding the short interval between the time Obara was removed from the courtroom to a holding cell following the sentencing and the time he was recalled to the courtroom after a search in his holding cell revealed drugs hidden in his shoes.

Therefore, Obara was entitled to the benefit of his originally imposed sentence because his conduct, while unlawful, did not violate any expressed conditions of the written plea agreement in the earlier sentencing.

Accordingly, Obara's sentences were reversed and remanded for a resentencing consistent with the original plea agreement. It was furthered noted, however, if the State wished to pursue criminal charges against Obara for possession of drugs at the time of sentencing, "it is, of course, free to do so."

Schwenn v. State, 32 Fla. L. Weekly D1433 (Fla. 4th DCA 6/6/07)

Jeffry Schwenn appealed the denial of his rule 3.850 motion where the lower court had reasoned that his sixty-seven page motion was too lengthy.

On appeal, Schwenn argued that rule 3.85. does not contain a page limit. Nothing in the rule 3.850 contains a similar limitation to that contained in rule 3.851, which explicitly imposes a seventy-five page limit to a motion for collateral relief after a death sentence.

It was noted that the State, pursuant to the lower court's order to respond on Schwenn's motion, argued that the motion exceeded even the limits for an appellate brief. Patently, Florida Rule of Appellate Procedure 9.210, does not apply to a rule 3.850 motion.

It was concluded, after noting *Henery v. State*, 937 So.2d 563 (Fla. 2006), that a lower court can impose a reasonable page limit on such a motion. However, the movant should be given an opportunity to show good cause for filing a longer one. Thus, it was opined that rule 9.210(a)(5) could be used as a benchmark for a lower court's restricting a rule 3.850 motion to fifty pages absent a showing of good cause for a longer motion. Otherwise, as in Schwenn's case, the lower court should have either dismissed the motion with leave to amend, or issued an order to show cause why the motion should not be dismissed without prejudice.

Therefore, it was concluded that the lower court had abused its discretion in denying Schwenn's motion without considering the merits of the case. Accordingly, the denial order was reversed and the case was remanded for proceedings consistent with the appellate court's findings.

Edison v. State, 32 Fla. L. Weekly D1420 (Fla. 2d DCA 6/6/07)

George Edison Jr. presented the appellate court with an issue of whether the State had proven he had constructive possession of cocaine found in a home where ten or eleven other people were present at the time a search warrant was executed, as he had brought out in the motion for judgment of acquittal that the trial court denied.

The appellate court opined that the trial court erred in denying the motion for judgment of acquittal because the State failed to present independent evidence of Edison's dominion and control over the cocaine found in the house that was occupied by ten or eleven other people at the time. Mere proximity was insufficient to prove dominion and control over the contraband and no evidence was presented that Edison was the owner or an occupant of the residence. Nor was there any evidence presented that he had drugs in his system when detained, or that his fingerprints were on any of the contraband, weapons, or money found.

Accordingly, Edison's conviction and sentence was reversed and the case was remanded with instructions for the lower court to discharge Edison.

Auritt v. State, 32 Fla. L. Weekly D1459 (Fla. 1st DCA 6/13/07)

Charles F. Auritt appealed the denial of his rule 3.850 motion where he challenged a conviction, of which he was longer "in custody" for, with newly discovered evidence.

The lower court had reasoned that in light of *McArthur v. State*, 597 So.2d 406 (Fla. 1st DCA 1992), citing *Wall v. State*, 525 So.2d 486, 487 (Fla. 1st DCA 1988), it lacked jurisdiction to consider Auritt's motion's merits since he was no longer in custody for the challenged conviction.

Rule 3.850 is an appropriate vehicle to seek postconviction relief regardless of whether the movant is "in custody". *See: Wood v. State*, 750 So.2d 592 (Fla. 1999).

Accordingly, the trial court was found to be in error for denying Auritt's motion. That order was reversed and the case was remanded for an evidentiary hearing.

Dept. of Corrections v. Daughtry, 32 Fla. L. Weekly D900 (Fla. 5th DCA 4/5/07)

The Florida Department of Corrections (DOC) appealed an order of the Seventh Judicial Circuit enjoining the DOC from engaging in the "practice of automatically violating the probation of every sex offender who fails to give an address acceptable pursuant to section 948.30(1)(b) Fla. Stat. (2005), at the time of a scheduled release from incarceration," and requiring the implementation of a policy designed to resolve the issue.

On appeal, the DOC asserted that the basis for taking such type of actions in such cases was its statutory obligation to report a compliant residence address for each sex offender release. It cited to section 944.606(3)(a)(1), Fla. Stat. (2005), which provides in pertinent part that: "The Department must provide... the offender's intended address, if known...."

