FLORIDA PRISON LEGAL

Perspectives

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AMERICA'S REVOLVING PRISONS

by Oscar Hanson

More than 2 million people are incarcerated in U.S. prisons and jails, more than at any other time in America's history, and more than in any other country in the world. Most of them are first-time, nonviolent offenders; many are mentally ill or chemically dependent. Each year almost 600,000 of them are released back into our communities. Eventually, 95 percent of all prisoners will be released back into society.

Many of those released will be drug abusers who received little or no substance abuse treatment for their addictions while incarcerated, or violent offenders who received no counseling or illiterate drop outs who took no classes and acquired no job skills; essentially they leave prison with the same problems they entered with – or worse. Most of the opportunities to receive any available education or counseling must be self-initiated, but the numbers seeking such opportunities are few. Many others are sick; rates of HIV, hepatitis, and tuberculosis are significantly higher for prisoners than for freeworld people.

An overwhelming number of those released will be repeat offenders. Statistics show that 40 percent of them will be rearrested within a year of being released while almost two-thirds can be expected to be charged with a felony or serious misdemeanor within three years. Only about 13 percent of releasees will have participated in any kind of pre-release program to prepare them for reintegration into society. Nearly two-thirds of them will return to just a few metropolitan areas, where they will be further concentrated in struggling neighborhoods that can ill afford to accommodate them.

When the majority of those released leave prison, they frequently face practical and legal barriers that almost guarantees their perpetual exclusion from civil society. Job opportunities are limited or essentially nonexistent or only available at the bottom of the pay scale. They often find themselves suddenly confronted with overwhelming financial responsibilities-including victim restitution, court costs, supervision costs, child support-on top of starting over again with nothing and trying to survive, eat, have a place to sleep and transportation on a daily basis. In Florida, released prisoners are given a one-way bus ticket back to their community and $100, which may help to explain why Florida's recidivism rate is over 40 percent.

Those multitudes being released from America's prisons, most of whom are African American and Latino, although those races are minorities in our culture, are faced with additional barriers to successful societal reintegration. While in 38 states felons either never lose the right to vote or automatically have their civil rights restored at some point after being released from prison, in 13 states former felons who have completed their sentences,

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UNITED FOR PRISON REFORM

ON THE INSIDE

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

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

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

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and allegedly paid their debt to society, can be disenfranchised for life. Florida is one of those 13 states. In fact, Florida has the distinction of leading the nation in the number of former felons who are prohibited from voting. An astounding one-third of the 1.4 million disenfranchised former felons in the U.S. are in Florida. An equally astounding 31 percent of Floridian adult black males no longer have the right to vote.

It's questionable whether many people thought about those sort of things when the rage to incarcerate began to dominate American crime policy about three decades ago. Certainly someone envisioned that almost all prisoners would get out eventually. What happens when they do, however, is not a topic that held the interest of the legislators who passed mandatory sentencing laws, abolished parole, and eliminated funding for prisoner education.

As a result, prisoners are serving longer sentences (85 percent in most cases) while prisons have become places where nothing is done to help prisoners deal with their issues and change their way of thinking for a life outside that 95 percent of them will ultimately return to. In a sense, America's contemporary prisons basically replicate the social order that produced the offenders to begin with. Their attributes are violence, idleness and hoplessness. But it wasn't always like this.

Before the hardline stances on prisoner sentences and the prison boom, education and rehabilitation programs were deeply rooted in American corrections. However, over the years vocational and educational programs for prisoners have declined sharply while the prison population has swelled four-fold. Funding, once earmarked for such programs, has gone instead toward building more prison facilities.

Prison programs lost their funding partly in response to research in the late 1970's that implied they had scant success in cutting recidivism. But new studies suggest that certain kinds of programs do work to increase employment and reduce recidivism. Adult literacy and GED classes, vocational training with a realistic eye to the job market, cognitive therapy for sex offenders, and drug-abuse counseling that continues after release have all shown modest but cost-effective success.

A recent study released by the Virginia Department of Correctional Education, in which ex-prisoners were tracked for fifteen years, found that recidivism among those who had pursued an education while in prison was 59 percent lower. More comprehensive studies on prison educational programs have shown that reincarceration is 20 percent less frequent for participants. The irony to this story is that just as the evidence for programs that reduce recidivism was growing, the willingness and capacity to fund them diminished.

Education is not the only prison culture to change. The conditional release mechanism has been restructured too. Resources for supervising releasees have not kept up with the growing numbers of prisoners released, so caseloads have become bigger. Over the past few years Florida has tailored the conditional release statute to capture as many prison releasees under the umbrella as possible. As a direct result, the emphasis has been on surveillance rather than more time-consuming personal relationship where the supervising officer and releasee share common interest: the successful reintergration back into society. This translates to more releasees being charged with minor technical violations and with them being returned to prison.

Indeed, conditional releasees, parolees, and probationers

make up a rapidly growing class of prisoners: in 1980 they accounted for 18 percent of admissions; today they account for a third, and most are returned to prison on technical violations, meaning no new criminal activity. In other words, technical violations such as leaving a designated area, not submitting a monthly report, arriving home late – aren't crimes, and it's not at all clear that improving the capacity to detect technical violations or locking up more supervised releasees enhances public safety. What can be said of this tactic is that it is expensive: California, which sends more violators back to prison than any other state, spends approximately $900 million a year to house them.

The larger problem, like the one in Florida, is that discretionary parole has been completely replaced with a regime that eliminates much of the discretion not only from the parole commission but also from the judiciary. In doing so the Florida Legislature has removed some powerful incentives for prisoners to become the sort of people society would want to send home again.

Joan Petersilia, a criminologist at the University of California at Irvine, published a book entitled, *When Prisoners Come Home*, which drives the point perfectly. "A majority of inmates being released today have not been required to 'earn release' but rather have been 'automatically released.' Parole boards used to examine a prisoner's 'preparation' for release, including whether he or she had a place to live, a potential job, and family support. With determinate sentences [fixed prison terms in which parole boards have no say], the factors are not relevant to release. When offenders have done their time, they are released no matter what level of support is available to them or how prepared they are for release."

Over the past year some of the dismal facts about recidivism have come under new scrutiny and have begun to generate some creative thinking. For one thing, conditional release and parole clearly needs to be reformed. It is not working; more than 40 percent of released inmates are back in prison within three years. Part of the problem is the all – or – nothing response to technical violations. In other words, we need a system that does not have as its only sanction ending the experiment of supervised release for someone entirely.

Another area that needs to be explored is the involvement of families and community groups in a prisoner's release plan before he is let out. Representatives of community organizations need to enter the prisons and talk to prisoners about jobs they might seek once they're free. Counseling for prisoners and their families before the prisoners' release is vital too. When prisoners serve long sentences, as many have done recently, family ties are likely to be more attenuated, meaning that prisoners are likely to require more help to reconstruct them. While these ideas could deliver promising results, even more promising is the larger idea this approach evokes.

It may be that as a society we want to keep our incarceration rates higher than those of other industrialized democracies. After all, there is fairly good evidence that the prison boom was responsible for about a quarter of the decline in crime in the 1990's although the latest statistics show an increase. But if society wants to keep our prisons full, they must endow them with a purpose broader than incapacitation. Society must take up, in new form, the goal of remaking prisoners for life beyond bars. Society will have to accept that the question before them is not only how stringently they want to punish people in prison but also what kind of people they want to see emerge from it.

Resource materials: *From Prison to Home*, 56 page book, (2001), copy available at no cost from: Urban Institute Justice Policy Center, 2100 M. St. NW, Washington, DC 20037, www.urban.org; *Re-Enfranchisement: A Guide for Individual Restoration of Voting Rights in States that Permanently Disenfranchise Former Felons*, 90 pages, (2002), available from: Advancement Project, 1730 M St., NW Ste., 401, Washington, DC 20036, (202) 728-9557, www.advancementproject.org ■

Oscillating Justice

by Linda Hanson

In 1972, the United States Supreme Court, in *Furman v. Georgia*, ruled that the Georgia sentencing scheme that allowed defendants to be sentenced to death was arbitrary and violated the Eight Amendment's prohibition against cruel and unusual punishment. The effect of *Furman* was felt in many of the states that had similar sentencing schemes. Florida was one of the many states that modified the capital sentencing laws to comply with the requirements established in *Furman*. Four years later, the Supreme Court allowed the reinstatement of the death penalty. Since 1976, the year the moratorium was lifted, to the end of last year, 820 people have been executed in this country. Over 3,700 others on death row are waiting to be executed. Only three nations – China, Iran, and Saudi Arabia – are known to have executed more people than the United States did in 2001.

