FLORIDA PRISON LEGAL

Perspectives

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-Know Your Rights- Public Access to Government Records Often Unlawfully Blocked

by Bob Posey

A first-of-its-kind, statewide audit conducted by 30 Florida newspapers in January 2004 found that local public officials regularly thwart citizens' constitutional and statutory rights to inspect and examine public records.

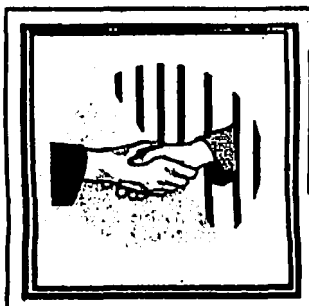
During a one-week period in January the group of Florida newspapers tested how government officials respond to routine requests by citizens to inspect records that are required to be open and readily accessible by the public. Reporters and other media employees posing as regular citizens visited 234 local agencies in 62 of Florida's 67 counties and 6 state agencies to make public record access requests.

Overall, 57 percent of the local agencies complied with the requirements of Florida's public record laws. The other 43 percent made unlawful demands before they would allow access to the records requested or simply unlawfully refused to allow access or turn over the records. The audit showed that while journalists and attorneys, who know the public records laws and their rights associated with them, enjoy the benefits of the laws, the same rights are not always observed for other Florida citizens.

Of the six state agencies approached for records five complied with the access laws with no problem. One, however, Gov. Jeb Bush's office failed to comply. When a volunteer requested records from Bush's office she said she was told she would have to give her name and address and fill out or sign a request form – a clear violation of the open records law, which ensures anonymity when the requestor desires not to be identified.

During the audit, which was organized by the Florida First Amendment Foundation, the *Sarasota Herald-Tribune* and the Florida Press Association, public officials lied to, harassed and even threatened volunteers who were simply exercising rights established in Florida's Constitution and Laws. Those rights were established to give citizens the power to watch over governmental activities.

In six counties volunteers were erroneously told that records they had requested didn't exist. Many officials demanded to know who the volunteers were and who they represented and what they intended to do with the information – all questions that shouldn't be asked and do not have to be answered, according to the law. One volunteer, a *Sarasota Herald-Tribune* reporter, was almost arrested when he calmly declined to sign-in at the front desk at the Charlotte County School District. Instead, he asked to remain anonymous and have the



ON THE INSIDE

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

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

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

FPLP is automatically sent al all members of FPLAO, Inc., as a membership benefit. Membership dues for FPLAO, Inc., operate yearly and are $9 for prisoners, $15 for family members/individuals, $30 for attorneys, and $60 for agencies, libraries, and institutions. Family members or loved ones of prisoners who are unable to afford the basic membership dues may receive membership for any size donation they can afford.

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

records delivered to the lobby for his review. While one official said he would look into the request, a security officer called the sheriff's department to report a "suspicious person." Later, officials admitted they weren't aware that public records laws specifically provided that records may be access by citizens without giving their name.

"Basically, its not the government's business why a member of the public wants a record," said Pat Gleason, general counsel for the state's attorney general. "The desire of government to impose procedural roadblocks...directly conflicts with a citizen's right of access."

Instead of quickly responding to volunteers' record requests, many officials asserted needless and unauthorized bureaucratic requirements, or bounced requestees from one office to another. At almost half the agencies approached, someone looking to obtain a copy of or just see what should have been easily accessible records during a lunch break would have walked away empty-handed.

Suspicion and Fear

Since 1909 Florida law has guaranteed citizens access to public records. In 1993 the right was written into Florida's Constitution, which provides at Article I, Section 24:

"(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."

Florida is only one of a handful of states that has adopted such powerfully protected rights to access public records.