The appellate court opined that the DOC had asserted multiple reasons why the injunctive provisions of the challenged order must be reversed. First, the DOC was not party to the proceedings and, evidently, no notice was given to DOC that such an order was within the contemplation of the court. Nor had Daughtry filed any motion or sought injunctive relief. Thus, sympathetic to the frustration of the trial court at the DOC's actions of re-arresting probationers like Daughtry, based on its decisional basis under the provisional grounds, which was found to be "as baffling to [the DCA] as to the trial court," the provisions of the order directed to the DOC were found to be not authorized and were thereby vacated.

[Note: *It was noted*, at n.1 that DOC's Deputy General Counsel did attend one of the several hearings conducted prior to entry of the appealed order, at the request of the trial judge.??]

Springer v. State, 32 Fla. L. Weekly D890 (Fla. 4th DCA 4/4/07)

Shean Springer's case was granted a motion for rehearing where the appellate court gave an opinion regarding the timeliness of a rule 3.850 motion when a defendant *voluntarily* absence himself from a scheduled sentencing hearing and has been arrested on unrelated reasons in another state.

Pertinently, it was opined that if the *voluntary* failure of a defendant to appear at sentencing does not render the sentence illegal, there seems little reason to suppose that the time to seek post-conviction relief from the sentence does not begin to run from that legal sentencing.

The rehearing opinion was from an original order that affirmed Springer's conviction and sentence.

Jenkins v. State, 32 Fla. L. Weekly D964 (Fla. 5th DCA 4/13/07)

Ernest O. Jenkins appealed an order that denied his mandamus petition that sought removal of a detainer lodged against him by the Volusia County Sheriff's Office.

In filing his mandamus petition, the lower court had entered an Order on Application for Indigent Status, which declared Jenkins indigent, but ordered him to pay the initial court costs from his prison account. In turn, Jenkins filed a Motion for Review of that order, claiming he was exempt from a statutory lien because his was a collateral criminal proceeding.

The lower court did not address Jenkins motion regarding the exemption. Instead, it entered an order Dismissing Writ of Mandamus, finding it had no record of the detainer Jenkins complained about, and attached a copy of a computer printout from the Volusia County Justice Information System that stated Jenkins had "no warrants on file." Jenkins timely appealed.

On appeal, the State first argued that "if there is no warrant, there is no relief that can be granted." It attached a copy of the same

computer printout that depicted Jenkins had "no warrants on file."

A warrant is not a detainer. "A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Chapmen v. State*, 910 So.2d 940. 941 n.1 (quoting *Carchman v. Nash*, 473 U.S. 716 (1985)). Thus, the appellate court opined that it was not clear how the lower court's check for warrants on the court system's computer would reveal a detainer lodged by the Volusia County Sheriff's Office. Further, even if such a check would have revealed a detainer, the court only checked under the name Ernest Osbie Jenkins, not his alias, Mack L. Jenkins, which appeared on all Jenkins' prison documentation.

As a result, the lower court's order that dismissed Jenkins' petition was reversed and the case was remanded with directions to the lower court to issue an order to the sheriff's office to show cause why mandamus should not be granted. It was noted that Jenkins complaint incorrectly named the State of Florida as the respondent and requested the DOC to remove the detainer. The appropriate respondent would have been the Volusia County Sheriff's office because it lodged the detainer.

In regard to the lien issue, Jenkins failed to establish that his proceeding was a collateral criminal proceeding. Thus, that issue was affirmed.

[*Note*: Jenkins' complaint in the lower court stated that the detainer by the sheriff's office, from 1983, which was still pending against him, was impeding his eligibility for a lesser form of custody and early release.]

Dessouce v. State, 32 Fla. L. Weekly D993 (Fla. 4th DCA 4/11/07)

George Dessouce sought review of an order that summarily denied his rule 3.850 motion that sought to withdraw a 1986 plea, where he claimed his counsel improperly advised him of the immigration consequences of that plea.

The lower court's denial was prior to the ruling made in *State v. Green*, 944 So.2d 208 (Fla. 2006), instead, it relied upon *Peart v. State*, 756 So.2d 42 (Fla. 2000). In *Green*, the Florida Supreme Court receded from the pleading requirements of *Peart*. The movant must now allege at least, "the trial court did not advise him at the time of his plea that he could be deported, that he would not have entered the plea if properly advised, and that the plea in fact renders him subject to deportation." *Green*, 944 So.2d at 219.

Accordingly, because Dessouce failed to satisfy the pleading requirements noted, the summary denial was affirmed. However, in accordance with *Green*, it was found that the Affirmance is without prejudice to Dessouce "filing a new motion within sixty-days after jurisdiction returns to the trial court." *Id.* ■

NEWS IN BRIEF

CT- Robert Kennedy, 46, a police Lt. was charged on May 22, 2007, with sexually assaulting a 15 year old boy. Authorities began investigating after the boy's father told an inspector, with the state's attorney office, that he was concerned about his son hanging around late at night at two parks. Kennedy, was placed on paid administrative leave while the case is resolved.