America's high ranking among the most frequent dispensers of capital punishment is due in surprisingly large part to the predilection of one region, the South. Fifteen southern states have accounted for 81 percent of all U.S. executions since 1977. Florida and Texas accounted for over 40 percent of the total executions during that time.

Twelve states and the District of Columbia allow no death sentencing at all, and the remaining thirty-eight states differ as to what kinds of crimes may be punished by death and how old a criminal must be to receive a death sentence.

Execution rates also vary widely according to race – not the race of the criminal but, rather, the race of the victim. Only 51 percent of murder victims over the past twenty-five years were white, however, more than 80 percent of those executed during that time period had been convicted of killing whites. In contrast, African Americans were the victims in 46 percent of all murders; yet only 14 percent of the criminals executed in the past twenty-five years had been convicted of killing black people.

States also vary widely in how frequently they exonerate death –row inmates. Between 1977 and 2002 Texas executed 289 people while exonerating only seven. Florida executed 54 people while exonerating 11 during that same period.

Yet in Illinois, twelve people were executed and thirteen exonerated. These disparities raise questions about the resources available to defendants, the adequacy of court-appointed counsel, and ultimately the accuracy of some convictions that have resulted in executions. Since 1973, 110 people on death row have been fully exonerated, sometimes mere hours before their scheduled executions. The advent of DNA testing has added another element to the dispute. Opponents of the death penalty cite DNA-based exonerations as evidence of how close states have come to killing innocent people and how likely it is that a mistake will be made – and as evidence that fatal mistakes already have been made. Proponents cite the same exonerations as evidence that DNA testing has made wrongful executions less likely.

Ironically, supporters of the death penalty also argue that whatever small risk there is of executing an innocent person, it is more than offset by the lives saved as a result of capital punishment's deterrent effect. The data available, however, fail to bear that out. In fact, for each of the years 1980 and to 2000 the average murder rate in states with capital punishment ranged from 1.4 to 2 times as high as the murder rates for states with no death penalty. Some studies have even shown that certain kinds of homicides rise following a state execution – evidence of what researchers call the "brutalization effect."

Is the death penalty constitutional? The extreme variation in how often and under what circumstances the death penalty is applied today suggests that it may not be long before the supreme court is compelled once again to consider the above question – another time.

[Source: Death Penalty Information Center/Bureau of Justice Statistics] ■

Death Row Population Declines

For the first time since the Supreme Court reinstated capital punishment in 1976, the number of prisoners housed on death row has declined. Three states housed 40 percent of all death row inmates at the end of 2001: California, with 603; Texas, 453; and Florida, 372. In contrast, new Hampshire has no one on death row.

In 2001, 90 people had their death sentences removed or overturned by the courts. Florida leads the way with 11. Preliminary statistics for 2002 show that Texas conducted 33 of the 68 executions nationwide.

The death row population fell from 3,601 in 2000 to 3,581 in 2001, the first year-to-year decline in 25 years.

[Source: *Tampa Tribune*, 12/16/02] ■

ISOLATION A LEADING CAUSE OF RECIDIVISM

by Steve Perrault

Ask anyone familiar with the prison industry and most will tell you that prisons are a terrible waste of money. Almost no one believes that prisons actually rehabilitate anybody. Not the Wardens, who rarely track such things; not the prison guards; and not, most especially, the inmates. Even rank and file Americans have given up on the idea. In 1970, pollster Lou Harris of Lou Harris and Associates, surveyed Americans and found that 73 percent thought the primary purpose of prison should be rehabilitation. By 1995, only 26 percent did.

By comparison, 58 percent of those questioned in 1995 felt prisons were there to punish. At this, prisons do very well. Beginning in the late 1980's, Americans began to build a new breed of prison; in Florida they are called Close Management Units. Currently the Florida Department of Corrections is building a sleek, stark, and frightfully expensive fortress designed to warehouse 1200 prisoners in 8 x 10 isolation cells (at Columbia CI). Those prisoners will be locked in solitary close management cells twenty-fours hours a day for years on end and given nothing – not even work – to occupy their hours. These types of prisons are designed to be so devoid of stimulation that prisoners are, quite intentionally, driven to the brink of mental collapse.

Recently, Florida was forced by litigation to reduce the number of close management units as well as some of the inhuman conditions. Currently Florida has four institutions designed as close management units. The aluminum sheets that blocked sunlight, fresh air, and view have been removed from the windows of these units. But make no mistake, the trauma these units create is still present. A recent expose in the *USA Today* paints a very startling picture and shows the trend to isolate prisoners. There is a correlation between these super prisons and the numbers of prisoners isolated.

A recent survey of 34 states by the Criminal Justice Institute, a national research firm in Connecticut, found that the percentage of isolated prisoners in those jurisdictions rose from an average of 4.5 percent in 1994 to 6.5 percent last year.

Prison officials say the increasing use of isolation cells has made their facilities safer and more manageable, but mental health specialists say the lack of attention to how isolation can affect inmates long after their release has put the public at an increased risk.

The United States Justice Department has moved plans into place to reduce that risk. This year, it allocated more than $150 million to states to help violent offenders before release with basic social skills, education, and job training. However, in many states, inmates in isolation are denied access to rehabilitation programs for hypothetical security reasons.

Stuart Grassian, a Harvard University psychiatrist who has studied the long-term effects of solitary confinement says, "The prison system has forgotten that one of its missions is to increase the safety of the public when these people are released. When everybody was talking about getting tough on crime, all we really did was get tough on ourselves." Grassian continued his analysis by saying, "Our system has succeeded in making prisoners as agitated and violent as humanly possible. What people forget is that 95 percent of these inmates get out at some point. These people have no clue about how to get along in a real-life setting. The only thing you can do is pray they don't pick you as their next victim."

Its obvious the prison systems of America recognize this axiom because many prisons notify local authorities by sending a warning that release prisoners, who after spending years in extreme isolation are returning to communities with little or no rehabilitation. Analysts echo that these releasees have little hope of avoiding a return to crime.

Of the record 630,000 felons projected to be released this year from state prisons, the thousands who were kept in solitary confinement for much or all of their sentences pose the most danger, authorities say.

The main culprit is the "super maximum" security prisons. The scores of new "super max" prisons across the nation symbolize a crackdown on crime in which states made sentences tougher and clearly abandoned any pretense of trying to rehabilitate inmates.

Prisoners housed in close management units are typically kept in small cells for 24 hours a day except for brief moments allowed for showers and, on occasion, a one-hour per week recreation period. They have no one to talk with, little or no television, no windows, restricted visitation with family members, and little help in dealing with the physical and psychological atrophy that can result from such conditions.

Now, record numbers of these prisoners and other felons are getting out of prisons. It's an on-going exodus that some law enforcement officials believe is partly to blame for last year's 2.1 percent increase in major crimes nationwide, the first such rise in more than a decade.

It's unclear how many prisoners are being released directly from isolation cells into communities; states do not keep uniform statistics on such inmates. However, during the past 21 months, Florida has released nearly 1,000

prisoners who were in close management cells.

States are just beginning to examine the threat that such prisoners pose after their release. Law enforcement and prison officials agree that the percentage of formerly isolated inmates who are likely to be arrested within three years of their release easily surpasses the 62 percent recidivism rate for all felons that have been reported by the Justice Department.

Former Texas District Judge Fernando Mancias, who opposes the broad use of isolation cells says, "We've been destroying these people, denying them access to rehabilitation and releasing them to their communities resentful and angry."

American Civil Liberties Union Attorney David Fahti has challenged the conditions of solitary confinement in many states. The ACLU protests what Fahti describes as a "life-shattering" policy of punishment that stops just short of the death penalty. "This should be a huge concern in this country, not just because of what is happening inside prisons, which is catastrophic," Fahti says. "Very little is being done to help these people transition back home. And most of them are getting out."

Grassian, the Harvard Psychiatrist who has testified in cases brought against prison systems, says some of the hundreds of inmates he has interviewed have called him after their release "in desperate straits." Grassian adds, "In many cases, their ability to think and to reason is totally gone."