Further, Florida law unambiguously sets forth the legislative intent in enacting the Florida Public Records Act,[1] wherein it is stated:

"It is the policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person."[2]

The law provides that the public can inspect and obtain a copy of any document (with payment for copying costs) generated by the government, unless there is a specific statutory exemption for specific confidential records. Records that must be made accessible to the

public include all manner of written communications to or from an agency, investigation reports and results, financial records, personnel files, books, tapes, photographs, computer-generated or stored materials, etc.[3]

The mandatory nature of Florida's public record laws, found in Chapter 119 of the Florida Statutes, is emphasized by mandatory language, which orders that:

"Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so..."[4]

And, the law removes any doubt as to the mandatory nature of the Public Records Act by establishing relatively stiff penalties against public officials or employees who fail or refuse to comply, where it is stated that:

"Any public officer who shall violate the provisions of section 119.07(1) shall be subject to suspension and removal or impeachment and, in addition, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."[5]

and:

"Any person willfully and knowingly violating any provisions of this chapter [FLA. STAT. 119] is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.02 or s. 775.03."[6]

Yet, despite the clarity of the law and seriousness of failing to comply with it, many public officials and employees react with suspicion and fear when confronted by public record requests. Such reaction was exemplified in the recent media audit.

Audit volunteers were directed to ask for documents that should have been easy for officials to produce: 911 call logs from sheriffs' offices, city manager job reviews, county administrator e-mails and school superintendent cell phone bills. At many agencies, requesting such documents immediately sparked suspicion and apparent fear.

In one case the administrator for Broward County threatened a volunteer who requested to see e-mails, saying, "I can make your life very difficult." Questioned later, the administrator said the volunteer was suspicious where he declined to identify himself. Other officials across the state cited a number of arbitrary reasons for thinking the volunteers were suspicious, including hair length, causal dress and, in one case, "the look in his eyes."

Mary Kay Cariseo, executive director of the Florida Association of Counties, said people need to understand that making a public records request can be threatening to public officials. "You're not looking at e-mails to do something good," she defended. "You're trying to find something. You're trying to dig something up when we're trying to be good public servants and run our government."

Looked at differently, Sandra Chance, executive director of the University of Florida's Brechner Center, a nonprofit organization that studies and serves as a resource on public record laws, said the ability to inspect government records lets the public police officials who are paid with taxpayers' monies.

"The law clearly says that public agencies cannot institute any kind of requirements that inhibit access, or chill this right of access, including requiring people to give their names," Chance said. "Sometimes I think bureaucrats forget that the purpose underlying all of this information is to serve taxpayers." If Florida agencies are going to improve their performance with public records, changes will have to start at the top, said Chance. Government employees need to feel safe turning over all public records, even those that may embarrass their superiors. Otherwise their first reaction will be suspicion and fear when a citizen walks in and requests public information.

One problem that may contribute to officials' and employees' perceived safety in denying or stonewalling public record requests is the general public's lack of knowledge about the law and the criminal aspect of denying or blocking public access to records. If more citizens pressed charges against public officials and employees who intentionally stymie access to records, as the law provides for, then no doubt there would be more accommodation.

Requesting Public Records

Florida's Public Records Act does not establish any specific procedures that must be followed by persons seeking public documents. Requests may be made verbally or in writing, either carries the same force. Knowing, however, that public officials or employees may be hesitant to allow examination or copying of requested records, it would be prudent to make requests in writing whenever there is any concern that there may be resistance to the request. Such written request does not have to be in any specific form and may be a simple letter stating it is a public records request and identifying the material being requested. A copy of the written request should be retained and, if requested through the mail, the request should probably be sent Certified Mail-Return Receipt Requested so that it can be verified later that the request was received, if it becomes necessary to force production of the requested records.

When record requests are made by mail the public official or employee receiving the request should timely respond notifying the requestor of the cost of photocopying the documents, and provide such copies upon payment of the cost. Florida law provides that for photocopies of less than 8 ½" by 14" an agency may

charge 15 cents for one-sided copies and no more than 20 cents for double-sided copies.[7] If the requested document is larger than that, or if it is a photograph, audio or video tape, or other such material, then actual cost of duplication may be charged.