FL- On May 24, 2007, the FBI arrested Chuck Roberts, 48, a Lt. with the Hollywood police. The arrest was made for his alleged leak of an undercover sting operation which involved four other officers who pleaded guilty to drug conspiracy charges. Roberts faces a possible five-year prison sentence.

FL- An ex-jail employee was arrested on May 30, 2007, for impersonating an undercover officer. Bermore "Bernie" Malave, 36, asked codes enforcement officers for the 911 address of a home allegedly owned by a drug dealer. While talking to the codes officers, he used his I.D. issued by the corrections division of the Putnam County Sheriff's Office.

FL- A Lake Wales police officer was arrested on May 31, 2007, and charged with lewd molestation on a 6-year old girl. Cristopher Roberts, 35, a corporal, allegedly had clothed genital contact with the girl, which was a relative. The girl told her mother that this was not the first time that Roberts had genital contact with her.

FL- Orlando Circuit Judge James Hauser, was accused before the Florida Supreme Court on June 1, 2007, of making unwanted sexual advances to a female who was a law student in a class Hauser co-taught. In a separate criminal investigation, the married woman said that Hauser came to her apartment to pick up a movie that related to the class he co-taught, and while there, the judge exposed himself, pushed her onto her bed, and held her down.

FL- Since Sheriff Sadie Darnell took office with the Alachua County Sheriff's Office six months ago, there have been ten employees that have been terminated or resigned after being accused of misconduct. The allegations against two employees included watching pornographic videos in the courthouse control room, Deputy James Brown, 45, and rape, Deputy Randy Thomas, 31.

FL- Kenneth Wilk, 45, who was charged with the killing of one Broward Sheriff's Office deputy and the wounding of another, was found guilty of first degree murder and second degree-attempted murder on June 5, 2007. The incident took place while deputies were serving a warrant on Wilk. The wounded officer testified that Wilk used a high-powered hunting rifle and a bullet pierced the officer's protective vest.

FL- On June 5, 2007, a fire was spotted in the North Florida Reception and Medical Center in Lake Butler. Officers became aware after 10 p.m. that the unoccupied laundry room was on fire. A captain and a sergeant were treated for smoke inhalation at Shands hospital. A laundry cart and about 70-100 prisoner uniforms were destroyed. The cause of the fire is being investigated by the State Fire Marshal's office.

FL- The Seminole County sheriff is reviewing 272 cases of print analysis after a fingerprint analyst quit when she learned she would be fired. Donna Birks, resigned on June 6, 2007, after receiving a termination notice for failing to maintain a level of competence for the position. The cases being reviewed are cases Birks worked on where the print analysis was the only piece of physical evidence used for a conviction.

FL- Daniel Brock, 38, a senior Hillsborough County Sheriff's Deputy, was fired on May 24, 2007, after an internal review revealed that he may have lied in his reports. Officials believe that Brock's pending cases may be suspect and that people were wrongfully arrested.

ID- On May 20, 2007, an unidentified sniper sprayed dozens of bullets on a courthouse, killing a police officer, and wounding a sheriff's deputy and a civilian. Shortly after six in the morning three SWAT teams entered a nearby church where the sniper was hiding and found the bodies of the shooter and another man who was believed to be a church caretaker. Officials found an assault rifle, ammunition and spent shells next to the gunman's corpse. The motive for the shooting was not known. The shooter died of what appeared to be a self-inflicted gunshot wound to the head, authorities said.

ID- David Holt, 57, a former city councilman was charged with endangering the welfare of a minor, sexual assault, and rape. The charges were filed on May 22, 2007, in Nez Perce Tribal Court. Holt, allegedly give marijuana to a 17-year-old girl at his home, then raped her.

ID- Idaho DOC Director Brent Reinke said in July '07 that he wants

to send more prisoners to a private prison in Texas run by a company accused of abuse by guards, filthy conditions, lack of treatment, and a suicide. Reinke admitted that his department failed to properly monitor conditions at the prison run by the GEO Group, but claims that sending prisoners to another GEO prison doesn't mean more problems will happen.

IL- Robert Gallegos, a Chicago police officer, was arrested on May 26, 2007, and charged with aggravated battery. The Cook County judge set a bond at $100,000. The victim, a 15 year old high school student, suffered a broken jaw and other injuries in the attack.

ME- On May 2, 2007, the state DOC transferred 46 prisoners to county jails due to overcrowding problems. Another 90 prisoners were scheduled to move within a week for the same reason. There were still 200 prisoners being housed in the system over the housing capacity.