[Sources: FDOC records; *USA Today*, 12/12/02]. ■

Texas has the most inmates in isolation

The number of inmates in isolation, along with their percentage of the state's overall prison population, as of Jan. 1, 2001. Chart includes figures only from 34 states and the District of Columbia, which responded to a survey by the Criminal Justice Institute:

	Inmates in isolation	Percentage of overall prison population
Ariz.	998	4%
Ark.	1,883	17%
Calif.	8,775	6%
Colo.	922	7%
Conn.	525	3%
Del.	96	2%
D.C.	592	16%
Fla.	4,001	6%
Hawaii	132	4%
Idaho	187	5%
Ill.	3,563	8%
Ind.	1,443	8%
Kan.	486	6%
Ky.	170	2%
Md.	1,120	5%
Mich.	2,715	6%
Minn.	262	4%
Mo.	3,381	12%
Mont.	68	4%
Neb.	195	5%
N.C.	378	1%
N.D.	39	4%
N.Y.	5,961	8%
Ohio	1,022	2%
Okla.	497	3%
Ore.	294	3%
Pa.	2,207	6%
R.I.	27	1%
S.C.	627	3%
Tenn.	1,795	10%
Texas	9,239	7%
Va.	2,250	8%
Wash.	742	5%
Wis.	214	1%
Wyo.	24	2%
Total	**56,830**	

Source: Criminal Justice Institute, 2001 Corrections Yearbook

PRIVATE PRISONS UNDER FIRE

Officials with Corrections Corporation of America recently acknowledged that they "dropped the ball" on following state rules when it came to hiring correctional officers.

The Correctional Privatization Commission, which oversees the state's five privately run prisons, passed out a letter giving the company until Dec. 2002 to come into compliance or the board could meet to revoke the contract.

In March of 2002, the Florida Department of Law Enforcement found 61 correctional officers at Gadsden C I who were not registered with the state's Criminal Justice Standards and Training Commission, as required by state law and the company's contract. The company agreed to remedy the situation, but a follow-up found 31 officers who had still not registered.

In addition, investigators found that some officers hired had criminal records and that prison officials were not forwarding internal investigations of officers' misconduct to the state. ■

FDOC Mail Rule Challenge Update

In the last issue of *FPLP* (Vol. 9, Iss.1) it was noted that on Dec. 2, 2002, Florida Prisoners' Legal Aid Org., Inc., director, Teresa Burns-Posey, filed a formal administrative rule challenge with the Division of Administrative Hearings (DOAH) against mail rules recently and invalidly adopted and implemented by the Fla. Department of Corrections (FDOC). Those rules, codified at Sections 33-210.101, .102, and .103, Florida Administrative Code, impose severe new restrictions on routine, legal and privileged mail sent to or from Florida prisoners.

Most notably, the rules, that were implemented Dec. 5, 2002, arbitrarily restricts the amount and content of mail enclosures that free citizens may send to prisoners and fail to provide any constitutionally-acceptable provisions whereby such citizens may appeal mail rejections to someone other than the rejector before the mail is returned to the sender.

In the above noted rule challenge, Burns v. DOC, DOAH Case 02-4604RP, the FDOC, represented by the Attorney General's Office, has done nothing but create delays, violate the procedural rules, and attempted to mislead the administrative judge with ex parte communications, paper games and disparagement of Ms. Burns-Posey. The department's "defense" is that the mail rules at issue only affect the rights of prisoners and do not affect the rights of free citizens – who have no right to send mail to prisoners. Of course, that "defense" is frivolous, but the department's delay tactics have prevented the judge, so far, from ruling on that issue. FPLAO is seeking sanctions against the department for wasting the court's time with such frivolous defenses and has moved for summary judgment on the invalidity of the rules. Confidence remains high that the rules will be invalidated.

During the course of the case, discovery rules were invoked to obtain a copy of every document received or generated by the FDOC relevant to the challenged rules. Among those documents were all the objections to the rules that have been field by prisoners. Out of the 75,000 Florida prisoners who are being severely impacted by the rules, only the following 15 filed written objections to the rules, according to FDOC records:

Rexford Tweed – *Okee. CI*
Merritt Sims – *UCI*
Arthur Boyne – *Walton CI*
Robert D. Edwards – *SCI*
Kurt Smith – *FSP*
Robert A. Edwards – *UCI*
Donald Dillbeck – *UCI*
Mark Osterback – *Ham. CI*
Randall Prater – *Ham. CI*
Eric Hoffman – *Glades CI*
Victor Chapman – *UCI*
Kenneth Pierce – *Glades CI*
Darryl Belgrave – *UCI*
Alan Yurko – *Wash. CI*
John Armey – *Col. CI*

Additionally, FPLAO directors and prisoners Bob Posey and Oscar Hanson are assisting FPLAO with the rule challenge, as are prisoners David Reutter and Mark Ellis (Mark's outside records custodian, Elizabeth Green, has filed a separate challenge to the rules, Green v. DOC, DOAH Case 02-4723RP).

Also in the last issue of *FPLP* it was noted that Ms. Burns-Posey had filed a petition with the FDOC to adopt a rule providing the required due process for an appeal by citizens whenever the FDOC rejects their routine, legal or privileged mail. The FDOC rejected that petition, claiming no law exists requiring such due process. Ms. Burns-Posey has now filed a Notice of Intent to Sue with the Dept. of Insurance as a preliminary to a legal action against the FDOC on that issue. (Prisoner Mark Osterback currently has a federal case against FDOC's practice of returning rejected mail to the sender before a prisoner can file an appeal of the rejection, Osterback v. Moore, Case 4:01CV-76-WS (N. D. Fla.).)

FPLP will keep readers updated on these important events as they proceed. ■

FAMILIES AGAINST INFLATED RATES (FAIR) CAMPAIGN

During August 2002, Florida Prisoners' Legal Aid Organization initiated the Families Against Inflated Rates (FAIR) Campaign. The purpose of the campaign is to reduce the collect-call telephone rates being charged the families of Florida state prisoners.

The strategy of the FAIR Campaign involves organization of family members, loved ones and advocates of prisoners into a grassroots movement to speak out, support, and push for administrative and legislative changes to eliminate the Florida Department of Correction's discretion to award the Collect-call phone contracts to companies that guarantee the Department the highest kickback commission, instead of guaranteeing the lowest rates to families.

Currently, the monopolistic rates being gouged out of prisoners' families, who are struggling to maintain their ties with those incarcerated, are unconscionable. While the general public can make collect phone calls to anywhere in the U.S. for about 10 cents a minute, a 15-minute in-state collect call for prisoners' families costs over $5. Out-of-state call rates are even worse, averaging $20 for a 15-minute call.

These monopolistic rates negatively impact frequent communication between prisoners and their families and often place an onerous financial burden on families. Consequently, family ties and relationships suffer and are often strained.

The exorbitant rates are a result of the FDOC's and telecommunication

companies' greed and willingness to sacrifice family ties for profit. Between them, the FDOC and MCI WorldCom are now bilking almost $40 million a year from the families of Florida prisoners (with the FDOC getting more of the split than MCI WorldCom).

Many families, especially those out of state, who can only visit infrequently, now cannot afford the phone rates to maintain communication with an incarcerated loved one. Children of incarcerated parents are having their ability to communicate strained or broken, raising their at-risk factor. Elderly parents on fixed incomes cannot afford to accept the phone calls of their incarcerated sons or daughters. This cannot continue.

Prisoners are called on to participate in the FAIR Campaign by encouraging their families and friends to get involved in the campaign. Families and friends can get more information on the campaign and how they can participate by visiting: www.fplao.org/FamilyIssues, or by writing: FPLAO, FAIR Campaign, P.O. Box 660-387, Chuluota, FL 32766

PRISON CENSORSHIP SUIT SETTLED FOR $55,414.31

Seattle, Washington – February 24, 2003 – A federal lawsuit filed against the Oregon Department of Corrections (DOC) on April 2, 2002, by *Prison Legal News* magazine has been settled for $55,414.31, which is believed to be the largest damages awarded in a prison censorship case involving a publisher in the U.S.

The lawsuit alleged the Oregon DOC was censoring *Prison Legal News* and informational brochures mailed to Oregon Prisoners by standard (a.k.a. bulk mail) and media (book) rate mail. The lawsuit also alleged that Prison Legal News was denied meaningful opportunity to challenge the censorship by being denied notice of when it occurred and the lawsuit asserted prisoners were wrongfully being required to pay for magazine subscriptions and books from their prison trust accounts.

The case was settled after discovery was conducted, but before motions for summary judgment had been filed.

Prison Legal News had previously won a lawsuit against the Oregon DOC over its ban on prisoners receiving magazines sent to prisoners at the bulk mail postage rate. After losing at the District Court level, *Prison Legal News* won an appeal in the Ninth Circuit Court of Appeals. *Prison Legal News v. Cook*, 8 F.3d 1145 (9th Cir. 2001). On remand to the District Court, an injunction was entered prohibiting the censorship of mailings based on postal classifications, ordering the Oregon DOC to provide notice and opportunity to publishers to challenge censorship. *Prison Legal News* was also awarded $58,000 in that prior case.