Additionally, if the nature of the records requested requires extensive time (over 15 minutes) to retrieve and copy or to examine in the presence of the record custodian, then a reasonable service charge may be charged to cover the salary of the clerical assistance or supervision.[8]

Compelling Production of Records

As found in the recent media audit, often when citizens request public records they meet resistance, suspicion and fear from public officials and employees. An amusing example of such occurred recently as relayed to Teresa Burns Posey, chairman of Florida Prisoners' Legal Aid Organization, by an aide to a state legislator. The aide was somewhat amazed when he contacted the Florida Department of Corrections requesting copies of records concerning the prison collect-call telephone system only to be told by a DOC employee that, "We don't have to give you those records." Asserting his position as an legislative aide, the records, of course, were finally provided. When Burns Posey was told of the incident she laughed and told the aide, "Well, its good to know that it's not just us public peons that are treated that way."

Most members of the public have little or no idea what to do if and when their requests for public records are refused or blocked. When stymied by public officials or employees in their quest for records, most people tend to give up their intent to obtain the records, either through not knowing what else to do or seeing it as more hassle than its worth. That contributes to the problem. When public officials or employees see that resistance works they are encouraged to continue using it.

So, what can be done to overcome resistance to requests for public records?

The state attorney general's office maintains an informal, voluntary mediation program to help the public resolve public record conflicts with agencies. When a member of the public makes a complaint, that office will assign someone to mediate the public record access problem. For more information about the mediation program, contact the Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; telephone (850) 488-9853.

If unable to resolve the problem with the AG's mediation program, or simply not interested in it, any person who has been denied the right to inspect or copy public records may bring a civil action in the circuit court to enforce their rights establish in the Florida Public Records Act. Before filing such a lawsuit, a request must be made for the requested records to the person having custody of them. Such request should be made in writing so that proof exists that the request was made. The type of civil action to be filed will generally be a Petition for Writ of Mandamus. That type civil action is used to ask the court to order a public official or employee to perform a duty required by law or rule. Further, the law provides that when such an action is filed seeking to compel production of public records that it will take priority over all other pending cases before the court and be afforded an immediate hearing.[9] And, in apparent recognition that the average citizen will not be familiar with filing civil actions, the law also provides that if a court determines that an agency unlawfully refused to permit a public record to be inspected, examined or copied, the court shall award costs and attorney fees to the prevailing person.[10] Since such actions are usually very simple and quick, it is usually very easy to obtain a lawyer to represent the action.

Conclusion

The intent of this article is to report on the recent statewide media audit and provide general information concerning public record access. The rights associated with such access are strong in Florida. Since so much of everyday life now involves dealing with a variety of public officials and employees and bureaucracies, it is important to understand what your rights are in association with the records kept by local and state agencies. [11] If you desire more information about public records laws and access in Florida, the First Amendment Foundation publishes a definitive manual on the subject that is prepared and updated every year by the Office of the Attorney General. That manual costs $12.95 and can be ordered from: First Amendment Foundation, 336 E. College Ave., Ste. 300, Tallahassee, FL 32301, 850-222-3518 or 1-800-337-3518.

End Notes

1. Florida Statutes, Chapter 119. Available on the Internet at www.leg.state.fl.us (under "Statutes" section).
2. Florida Statute, Section 119.01(1).
3. Florida Statute, Section 119.011(1).
4. Florida Statute, Section 119.07(1)(a).
5. Florida Statute, Section 119.02.
6. Florida Statute, Section 119.10(2).
7. Florida Statute, Section 119.07(1)(a).
8. Florida Statute, Section 119.07(1)(b).
9. Florida Statute, Section 119.11(1).
10. Florida Statute, Section 119.12(1).

11. Prisoners: Prisoners have the same right to access public records as the general public, except concerning records of the Department of Corrections. Prisoners seeking records from the FDOC should review s. 945.10, Fla. Stat., to understand the limitations and procedures associated with their requesting and obtaining FDOC records. Due to the limitations and hurdles in s. 945.10, it is often easier for prisoners to have a free citizen request and obtain FDOC public records for them. ■

-UPDATE-
Class Action Access to Court Case

In Volume 9, Issue 4 of *FPLP* we reported on and printed the final order granting summary judgment to the Florida Department of Corrections (FDOC) in a class action case filed on behalf of all Florida state prisoners alleging that certain rules, practices and policies of the department deny prisoners adequate access to the courts in violation of the Florida Constitution. (*FPLP*, Vol. 9, Iss. 4, "Circuit Court Grants FDOC Summary Judgment on Denial of Access to Court Claims, Appeal to Follow," pgs 25-29.) An appeal was filed challenging the Second Judicial Circuit Court's summary judgment order, and on December 8, 2003, the final appellate brief was submitted to the First District Court of Appeals in the case. Due to the importance of this case to all Florida prisoners, this article provides a summary of the appellate briefs that are now under consideration by the appeal court in *Henderson, et al. v. Crosby*, et al., L.T. Case No. 2001-CA001307, First DCA Case No. ID03-2367.