OH- Joshua Lunsford, 18, the son of Mark Lunsford, a national crusader for tougher sex-offender laws, has been arrested for sexual conduct with a minor. On May 18, 2007, he was arrested after a woman accused him of fondling her 14-year-old daughter twice.

OH- Bobby Cutts Jr., 30, a police officer was arrested on June 23, 2007, and charged with two counts of murder. The charges relate to the deaths of a pregnant woman and her unborn child. Authorities believe that Cutts was the father of the unborn child.

TN- J.D. Vandercook, 70, the former sheriff of Sumner County was sentenced, on May 22, 2007, to 18 months in prison. The sentence was imposed for his role in a scheme to funnel taxpayer money to his brother through a construction contract. Vandercook will not be allowed to work in a government leadership role and must also finish two years on probation after his release.

VT- During the June 22nd, 2007, weekend, two prisoners at Northeast Regional Correctional Facility assaulted staff members and one prisoner. The incident took place after a prisoner called on staff for medical help and a staff member opened his cell door. The prison remained in lockdown for nine hours after the incident.

VA- Anthony Richardson, the Police Chief of Damascus, was charged on June 22, 2007, with six felonies relating to an allegation that he distributed methamphetamine. The charges came after an undercover investigation in to Richardson's conduct. The police chief was also charged with one firearms count.

PR- Seven prisoners convicted of murder escaped from the Guayama prison. On April 10, 2007, authorities searched for the prisoners in the island's southeastern city. The prisoners escaped after gaining access to air conditioning ducts. An investigation is underway as to whether the prisoners were helped by guards.

PR- Damian Planas Merced, a spokesman for the Association for Prisoner's Rights and Rehabilitation, urged the island's government on June 11, 2007, to address the problem with contaminated water at the Guayama prison. One medical staff member at the prison supported Merced's claim that the water supply is contaminated. ■

Florida Prison Legal Perspectives

Florida Prisoners' Legal Aid Organization Inc.

BECOME A MEMBER

YES ! I wish to become a member of Florida Prisoners' Legal Aid Organization, Inc.

1. Please Check ✓ One:

- ☐ Membership Renewal
- ☐ New Membership

2. Select ✓ Category

- ☐ $15 Family/Advocate/Individual
- ☐ $10 Prisoner
- ☐ $30 Attorneys/Professionals
- ☐ $60 Gov't Agencies/Libraries/Orgs./etc.

3. Your Name and Address (PLEASE PRINT)

_____ DC#_____
Name

_____
Agency/Library/Institution /Org/

_____
Address

_____
City State Zip

_____
Email Address and /or Phone Number

Please make all checks or money orders payable to Florida Prisoners' Legal Aid Org., Inc. Please complete the above form and send it along with the indicated membership dues to: FPLAO, Inc., P.O. Box 1511, Christmas FL 32709-1511. For family members or loved ones of Florida prisoners who are unable to afford the basic membership dues, any contribution is acceptable for membership. Memberships run one year. If you would like to make a donation to FPLAO, Inc., to help the organization continue its work for prisoners and their families, send donations in any amount to the same address. Thank You. All members receive *Florida Prison Legal Perspectives*.

MEMBERSHIP RENEWAL

Please check the mailing label on this issue of FPLP to determine when you need to renew so you don't miss an issue. On the top line of the mailing label will be a date, such as ***Nov 07*. That indicates the month and year that your FPLAO membership dues are paid up to. Please renew your membership by completing the above form and mailing it and the appropriate dues amount to the address given a month or two before the date on the mailing label so that the membership rolls and mailing list can be updated within plenty of time. Thanks!**

FREE COPY OF FPLP

Prisoners: Have a free copy of FPLP sent to a family member or friend on the outside. Simply send us their name and address on this form. PLEASE PRINT.

_____
Name

_____
Address

_____
City

_____
State Zip

Complete and Mail to:
FLORIDA PRISON LEGAL PERSPECTIVES
P.O. Box 1511. Christmas, FL 32709-1511

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 48 page monthly magazine which has been published since 1990. 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 advice. 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 $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 year 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:

Prison Legal News
2400 NW 80th ST. #148
Seattle, WA 98117
(206)246-1022
http://www.prisonlegalnews.org
(Orders accepted by phone or online)

HAVE YOU MOVED OR BEEN TRANSFERRED?

If so, please complete the below information and mail it to FPLP so that the mailing list can be updated:

NEW ADDRESS (PLEASE PRINT CLEARLY)

Name _____

Inst. _____

Address _____

City _____ State _____ Zip _____

☐ Mail to: FPLP, P.O. Box 1511 Christmas, FL 32709-1511

VOLUME 13 ISSUE 4 JULY/AUG 2007

Florida Prison Legal Perspectives

P.O. Box 1511
Christmas, FL 32709-1511