This most recent case arose when the Oregon DOC failed to abide by the District Court's injunction in the prior case. Now, once again, the Oregon DOC has agreed to comply with the injunction's provisions and pay *Prison Legal News* an additional $39,914.31 in attorney fees and costs and $15,500 in damages. The court will retain jurisdiction for one year this time to ensure the Oregon DOC complies with the settlement.

Prison Legal News v. Schumacher, U.S.D.C. OR, Case No. 02-428-MA.

[Note: Subscription information for *Prison Legal News* can be found on the back page of this issue of *FPLP*-ed] ■

INTERNET RESOURCES

Below are Internet addressess where information can be found printed and mailed to prisoners.

Florida Supreme Court Opinions
www.law.ufl.edu/opinions/supreme
U.S. Supreme Court and Federal Courts
www.findlaw.com/casecode
Florida Statutes-Legislation
www.leg.state.fl.us
FDOC Chapter 33 Rules
www.dc.state.fl.us/secretary/legal/ch33
Florida Government Offices Directory
www.myflorida.com/myflorida/directory

CALL 1-877-USA-JOBS for referral to the nearest employment agency that should be able to help you with the Work Opportunities Tax Credit and Federal Bonding Program.
For employers who hire exprisoners the WOTC gives a tax write-off while the FBP provides up to $25,000 in insurance in case of theft. For more info on FBP, call 1-800-233-2258 or see www.bonds4jobs.com

Parole Presentation Package

by Dale Bass

At Sumter Correctional Institution, prisoners have an excellent opportunity to attend an educational class that instructs them in how to prepare a parole presentation package. This may very well be the only class of its kind offered anywhere within the FDOC. This instructional class offers no legal advice, charges no fees, and is open to anyone on the compound that wishes to attend. The Sumter CI Lifers' Group presents this as one small portion of its activities.

The Sumter CI Lifers' Group is a unique organization. Founded ten years ago, it has a current membership of 115 voting members, 81 associate members, and 122 pending members. The group, officially titled the Captain J.A. Shultz Memorial Lifers' Group, named after the original sponsor, hosts over twenty educational courses and meets each Friday, Saturday, and Sunday in the institutional visiting park. It is not unusual to find over 150 men lining up to attend an average meeting. The group's mission statement speaks of self-betterment through service to others. One of the twenty plus courses conducted each weekend, and highlighted here, is "How To Prepare A Parole Presentation Package."

This class began on October 6, 2002 and was designed to last approximately 12 Saturday evenings. It was based on published information from a variety of sources. The class was developed and facilitated by Dale Bass and Bill Hoertz. The first class had 40 participants and enrollment for a second class has already begun.

The facilitators spent months collecting information and arranging it in an easy-to-understand format. They presented it, complete with handouts, sample letters and documents, overhead projections, and guest speakers, in a manner intended to serve as a guide to parole-eligible prisoners facing the often confusing task of preparing a presentation to the Florida Parole Commission.

As all parole-eligible Florida prisoners know, the Florida Parole Commission is silent as to what they would like to see in regards to a request for parole. There is, of course, the standard advice to remain free of disciplinary reports and to take advantage of institutional programs. But is this enough? Statistics clearly show that the prisoner seeking parole in Florida faces tremendous odds. Other states, however, offer published guidelines. Much of the material from the SCI Lifers' Group class has been taken from these sources and adapted to fit the situation in Florida. In addition to material, personal experiences and observations are offered by several of the Lifers' Group sponsors who are ex-cons and ex-parolees.

It is not a coincidence that many of the Lifers' Group sponsors are ex-cons and ex-parolees. These are men who have made the successful transition from prison to society and come back into the prisons to share their experiences and guide prisoners who are striving to accomplish the same thing. Most of the sponsors are associated with the Bill Glass Prison Ministry or the Christian Motorcycle Association. They have an unlimited love for their brothers in blue, they are proof that change is possible, and they volunteer their time to help make it happen. Of the sixty-something men that these sponsors have helped get out of prison, only one has been returned.

During the twelve week class on how to prepare a parole presentation package, participants are constantly reminded that there are not set-in-stone rules. There are, however, some basic concepts that are highly recommended. Participants in the class are encouraged to use these components when preparing their presentation package:

The Cover Letter, addressed to the Chairman of the Parole Commission, should be brief. Simply state that three (3) complete presentation packages are enclosed, one for each commissioner, and ask for serious consideration.

Table of Contents should be the first document in the package. It should list the components in the order in which they appear. You may choose to use page numbers or labeled dividers between the sections.

The Parole Plan is a one-page document stating where you intend to live and with whom. Give some details of who you intend to live with such as their relation to you, their background, their educational level, place of employment and how to contact them. If you have employment lined up, state where, doing what, and expected salary. If you have any support groups lined up such as a church, AA, NA, etc. Give the details and list a contact person.

It is always a good idea to submit at least two plans (Plan A and Plan B); this allows the commission to reject one if they are uncomfortable with it and consider the alternate one. Any prisoner that has been incarcerated a long time should give serious consideration to seeking acceptance to a halfway house and making it their intended resident on the plan.

A Short Essay, as a part of the package, is the prisoner's opportunity to speak directly to the commissioners. Outline briefly what changes you have in your life and how you intend to keep from re-offending. Keep this short and to the point. Do not attempt to retry your conviction before the commissioners.

A Resume' is strongly recommended as part of your presentation package. Even if you already have a promise of employment, it's a good idea to show the commissioners that you have the skills and/or experience necessary to find employment. Keep this document to one page. Most prison libraries have books that will guide you through the resume process. Take advantage of these. It

is suggested that you craft your resume to highlight your employability.

Achievements you have acquired while in prison are an important component of your presentation package. This serves to show that you took advantage of every possible avenue towards bettering yourself instead of just hanging out and kicking the bobo with the fellas. Everything positive that you can document should be included. GED, vocational courses, Bible study courses, college correspondence courses, library programs, psychology department programs, AA, NA – don't leave anything unmentioned. Actual copies of these accomplishment certificates should be forwarded to the commission as you earn them to be included in your file there. In your presentation package you will want to list these accomplishments with a notation that copies of the certificates are in your file at the commission's office.

Many prisoners have recently discovered that the institutional classification departments will no longer accept program completion certificates for inclusion in their institutional records. Don't let this be of major concern; the parole commission will accept them for your file there and it is advised that you take the originals with you to show the parole examiner.

Support Letters from family and friends are important. These should clearly state that the writer supports your request for parole and that they are willing to assist your transition however they can. Support letters should specifically mention areas such as financial, emotional support, clothing, transportation, employment, and social adjustment. These letters should be one page maximum, clear, and to the point. All letters should include the sender's name, address, and phone number. Support letters may be sent to the commission at any time (to be included in your file there) and it is recommended that your presentation package contain up to 10 of these.

Other tips: Should your presentation be typed or handwritten? There are valid arguments for each. This is an individual decision and should be carefully considered.

It is strongly recommended that each document in the presentation package be no more than one page in length. Don't overwhelm the commissioners and thereby reduce the chance of a thorough reading of your package.

Make at least four copies of your presentation package. Mail three; one for each of the commissioners, to their office, before your hearing. Take one with you to show the examiner. You may want to send a copy to each person who goes to your hearing to speak on your behalf.

One of the Lifers' Group sponsors who goes to parole hearings to lobby on behalf of parole-eligible prisoners recently shared this advice with the class: The commission does not want to hear a prospective parolee claim his innocence. They do not want to hear about a miraculous religious transformation (He says that the commissioners are Christians but they have been burnt with stories like that before). They do, he says, want to see documentation of completion of drug/alcohol programs even if the crime or record of the offender does not specifically state an involvement of substance abuse. Finally, he says, the commissioners give significant consideration to all documentation of program accomplishments.

A final piece of advice is pertinent; never forget that parole is an act of grace (a gift) and shall not be considered a right (FS 947.002 (5)). Parole is not granted as a reward for doing what you are suppose to do. Therefore, to increase your chance of parole, do everything you can, above and beyond the routine, to convince the commissioners you are working on change.