Brief History

Over thirty years ago Florida prisoners challenged the FDOC's failure to accommodate the right to access the courts and lack of law libraries or other constitutionally-adequate means of facilitating court access. That case, *Hooks v. Wainwright* (né *Singletary*, né *Moore*) was responsible for the FDOC electing to establish law libraries in Florida's prisons. The *Hooks* case was litigated in federal court and *only* involved federal claims and what was required under the federal Constitution. That case was terminated in December 2000 with the federal court finally approving the FDOC's prison law library system and finding it adequate to meet the minimal federal constitutional requirements as set forth by the U.S. Supreme Court in *Lewis v. Casey*, 518 U.S. 343 (1996). The *Lewis* court had held (retreating from prior case decisions) that prison officials are only "required to supply access to legal material that enables inmates to ascertain their legal rights concerning the conditions of confinement and to attack their sentences." Pointedly, the Supreme Court said the federal Constitution does not require prison officials to provide access to legal books, materials or assistance to enable prisoners to litigate or defend against any other type legal action that does not involve their conditions of confinement or criminal sentences.

As soon as the *Lewis* decision was released, the FDOC started removing all law book and legal materials from its prison law libraries not related to conditions of confinement or criminal law and began implementing new policies to scale back prisoners' access to the law libraries. Then, following the termination of the *Hooks* case, the FDOC went even further.

Within a few months of the Hooks termination the FDOC removed all typewriters and word processing equipment from the law libraries and implemented new rules reducing the amount of hours the law libraries must be open (to 25 hrs. per week) in addition to reducing the number of prisoner law clerks available to assist other prisoners. Unofficially, funding for supplies, such as pens and paper, were also reduced for the law libraries. Concurrently, the FDOC began trying to adopt new rules to limit the amount of materials that prisoners may receive through the mail, including written legal materials.

In May 2001, when the FDOC removed the typewriters and word processors from the law libraries, three prisoners petitioned the Florida Supreme Court for an emergency writ of mandamus and temporary restraining order seeking restoration of the typing equipment and access to the legal materials stored on disks and the hard drives of the equipment. The state Supreme Court transferred the case to the Second Judicial Circuit Court, where two months later attorneys from the law firm of Holland and Knight appeared pro bono to represent the prisoners. Subsequently, the petition was amended to raise new claims alleging that cumulative actions by the FDOC act to deny state prisoners adequate court access and denied due process as guaranteed under the Florida Constitution, which affords a higher level of protection than the federal Constitution. The case was certified as a class action covering all state prisoners.

Both parties agreed that the circuit court could resolve the matter on their cross motions for summary judgment, based on the motions, memorandums of law, a joint stipulation of undisputed facts and oral argument.

Although the complaint for prisoner plaintiffs relied *solely* on the Florida Constitution to support the claims of constitutional defects, the circuit court, relying of federal precedents, specifically the *Lewis* decision, and a limited interpretation of *Mitchell v. Moore*, 786 So.2d 521 (Fla. 2001) (which referenced the Lewis case), determined that the constitutional right of access to court

is the same under the federal and state Constitutions. Summary judgment was thus granted to the FDOC. (See: *FPLP*, Vol. 9, Iss. 4)

On June 3, 2003, prisoners' attorneys filed a notice of appeal on the circuit court decision, and on June 12, 2003, filed a Suggestion of Certification for Immediate Resolution by the Supreme Court to the appeal court, which denied the suggestion.

The parties then filed an initial brief and answer brief and then, recently, filed amended briefs finalized with the reply brief filed on December 8, 2003.