When you complete your presentation package, probably after numerous rewrites, bind you final product into a neat and orderly package. Emphasis should be on neat, clean, clear, and concise. The commissioners know that prisoners don't have access to state of the art equipment, so just do the best you can with the tools you have. Always keep in mind that you are attempting to sell yourself; your future depends on it. ■

Seeking to contact the family of Robert Bruce. Please contact PLAA, P.O.Box 30280, PMB 111, Phoenix, AZ 85046-0280

-NEEDED-
PHONE BILLS

Several months ago FPLP staff asked prisoners and their families to send us copies of phone bills showing the high rates being charged families to accept phone calls from their incarcerated loved ones in Florida prisons. We got a good response. We have the in-state rates pinned down. We are asking for more bills on out-of-state calls. These bills are needed to support the Families Against Inflated Rates (FAIR) Campaign effort to get the rates reduced. Please send us a copy of your phone bill showing how much you are paying to maintain your communication and relationship with a Florida prisoner. Send to:

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

NOTABLE CASES

by Oscar Hanson

The following are summaries of recent state and federal cases that may be useful to or have a significant impact on Florida prisoners. Prisoners interested in these cases should always read the full case as published in the Florida Law Weekly (Fla. L. Weekly); Florida Law Weekly Federal (Fla. L. Weekly Fed.); Southern Reporter 2nd Series (So.2d); Federal Supplement 2nd Series (F.Supp.2d); Federal Reporter 3rd Series (F.3d); or Supreme Court Reporter (S.Ct.).

FEDERAL DISTRICT COURT

Gonzalez v. DOC, 16 Fla. L. Weekly (Fed) C193 (11th Cir 1/10/03)

In this case the Eleventh Circuit Court of Appeals held that a certificate of appealability (COA) is required for appeal from an order denying a true Rule 60(b) motion, one which attacks a prior federal court habeas corpus order denying habeas relief from a state court judgment of conviction and sentence, instead of attacking underlying conviction and sentence judgment itself.

Recently, the Eleventh Circuit held that the 28 U.S.C. 2253 (c)(1) requirement of a COA applies to an appeal from the denial of a Rule 60(b) motion if that motion is in reality an attack on the underlying conviction and sentence instead of a challenge to the previous federal court order denying relief from that conviction and sentence. In other words, if the motion is in reality a successive application or motion for relief parading as a Rule 60(b) motion, an appeal from the denial of it cannot proceed without a COA. See: *Lazo v. U.S.*, 16 Fla. L. Weekly Fed C 120(b) (11th Cir 12/16/02).

The threshold question in this case is different, because this is an appeal from the denial of a "true" Rule 60(b) motion-one that attacks the prior federal court habeas order denying relief from the state court judgment of conviction and sentence, instead of attacking the underlying conviction and sentence judgment itself as the motion in Lazo did.

In sum, the Eleventh Circuit aligned itself with five other circuits and held that an appeal may not be taken from any order denying Rule 60(b) relief from the denial of a 2254 petition unless a COA is issued.

The Eleventh Circuit also clarified the law with respect to Rule 60(b) motions, citing its decision in *Mobley v. Head*, 306 F. 3d 1096 (11th Cir. 2002) that concluded that under post-AEDPA law all Rule 60(b) motions in habeas cases are to be treated as second or successive petitions.

STATE SUPREME COURT

State v. Klayman, 27 Fla. L. Weekly S951 (Fla. 11/14/02)

The Supreme Court accepted jurisdiction in this case to answer a certified question of whether the supreme court's decision in *Hayes v. State*, 765 So.2d 1 (Fla. 1999) be retroactively applied.

The holding in Hayes established that Florida's drug trafficking statute applies only to Schedule I or II drugs or to mixtures containing Schedule I or II drugs. The question presented in this case is whether that holding should be applied to final cases wherein the lower courts construed the statute differently and imposed trafficking convections based on mixtures that did not contain a Schedule I or II drug.

The Supreme Court held that this clarification of extant law must be applied to final cases, citing *Fiore v. White* 531 U.S. 225 (2001) where the United States Supreme Court held that a "change" in the law may be analyzed in terms of retroactivity, a "clarification" in the law does not implicate the issue of retroactivity. Thus, under section 893.135 (1) (c) 1, trafficking in a Schedule III drug or mixture thereof (as in the instant case) was never intended by the Legislature to be a crime.

Bunkley v. State, 27 Fla. L. Weekly S967 (Fla. 11/21/02)

In this case the Florida Supreme Court accepted jurisdiction to answer a question certified by the Second District Court of Appeal on whether the supreme court's holding in *L. B. v. State*, 700 So.2d 370 (Fla. 1997), that a folding pocketknife with a blade of four inches or less falls within the statutory exception to the definition of a "weapon" found in section 790.001 (13), be applied retroactively.

In sum, the supreme court answered the question in the negative. The court reasoned that the decision in *L.B.* was not a jurisprudential upheaval under *Witt v. State*, 387 So.2d 922 (Fla. 1980) (discussing retroactivity) because *L. B.* was not a "major constitutional change of law." Rather, L.B. was a routine statutory construction case wherein the court construed and refined the phrase "common pocketknife" in the face of evolving

circumstances in the legal field. The decision thus "affords new or different" guidelines for Florida courts to use in applying the statute and is an evolutionary refinement in the law.

[Note: Justice Pariente wrote an excellent dissenting opinion wherein she believed that under the recent United States Supreme Court decision in *Fiore v. White*, 531 U.S. 225 (2001), the L.B. decision should be applied in this case.]

State v. Carter, 27 Fla. L. Weekly S1004 (Fla. 12/5/02)

In this case the Florida Supreme Court resolved conflict between district courts of appeal on the issue of whether a probationer's failure to file a single monthly report justify probation revocation.

The Court held that trial courts must consider each violation on a case-by-case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence. In other words, the trial court must review the evidence to determine whether the defendant has made reasonable efforts to comply with the terms and conditions of his or her probation.

Reed v. State, 27 Fla. L. Weekly S1045 (Fla. 12/19/02)

This case answers a question certified by the First District Court of Appeal on whether an inaccurate jury instruction is fundamental error. The Court's decision was premised on the question of an inaccurate definition of the disputed element of malice in a charge of aggravated child abuse.

The Court held that the failure to use the correct definition is fundamental error in cases in which the essential element of malice was disputed at trial. The Court previously recognized a distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dispute in the case. Thus, the failure to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error.

The Court further clarified that fundamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet the Court's requirement of being fundamental.

One final note on this case. The Court's decision provided for LIMITED retroactivity. The decision will apply to all cases pending direct review or not yet final.

STATE APPEAL COURTS

Adams v. State, 27 Fla. L. Weekly D2502 (Fla. 2d DCA 11/20/02)

This case offers a terse analysis of a defacto arrest, something not uncommon in Florida, but rarely discussed or published with regard to tainted confessions.

As the Court correctly recognized, there are numerous factors that a court must analyze to determine whether a suspect confession is free of the taint of an illegal arrest. The most important factors are: the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. See: *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The taint of an illegal confession cannot be purged solely by the act of reading a defendant his Miranda rights.

In this case, the police forcibly placed the handcuffed defendant in a police car and told him that he was NOT under arrest. The trial court correctly held that this clearly illegal behavior constituted a "defacto" arrest. Further, the Court held it was error for the trial court to rule that the events at the police station acted to cleanse the defendant's statements of any constitutional violations. The defendant's encounter with the police influenced his belief that he was not free to leave the police station. See: *Taylor v. Alabama*, 457 U.S. 687 (1982). Reversed for new trial.

Moore v. Nelson, 27 Fla. L. Weekly D2518 (Fla. 4th DCA 11/20/02)

The Fourth District Court of Appeal clarified an existing condition that many prisoners may not be aware of. The Court held that it is error to impose condition of supervision allowing defendant who was convicted of sexual activity with child to reside in foreign state without stipulating that the condition was contingent upon the approval of the receiving state interstate compact authority.

Mitchell v. State, 27 Fla. L. Weekly D2543 (Fla. 5th DCA 11/22/02)

The Fifth DCA held dual convictions for attempted second degree murder and attempted felony murder, pursuant to section 782.051, Fla. Stat. (2001), for a single act, constitutes a double jeopardy violation, but certified the question to the Florida Supreme Court for review.

Perez v. State, 27 Fla. L. Weekly D2556 (Fla. 4th DCA 11/27/02)

The Fourth District Court of Appeal, in an en banc panel, has receded from its prior holding in *Wilcher v. State*, 805 So.2d 74 (Fla. 4th DCA 2002), which held that dismissal of a motion for post conviction relief was proper when a direct appeal was pending.

The en banc court properly recognized that nothing in the criminal rules requires a dismissal under such circumstances. Instead, the better procedure is for the trial court to stay (or hold in abeyance) the post-conviction relief motion

rather than dismiss for lack of jurisdiction.

Gundlah v. Moore, 27 Fla. L. Weekly D2592 (Fla. 4th DCA 12/4/02)

Florida prisoner, Charles Gundlah, sought appellate review in the DCA following the circuit court's denial of his petition for writ of mandamus as untimely. Gundlah alleged that because he was transferred between correctional institutions, his copy of the DOC's final answer on his administrative remedies reached him only days before the (30) day deadline for seeking judicial review of the DOC response.