Issues Raised on Appeal

The main thrust of the prisoners' appeal is the position that the lower court erred by equating the explicit state constitutional right of access to the courts to the minimal implicit federal counterpart of that right as diluted by *Lewis v. Casey*, supra. It is argued that since the state constitutional right of access to the courts is explicit and fundamental, and applies to all Floridians, including prisoners, that the lower court erred by not subjecting the prisoners' claims to a required "strict scrutiny analysis." Such an analysis would require the FDOC to demonstrate a compelling governmental interest to place any limits on prisoners' access to the courts, in addition to narrowly tailorly any actions to limit such right to meet any compelling interest that could be demonstrated. It is argued that the Florida and federal rights of access to the courts are distinct, with the federal implicit right forming the "floor", or lower minimal standard, while the Florida explicit right forms the "ceiling", or higher protected standard.

The prisoners' amended brief goes on to argue that the lower court "collapsed the floor and ceiling together when it found that Florida prisoners are entitled to no greater right of access than that afforded by the federal Constitution...as interpreted [by] Lewis." Essentially, the asserted position is that the Florida Constitution's right to court access guarantees prisoners the same right as any citizen to seek redress for any civil wrong and is not limited to only seeking redress for condition of confinement wrongs or to challenge criminal convictions and / or sentences, as under the federal Constitution, as interpreted by *Lewis*.

Further, the prisoners' brief argues that Florida's constitutional right of court access is not limited to state courts, as asserted by the FDOC. Instead, it's argued that the plain and explicit language of the Florida constitution protects the right of prisoners to file and litigate in state and federal courts and in administrative forums, such as in immigration and veteran matters. The brief points out one vast difference between Florida and federal law on access to court where the *Lewis* court explained that under the federal Constitution prisoners alleging a denial of court access must show "actual injury." No such requirement exists under Florida law in order to obtain a declaration to defend an asserted legal right.

Therefore, the brief continues that the FDOC's removal of legal research materials from the prison law libraries concerning topics such as immigration, racial discrimination, disability rights, veteran benefits, family law, etc., and removing form and sample pleadings, along with reducing law library hours and research assistance from trained law clerks and other prisoners, while failing to provide adequate supplies and removal of word processing equipment, on top of limiting written materials in incoming mail, impermissibly impairs prisoners' access to court under the strict scrutiny analysis required to be applied by the Florida Constitution.

The FDOC counters in its answer brief, claiming that strict scrutiny analysis does not apply where there has been no affirmative, or formal, restrictions or impediments enacted by statute or agency rule to impede or diminish an established right to court access enjoyed by prisoners. Instead, the FDOC asserts, its various "policies and practices," as complained of, are informal actions not reviewable under the strict scrutiny test.

The FDOC continues its answer brief to argue that the right of court access in the Florida Constitution only applies to access to Florida courts. To support that position several cases are quoted from where they used language such as, "The right of access to *our courts* is constitutionally protected," and "*Florida courts* shall be open to every person..." Further, it is argued, the Florida Constitution cannot protect a right to file claims in federal courts or administrative forums.

Additionally, the FDOC claims that the Florida Constitution only guards rights that existed at common law or by statute *prior* to enactment of the Declaration of Rights of the Florida Constitution. Hence, the Florida Constitution cannot require the department to furnish prisoners with legal materials related to the Americans with Disabilities Act of 1990, for example, because such Act was not enacted prior to Florida's Declaration of Rights. Further, it's argued that it was not error for the lower court to rely on federal precedent where there is no Florida precedent providing greater rights of access to court than held in *Lewis*.

The answer brief then addresses each of the "policies and practices" complained about and relying largely on affidavits and depositions from FDOC "experts" or employees explains away any suggestion that they work to deny or impede prisoners' access to court.

In the prisoners' reply brief it is pointed out that the FDOC advanced inconsistent positions in the answer brief, asserting that the department has "no affirmative obligation under the Florida Constitution to provide legal materials of any kind to [prisoners]", yet also arguing that the state and federal Constitutions are co-extensive, necessarily acknowledging that under *Lewis* provision of

legal materials is required for at least two categories of legal actions.

The reply brief also calls the FDOC's argument, that strict scrutiny review is limited to only formal actions of the legislature or an agency, an "absurd argument." The reply brief cites to U.S. and Florida Supreme Court case law wherein those courts applied the strict scrutiny standard to cases involving informal customs, policies and practices of government actors.

The reply brief also counters the FDOC claim that only causes of action that existed at common law or prior the enactment of Florida's constitutional Declaration of Rights are actionable under the Florida Constitution's right to access the courts. It's explained that *only* the Legislature can limit access to court for post-Act claims. The Legislature *has not* placed any limits on ADA claims, for example, and the FDOC cannot exercise authority, which rests with the Legislature.

The prisoners' briefs conclude by asking the appeal court to reverse and remand with directions for the trial court to declare that (1) the Florida Constitution creates a higher standard than the federal Constitution, and provides prisoners with the right of access to the courts to prosecute and defend all civil, criminal and administrative matters, state or federal, not just challenges to sentences or prison conditions; (2) that under the Florida Constitution prisoners need not prove "actual injury" to challenge state actions; and (3) that the FDOC's challenged actions and omissions significantly burden, obstruct, restrict, and infringe prisoners' ability to access courts. Further, directions to the trial court are requested to enter judgment in favor of prisoner plaintiffs on liability, and direct the FDOC to prepare a remedial plan to address the constitutional deficiencies.

Comments

To help understand the positions and issues on appeal in the *Henderson* case it would be useful to review the circuit court's summary judgment order which was reprinted in *FPLP*. A copy of that order was also furnished to all prison law libraries.

It would also be beneficial to review the Joint Stipulation of Undisputed Facts that was filed in the circuit court, which documents the rules, policies and practices that are alleged to cumulatively impede prisoners' court access. Unfortunately, space limitations here prevent detailing that Stipulation.

Now that all the briefs are filed in the appeal, a decision can be expected from the appeal court in the next several months. Regardless of the appeal court's decision it may very well be that this case finds its way back to the Florida Supreme Court for final resolution, which would likely be best for prisoner plaintiffs.

On the appeal, assistant attorneys general Joe Belitzky (formerly on the FDOC's general counsel staff) and Sean F. Callaghan are representing the FDOC. Attorneys Stephen F. Hanlon, Robin L. Rosenberg and Susan L. Kelsey from the law firm of Holland and Knight are representing the Florida prisoner population.

FPLP will provide further updates on this case as it proceeds. ■

The Close Management Odyssey: Credit Where Credit is Due

by Mark Osterback

Even since the notice of proposed settlement in the Close Management (hereinafter "CM") litigation (*Osterback et al. v. Moore et al.*, Case No. 97-2806-CIV-HUCK) was posted, I've become somewhat of a household name in the Florida Department of Corrections (hereinafter "Department"). Thankfully, this has abated over time as I've never quite felt comfortable enduring the adulation and scorn this unwanted celebrity thrust upon me.

The reason for my discomfort is that I'm undeserving of such an honor. Why? Because, while I did have must to do with getting the case started, my involvement in what we eventually achieved was minimal. Now that I'm in a position to do so, I feel the need to give some recognition to those whose names have become lost in the shuffle.

It was late summer 1996 when I was placed in CM III status based on several disciplinary reports (hereinafter "DRs") received at Gulf CI a few months previous. The DRs, which caused me to be recommended for CM review, were subsequently overturned on appeal, but only *after* I'd already been placed in CM. Efforts to reverse the CM review team's decision due to the DRs' expungement were not successful. Of course, had I succeeded, my name would not now be synonymous with this infernal housing status.

During my stay at Washington CI awaiting the CM review Gulf CI staff had arranged for me, the stark reality of what the 1995 revision of the CM rules had wrought upon the prison system was brought home to me. Scores of prisoners had been recommended for CM placement for no other reason than their receipt of a couple minor DRs or even just one. Some had merely been under investigation and one fellow I spoke with had done nothing more than arrive at Washington CI after having previously been on CM several years earlier. For certain, something was amiss. Although these prisoners had only been *recommended* for review to determine whether CM placement was appropriate, as anyone who's been in CM knows, once served the "green sheet" placement is all but a foregone conclusion.