The Fourth DCA found no error in the circuit court's ruling on timeliness. However, where a state action deprives a party of the ability to file a timely notice of appeal, the appellate court, although deprived of jurisdiction over the appeal, will provide the thus-rejected appellant with an alternative avenue of review.

The appropriate remedy has been to dismiss the untimely appeal without prejudice, allowing the appellant to pursue relief in the lower tribunal by motion seeking to set aside the original order and requesting that a new appealable order be entered. See: *Department of Corrections v. Saulter,* 742 So.2d 368 (Fla. 1st DCA 1999). If the lower tribunal acts favorably upon such application, the appellant may timely appeal the re-entered order and thereby challenge the merits of the original adverse agency action. See: *Etienne v. Simco Recycling Corp.*, 721 So.2d 399 (Fla. 3d DCA 1998). If the lower tribunal refuses to vacate the order, then the appellant may appeal the refusal to re-enter the order. Id.

Moore v. DOC, 27 Fla. L. Weekly D2586 (Fla. 4th DCA 12/4/02)

Cynthia Moore appealed the dismissal of her complaint for negligence and false arrest against the DOC. While Moore was on probation, a DOC officer filed an affidavit alleging that Moore had failed to pay her probation fees. The trial court issued a warrant for probation violation. Subsequently, Moore's probation was terminated, but Moore's probation officer did not revoke the outstanding warrant. Moore was ultimately arrested on the warrant.

The heart of Moore's complaint is that the DOC had a duty to revoke the outstanding warrant for violation of probation once it received notice that her probation had been terminated.

The Fourth DCA explained that for Moore to have an actionable negligence claim against a government entity, there must be a common law or statutory duty regarding the alleged negligent conduct, citing *Hinckley v. Palm Beach County Bd. of Comm'rs,* 801 So.2d 193, 194-95 (Fla. 4th DCA 2001). Moore alleged that the DOC had a common law duty not to subject her to a false arrest.

To analyze government tort liability, the Florida Supreme Court divided government functions into four categories: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the protection of the public safety; (3) capital improvements and property control operations; and (4) providing professional, educational, and general services for the health and welfare of the citizens. See: *Trianon Park Condo. Ass'n v. City of Hialeah,* 468 So.2d 912, 919 (Fla. 1985). The supreme court held that there is no duty of care and no corresponding tort liability for discretionary functions within categories (1) and (2).

The Court held that probation supervision is a category (2) function involving enforcement of laws and protection of public safety. Probation supervision, the Court reasoned, is a discretionary duty involving the interpretation of existing probation statutes and supervision of probationers to protect the public. It does not give rise to a common law duty of care to individual probationers.

In addressing Moore's false arrest claim, the Court held that for an entity to be liable for false imprisonment, a person must personally and actively participate, directly or indirectly by procurement, in the unlawful restraint of another person against their will. Merely providing information to the authorities that a violation of law occurred is not sufficient to support an action for false arrest. See: *Harris v. Kearney,* 786 So.2d 1222 (Fla. 4th DCA 2001).

[Note: Judge Farmer delivered a well-reasoned and logical dissent that's critical of the majority opinion. Judge Farmer stated that the state of Florida has no proper interest in safeguarding law enforcement officers from such negligence as demonstrated by Moore. Farmer said that when officers come to know that an outstanding arrest warrant is no longer legally sustainable, then the officer should have no proper discretion or law enforcement zeal to maintain such invalid warrants. In closing, Judge Farmer pragmatically stated that it may seem a small thing that a former probationer is arrested, even if her or she loses their job as a result of such negligence. But the law in its perceived majesty either protects the legitimate liberty interests of all its citizens, or its claim to liberty for all is itself false.]

Hersey v. State, 27 Fla. L. Weekly D2607 (Fla. 5th DCA 12/6/02)

The Fifth District Court of Appeal has certified the issue of the constitutionality of the curative effect of Chapter 02-210, Laws of Florida as it relates to Chapter 99-188, the Three Strikes enhancement. The DCA certified the issue to the supreme court as one of exceptional importance.

Espindola v. State, 28 Fla. L. Weekly D222 (Fla. 3d DCA 1/15/03)

The Third District Court of Appeal recently ruled Florida's Sexual Predator Act unconstitutional. Section 775.21, Fla. Stat., contains the FSPA and under the Act, the sole determination to be made by the trial court before designating a person a "sexual predator" is whether that person had the prerequisite criminal conviction. The DCA recognized that the statute provides no procedural due process, and therefore is unconstitutional.

Joseph v. Henderson, 28 Fla. L. Weekly D230 (Fla. 2d DCA 1/15/03)

Florida Prisoner Shane Joseph petitioned the Second DCA for a writ of certiorari to review a trial court order denying his challenge to a booking fee imposed by the county jail during his resentencing hearing.

The DCA held that the Sheriff's imposition of a booking fee against Joseph who had returned to the county jail from state prison for new sentencing hearing constituted a violation of equal protection and substantive due process.

This case provides a concise statement as to determine whether a statute violates substantive due process as well as a rational basis test as to equal protection claims.

DuBose v. State, 28 Fla. L. Weekly D239 (Fla. 2d DCA 1/17/03)

Florida prisoner Dwight DuBose appealed his judgment and sentences upon conviction of various crimes. DuBose argued that the trial court erred in running a 5 year sentence under the Prison Releasee Reoffender Act consecutive to his life sentence. The DCA agreed and cited their decision in *Hall v. State*, 821 So.2d 1154 (Fla. 2d DCA 2002), where the defendant was ordered to serve a habitual violent felony offender sentence of thirty years consecutively to a nonhabitual life sentence.

The Court in Hall stated that the defendant was entitled to serve his habitual offender sentence first in order to preserve Hall's entitlement, if any, to control release. In the instant case, the DCA applied this same reasoning to PRR sentences. As with the defendant in Hall who was given a habitual offender sentence, a defendant who is sentenced pursuant to the PRR statute is severely restricted in his opportunity to earn gain time or otherwise serve less than the entire sentence. Thus, in order to preserve entitlement to any possible early release that may apply to the non-PRR sentence, DuBose must be allowed to serve his PRR sentence first. ■

DNA REMINDER

The Florida Legislature has provided a limited remedy for convicted persons to seek to exonerate themselves by resort to DNA evidence, section 925.11, Florida Statutes.

The legislative remedy is limited in time: a two year window from the date this statute was enacted on October 1, 2001, for persons convicted prior to the date of the statute. See Section 925.11 (1)(b) 1. A person seeking this remedy must file a timely petition with the required allegations and information. Florida Statutes 925.11 and Florida Rule of Criminal Procedure 3.853. Compliance is essential, since at this point, arguments based on due process and fundamental fairness have not succeeded in this state.

It is also crucial that the movant must stickly follow the substantive requirements of Florida Rule of Criminal Procedure 3.853. If this rule is not *strictly* complied with, the motion will be denied. Specifically, a Rule 3.853 motion must be under oath and must include the following:

(1) a statement of the facts relied on, including a description of the physical evidence containing DNA to be tested, and, if known, the present or last known location of the evidence, and how it was originally obtained;

(2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;

(3) a statement that the movant is innocent, and a statement how the DNA testing requested will exonerate the movant of the crime for which he is sentenced, or a statement how the DNA testing will mitigate the sentence.

(4) a statement that identification of the movant is a genuinely disputed issue, and why it is an issue, or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence;.

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority. ■

MEDICAL SERVICES MAY GO PRIVATE

The Florida prison rumor mill is never short of scoops and recently the buzz has been that medical services will go private. This rumor has a little more credibility because medical staff at at least one institution has been vocal about the threat of losing their state jobs and benefits.

If medical services do go private the frontrunner for the contract will undoubtedly be Correctional Medical Services (CMS), the nation's largest private correctional health-care corporation. It is estimated that CMS provides health services to more than 268,000 prisoners at 341 facilities in 30 states.

A closer review of the move by corrections to privatize health care for prisoners reveals more privatization than treatment, and CMS appears to be the worst offender of corrections privatized health car providers.

News reports reveal that many episodes of neglect, involving many cases in which prisoners have died. In an investigative report published by the *St. Louis Post-Dispatch* in 1998 reporters William Allen and Kim Bell recounted the deaths of Jacqueline Reich who died after health care providers in Nevada failed to treat her diabetes; Lorenzo Ingram Sr. who was one of four Alabama prisoners to die after technicians put the wrong chemical in their kidney dialysis machine; and Henry Simmons who died after a heart attack in a Virginia prison when a doctor's order for a test was ignored. In each of these cases CMS was the health care provider and the company settled lawsuits with agreements to keep these accounts secret.

Like most corporations, corrections contractors are in the business to earn money-not lose it. CMS's overzealous cost-cutting tactics for the sake of profit has amounted to death sentences for many prisoners. One CMS employee epitomized the attitude of CMS's cost-saving strategies: "We save money because we skip the ambulance and bring them right to the morgue," the reported comments of Diane Johnson, one of CMS's employees implicated in the death of a Florida county jail prisoner.

The Virginia Department of Corrections has not renewed its contract with CMS and assessed $900,000 in penalties against CMS for noncompliance, said Bill Baskervill of the Associated Press. Virginia's state auditor of public accounts reported that penalties were assessed against CMS for failing to triage in a timely fashion, not assessing medical conditions within 48 hours and not providing timely referral visits.

It is likely that Florida will follow Michigan in contracting with CMS for privatized health care. Michigan's contract with CMS was the product of a closed bid that cost the state 250 million over a five year period. Estimates are not in as to what it will cost the state of Florida, but it will certainly. eclipse Michigan's contract.

While Bill Martin, Director of Michigan's Department of Correctional Services, claims to be comfortable with the choice of CMS, the quality of health care has declined in Michigan prisons. One noted incident shocks the conscience of a civilized society. An emergency referral was written for a prisoner in July 2000. CMS didn't approve the referral until September 2000. Later, a retinal specialist at the Kresge Eye Institute in Detroit verbally criticized and wrote a report that the prisoner was going blind because CMS won't approve the orders to conduct various tests, or bring the prisoner to his appointments in a timely fashion. Nothing was done to save the prisoner's sight, and CMS employees destroyed all the records related to the prisoner's treatment and the Kresge Eye Institute visit on Jan. 31, 2001.

Critics of the private companies say the industry's astounding growth and drive for profit raises cautionary flags. Michael Vaugh, a professor of criminology at Georgia State University in Atlanta, said, "Appalling things are going on in some of these facilities in the name of efficiency, saving money and managed care." He also added, "I've seen enough smoke to know the fires are burning."

As in most cases, the move to privatize is yet another instance of an over-zealous industry that takes advantage of the public's ill-will towards prisoners to provide poor health care, poor food services, etc., all in the name of profit.

[Sources: *St. Louis Post-Dispatch*, 9/28/02; Judicial Process Commission, January 2003] ■

Sexually Explicit Publication Ban Upheld

In 1998 Florida prisoner Richard Davidson, Jr., filed a 42 U.S.C.s. 1983 civil rights action in the U.S. District Court for Southern Florida challenging a ban imposed by the Florida Department of Corrections (FDOC) on prisoners receiving sexually-explicit or adult type publications through the mail. Within two months of the lawsuit being field the complaint was amended to add Komar Company, a Maryland -based company that sells discount magazine subscriptions, and prisoners Thomas Chick, Louis Gaskins, and Ted Herring as petitioners against the FDOC. Komar Company provided attorneys to represent the company and the prisoners, In 2000 the district court judge denied a motion to dismiss the case from the FDOC and it appeared that the case would be going to trial or would be settled by mediation.

By 2001 the case appeared to be going well for prisoners and Komar Co. A mediator was appointed to try to reach a settlement in the case; Richard Davidson and Thomas Chick dropped out of the case as plaintiffs' and prisoners Billy Bostick and Orestes Cruz were added as plaintiffs, and the plaintiffs filed for summary judgment.

In Nov. of 2001 the mediator reported to the court that no settlement could be reached and the court scheduled a hearing on plaintiffs summary judgment motion for Jan. 10, 2002, and if not granted, scheduled the jury trial to begin Jan. 28, 2002.

Plaintiff's motion for summary judgment was denied and the trial rescheduled for June 3, 2002, and the FDOC filed its own motion for summary judgment and plaintiffs renewed their motion for summary judgment. On Aug. 30, 2002, Judge Donald Graham denied plaintiff's renewed motion for summary judgment and granted summary judgment to the FDOC. On Sept. 30, 2002, the judge entered final judgment for the FDOC.

The plaintiffs filed a notice of appeal but then voluntarily dismissed the appeal on Nov. 13, 2002. Subsequently, on Feb. 6, 2003, the district court awarded the FDOC $2,114.86 in costs and the case that so many Florida prisoners had been counting on to uphold their First Amendment rights to be able to receive publications like *Playboy* or *Penthouse* ended in defeat. *Davidson, et at. V. Dept. of Corrections*, et al., Case No. 98-CV-14294 (S.D. Fla.).

[Note: Since the ban on adult publications went into effect in Florida's prisons there has been an increase in the number of prisoner-on-prisoner sexual assaults and a dramatic increase in the number of male prisoners being disciplined for committing obscene acts towards female prison guards involving stalking them and masturbating while looking at them.

Although such is a crime, the FDOC encourages such behavior by imposing only relatively minor discipline for such perversity. It is expected many of those offenders will carry their sexual criminal behavior, that they learned in prison, back to the communities when released. This is apparently preferable to the FDOC than having adult prisoners relieving their sexual urges with a Playboy magazine - BP editor] ■

SPREAD OF DISEASES FROM PRISON RAPE COMPELS CONGRESSIONAL ACTION

The spread of deadly diseases from prison rape has become such a common occurrence in many state and federal prisons that Congress is taking a closer look at the issue. According to Lara Stemple, executive director of the nationwide organization Stop Prisoner Rape, one in five men have been sexually assaulted and one in ten have been raped while in prison. In some prisons, up to 27 percent of women are sexually abused. This abuse, according to Stemple, is not limited to incidents between prisoners, but is also perpetuated by prison guards, as evidenced by frequent reports of women prisoners becoming pregnant while imprisoned.

Finally, Congress is paying attention. The Rape Reduction Act, which has been introduced in both houses of Congress, would establish a national commission to set up standards for reducing and eliminating prison rape.

Congress is almost compelled to act because an estimated 95 percent of prisoners will eventually be released back into the community. Reports show that prison rape is helping to cause the spread of AIDS, herpes, and other sexually transmitted diseases.

Stop Prisoner Rape can be contacted at:
Stop Prisoner Rape
6303 Wilshire Blvd., Ste. 205
Los Angeles, CA 90048
323-653-7867
www.spr.org ■

ANOMALY IN LAW ALLOWED DISPARATE LIFE SENTENCES

by Bob Posey

Florida eliminated parole on Oct. 1, 1983, with the exception of parole still being available for offenders convicted of committing first degree murder, a capital felony, and who received a life sentence, instead of a death sentence, but who could only become eligible for parole after serving a mandatory 25-year term on the life sentence. Recently, I examined in two articles why parole was "allegedly" abolished as part of the criminal sentencing structure in Florida in 1983 – essentially to eliminate indeterminate, disparate and often, biased sentencing – and discussed how the Florida Parole Commission, which was intended to have been phased out in the 1980's, has managed to remain in existence by balancing the number released with the number who have their parole revoked and return to prison largely for technical violations. (See: *FPLP*, Volume 8, Issues 4 and 5, "The Florida Parole Game," Parts 1 and 2). However, disparate sentences were not eliminated in 1983, in fact, for one category of prisoners fair sentencing was actually turned upside down in a perversion of justice that was allowed to exist for over 10 years following the parole-elimination fiasco of 1983.

Prior to Oct. 1, 1983, there existed in Florida laws which classified serious crimes as either a capital felony, life felony, felony of the first degree, felony of the second degree, or felony of the third degree. The only capital felony recognize by Florida law, in which either the death sentence or life sentence with a minimum mandatory of 25-years before being eligible for parole could be imposed, was for first degree murder. On the other hand, under the pre-1983 parole system, persons convicted of what were termed "life felonies," for example: second degree murder, kidnapping, certain sexual battery crimes, armed robbery, carjacking with a deadly weapon, armed burglary, or trafficking in cocaine, could receive any term of years up to a sentence of "life" in prison.

However, such life sentences did not carry a 25-years minimum mandatory like capital felonies did, although if a firearm was used a 3-year minimum mandatory term could be imposed on the term of years up to life or life sentence. Regardless, persons sentenced for "life felonies" were parole-eligible much sooner than those sentenced for a capital felony and who avoided a death sentence by receiving a life sentence with a 25-year minimum mandatory that had to be done before they could even become parole-eligible. Those persons convicted of a life felony essentially became parole-eligible as soon as they were sentenced and could be paroled at any time by the Parole Commission.