Of course, there *were* also prisoners who had committed, or were accused of committing, the types of things that were what traditionally landed one in CM prior to 1996 (e.g. armed assault, assault on staff, escape, etc.).

They were the exception though. The fact that an entire quad of a butterfly dorm at Washington CI was reserved strictly for prisoners awaiting CM review is indicative of how radically the CM program had changed.

This change was the result of a comprehensive overhaul of 33-3.0083, Fla. Admin. Code, which became effective in late 1995. The rule was scrapped in its entirety and a new chapter section was created, 33-38 (later renumbered to and presently existing as 33-601.801-.813). In this new rule, previously unwritten policies and procedures were codified, greatly expanded criteria for placement in CM were devised, a new level of CM was created (CM III) and finite terms were ascribed to each level. Additionally, for the first time there was no requirement, as had previously existed, that CM prisoners be single-celled. Perhaps the most ominous aspect of this new rule was the demise of the provision designating Florida State Prison, Union CI, Hardee CI, Martin CI, Charlotte CI and North Florida Reception Center, as the only institutions permitted to house CM prisoners. Under this former provision along with the requirement of single-celling CM prisoners, the total statewide CM population had never exceeded 1500.

This seemingly innocuous omission caused a revolution in the CM program by opening the door for any institution to join the CM club. Between late 1995 and 1997 CM units sprang up all over the state. By early 1998 the number of institutions with CM units had increased by 200% from their pre-1995 levels, with another 4-5 institutions awaiting approval to open CM units. There were even rumors that *Avon Park CI*, of all places, was to get a CM unit! This expansion swelled the statewide CM population beyond 3500 with a potential to surpass 4000.

With no real unrest or turmoil within the prison system, which the Department seemed to have braced itself for by expanding the CM program, there was a surplus of CM beds and a dearth of eligible candidates who would have qualified for placement under the previous criteria. It was into this state of affairs I found myself, along with hundreds of other prisoners, housed 24 hours a day in concrete and steel boxes in sensory depriving confinement.

Washington CI staff decided to place me in CM III status and I was sent to Okaloosa CI as no CM III prisoners were housed at Washington CI. Once settled in, it wasn't long before I began noticing the myriad problems the rapid and ill-conceived expansion of the CM program had brought about. Use of chemical agents was rampant, physical abuse less so but still prevalent, bogus DRs were routine and overt psychological abuse was commonplace.

The worst condition, however, imposed by this new regime was double-celling. It created a great deal of tension, stress, and physical violence among cellmates. Once reason was the failure by staff to ensure compatibility before forcing two prisoners to live together and an unwritten policy which prohibited separation of incompatible cellmates *unless and until* one was assaulted by the other. This condition was exacerbated by the fact that the protective custody rule prohibited any CM inmate from seeking protection in such a situation. As all CM housing had previously been single-cell there was not a need to extend protective custody to CM inmates, but in removing the single-cell requirement, Department staff overlooked the prohibition contained in the protective custody rule, to the detriment, no doubt, of many CM prisoners. This oversight was eventually corrected in 1998 through a rule change.

Something had to be done. I wanted to try and effect a change as the thought of doing nothing was more intolerable than the conditions and treatment I was suffering. At that point I had only vague notions of what I could do. So, I began observing and documenting everything that went on to amass a factual record which could later be brought to light. I also began ordering cases on prison conditions and information on how to challenge them. This, in itself, was a herculean task as the first obstacles on the road to challenging the CM program were law clerks who didn't think I should be ordering the permitted 15 research items on each request.

After 4 months at Okaloosa CI my mental health underwent a rapid deterioration and I was sent to the Crisis Stabilization Unit at North Florida Reception Center. Following my release, I was housed in the cellblock where a fateful meeting took place between myself and Frank Bass. Frank is someone who can be described, in a word, as "driven" (no pun intended). Anyone who knows or has met Frank won't soon forget him.