The anomaly was created when parole was eliminated for all crimes committed after Oct. 1, 1983, except for capital felonies receiving a life sentence with a 25-year mandatory before parole eligibility. The courts continued to give out life sentences for offenses classified as "life felonies" although parole was no longer available on such sentences. The result was that until May 24, 1994, when the State Legislature enacted a law eliminating parole-eligible life sentences for capital felonies, and making the alternative to death for a capital felony a life sentence without parole, those persons sentenced for "life felonies" to life between Oct. 1, 1983 and May 24, 1994, were actually receiving a harsher sentence than those convicted of first degree murder. Those who received the life sentences for life felonies, e.g. second degree murder, will never have an opportunity to be released on parole while those who received life sentences for capital murder up until 1994 will be eligible for parole after 25 years.

On Apr. 24, 2000, there were 13,275 prisoners in Florida prisons who had offense dates between 10/1/83 and 5/24/94 for life felony offenses. The majority, however, had received a term of years instead of an actual life sentence. But, of the 13,275, 1,213 had received a life sentence, which, in effect, since they will never be eligible for parole, is essentially a natural life sentence meaning they will never be released from prison. The Florida Legislature has failed to take any action to correct that perversion of justice.

CONTACTS

The Florida Corrections Commission is composed of eight citizens selected by the governor to oversee the operation of the Florida Department of Corrections. The Commission makes recommendations to the governor and state legislature concerning problem areas within the prison system. The Commission welcomes input from the public identifying problem areas. The Commission's activities can be found on its website. The Commission is independent from the FDOC.

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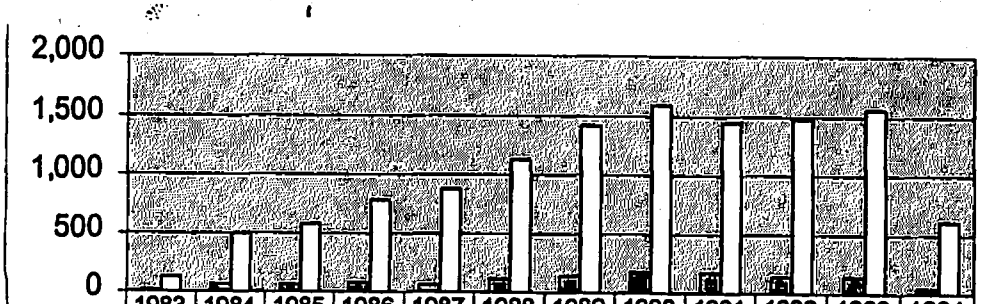
The following chart shows the offenses and number of people who received either a life-without-parole sentence or a sentence to a number of years for a "life felony" between 10/1/83 and 5/24/94.

Denoted Population as of April 24, 2000
Offenses with Sentence of Life/Other

Offense	Life	Other
2nd degree murder, dangerous act	134	1,565
2nd degree murder, commission of felony	12	190
Kidnapping, commission of felony	135	596
Kidnapping, hold ransom	6	18
Kidnapping minor, exploitation	3	16
Kidnapping, assault or terrorize	14	73
Sexual battery by juvenile/victim under twelve	10	70
Sexual battery, threaten with deadly weapon	145	467
Robbery with firearm or deadly weapon	444	5,343
Carjacking with deathly weapon	2	19
Attempted murder law enforcement officer	0	1
Burglary, assault any person	136	1,150
Burglary, armed with weapon	158	1,915
Trafficking in cocaine	14	635
Continuing criminal enterprise	0	1
Trafficking, heroin, etc 150-300k	0	3
Totals	**1,213**	**12,062**

The following chart shows by calendar year the denoted population by the year of offense for those who received a life sentence as opposed to an other than life sentence for a "life felony" between 1983 and 1994.

Number of Life/Other Sentence Population by Year of Offense



	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Life	12	62	63	87	61	104	146	169	170	144	141	54
Other	126	497	568	781	880	1,131	1,410	1,588	1,442	1,478	1,556	605

Around the System

- As reported n the last issue of *FPLP* James V. Crosby, Jr., is now the Secretary of the Florida Department of Corrections (FDOC). Crosby, who was promoted from warden of F.S.P. to Director of the FDOC's Region I after death row prisoner Frank Valdes was brutally stomped to death by a gang of prison guards in 1999, has selected C. George Denman, who has been serving as Director of Region II, to be the Deputy Secretary of the FDOC. Denman replaces Richard Dugger as Deputy Secretary. Unverified reports claim that Dugger has resigned from the FDPC, but will still feed at the taxpayers' trough as a paid consultant to the department.
[Source: FDOC records]

- As of Fe. 3, 2003, there were 75,327 state prisoners incarcerated in the FDOC. That number is up almost 2,000 people since that same time last year. Currently there are 79,022 prison bed spaces in Florida. The Criminal Justice Estimating Conference, which forecasts Florida's prison population, admissions and releases, and the supervised population, estimated in Sept. '02, that by June 2005 there will e over 80,000 people in Florida's prisons. The CJEC estimates there will be almost 90,000 prisoners by June 2008. [Source: Senate Committee on Appropriations, FDOC records]

- In early Apr. 2003 a new 4-week cycle master menu was distributed to FDOC prison kitchens and institutions. Aramark Corp., which private company provides food services in most of the prisons, and Trinity Food Services, which provides food services at a few South Florida prisons, will be required to adhere to the new menu that is applicable at all prisons. The new menu will provide a slight decrease in variety of meals served from the previous 6-week cycle menu and appears to be designed to decrease the cost to the private companies for meals. Portion servings will remain close to the old menu, but more meatless meals will be served and the cold cuts and peanut butter sandwich lunches forced on the FDOC and prisoners by former State Senator Charlie Crist in 1995 (now Attorney General – which is still unbelievable-ed) will largely be abandoned for quick hot lunches including tacos, burritos, etc. Most prisoners will welcome the change as the old menu had been in effect for several years. [Source: FDOC master menu, Apr. 2003] ■

Front Line Activisme

On April 5, 2003, Florida state prisoner and *FPLP* editor Bob Posey, Washington state prisoner and *Prison Legal News* editor Paul Wright, and Louisiana state prisoner and formed editor of the *Angolite*, Walter Rideau, participated in a ground-breaking workshop on prison journalism held as part of the Critical Resistance – South Conference in New Orleans. Bob Posey and Paul Wright appeared through conference calls, while Walter Rideau was represented by Ted Quant, director of the Twomey Center for Peace through Justice. The workshop was facilitated by Lolis Eric Elie, *Times Picayune* columnist and was attended by other free journalists.

The workshop explored the purposes of prison journalism, the challenges and advantages of prison journalism, and strategies for using prison journalism to better educate the public and fight prison expansion in the U. S. The Critical Resistance Conference was organized by community organizations and individuals from 12 Southern states (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia) with support from Critical Resistance, a national grassroots group that is fighting to end the U.S.'s reliance on prisons, police and surveillance as an answer to social political, and economic problems.■

Rally Went Well

The March 10, 2003, rally in the Capitol's rotunda went well this year. Approximately 40 people attended, mostly family members of Florida prisoners who wanted to have their voices heard by our state lawmakers.

The rally was successful in providing a forum for those voices. Many people stepped up to the podium to talk about how having a loved one incarcerated in Florida has impacted their lives. FPLAO Director Teresa Burns-Posey spoke to those attending about the tremendous financial burden being placed on prisoners' families by the Department of Corrections with its exorbitant prison collect telephone rate scheme. Ms. Burns-Posey and rally attendees then visited legislators' offices and other Capitol building offices to talk about and distribute literature about the telephone rate gouging and the FAIR Campaign.

Several people, including prisoners, sent in donations to FPLAO to help finance the rally. That help was greatly appreciated and much needed, a big thanks foes out to those folks.

Florida Institutional Legal Services in Gainesville also deserves thanks. They helped with renting tables for the many displays and a P.A. system. And thanks go out to all FPLAO members who make activities like the rotunda rally and other projects possible through their, Your, continued support. Thank You! ■

Attention Parole-Eligible Prisoners

Over 500 letters were received from parole-eligible prisoners in response to FPLAO's recent notice for those to write who are interested in FPLAO starting a project to do something about the parole problem. FPLAO staff are still in the process of gathering all the necessary information on such a project. Thanks to all those who wrote for their patience. FPLAO should be contacting all those who wrote shortly, by letter, to let you know more about the project.■

Florida Prisoners' Legal Aid Organization Inc.

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not brought up by by humans, are we human? Feral Children – the experiment we are not allowed to carry out – nature v. nurture – genes v. experience?

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.

Copy habits of those creatures around them –

PRISON LEGAL NEWS

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

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

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

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See *PLN*'s Website at:
http://www.prisonlegalnews.org

Email PLN at:
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