Frank and I had both been in CM before the new rule came about and saw the changes it had caused. Through the cellblock's bars we discussed at length the problems created by the new rule and what the long term implications of an ever expanding CM program meant to the prison system as a whole. It was these discussions which were the genesis of what would later become the CM litigation.

Frank informed me that Billy Van Poyck had wanted to bring a challenge to the new rule ever since its promulgation, but being housed at FSP meant his choice of venue lay either in the U.S. District Court for the Middle District in Jacksonville or the Northern District in Tallahassee. Billy felt, and Frank agreed, that these courts would not be receptive, and quite possibly would be hostile, to any such litigation. In order to have a chance, the challenge would have to be filed in the U.S. District Court for the Southern District where a more even-minded judiciary could give the claims an objective hearing. Filing in this Court would also enable the Florida Justice Institute to become involved as they were located there. Therefore, someone capable of exhausting the grievances

and filing the complaint must do it from the CM unit at either Martin CI, South Bay CI or Everglades CI.

Before Frank was returned to FSP, he gave me the name and address of an attorney Billy had been in touch with concerning a potential challenge to the CM program. As my psychological grade had changed, it was possible I could be transferred to one of those institutions. Frank said that if I were sincere about trying to change things, deeds, not words, were the means to bring it about and contacting this attorney would be the first step. (I have not named this attorney for fear he could suffer some kind of professional repercussion.)

Fortuitously, I arrived at Everglades CI in March 1997 but was reluctant, however, to begin any litigation because I'd been informed during my initial CM review hearing there that I'd be released if I gave them 60 days "clean." Why I ever believed this escapes me. If only these inveterate prevaricators had kept their word to me, the CM program might still be the quagmire it was. Thankfully for us, the truth, it seems, is just not in them. Their perfidy only served to fuel my resolve to bring the challenge to their CM program and see it through to its conclusion.

My first step was, as Frank suggested, to contact the attorney. He gave me input and suggestions on facts to be presented and claims to be made which he and Billy had discussed. He also instructed me on the basic mechanics of actually bringing my complaint before the Federal Court and what it would entail. I was not a newcomer to civil proceedings, but I'd never attempted anything on this scale. These suggestions and advice proved invaluable later.

And so it began, as it usually does, at least in prison, with the filing of grievances. About 30 different issues were exhausted, some I'd come up with and some suggested by the attorney. I also decided I'd need 2 co-plaintiffs, each in CM I and CM II status so the challenge to the rule would be all inclusive. They would also have to exhaust grievance issues relative to their own statuses. Thus I began a search for candidates. Once again prisoners became my biggest detractors and the obstacles to fulfilling my mission. They didn't want to get involved, didn't think there was any chance for success, didn't want to "waste" their zoom-zoom and wham-wham money on court filing fees, feared staff retaliation or simply didn't want to *copy* the substance of the grievances onto the forms. Finally, there emerged two prisoners who refused to be cowed, who refused to be persuaded by defeatist attitudes, who felt it was better to try and fail than to never try, and stepped up to embark on the difficult cause of action with me. Thomas Gross (CM I) and Darryl E. Williams (CM II) earned my respect for their act of selflessness in joining me.

Our first hurdle, getting the grievances filed, responded to and having them delivered to me was a task in itself. Thanks are in order to two prisoners who aided in collecting documents, evidence, ferrying pleadings between plaintiffs and keeping me abreast of developments in the CM unit once I was released: Roberto Del Sol and William Glenn. Without them I doubt seriously the complaint would have been filed.

At last, the complaint was filed in August 1997 in the U.S. District Court in Miami. Instead of splitting the $150.00 filing fee 3 ways, as I erroneously advised my co-plaintiffs would be the case, we were each assessed a $150.00 filing fee. This was the first of many burdens the coming years would place on the 3 of us. I had the additional burden of several hundreds of dollars in photocopy liens attached to my account. In regards to this, I felt the vindication of my constitutional rights was more important than my ability to use my account. (This feeling was aptly summarized by the late James Quigley "Bang 'em up every chance you get. F... a soda."

The original complaint and the amended complaint filed two months afterward challenged the procedures for placement; criteria for placement; inadequate review mechanisms; double celling; conditions of confinement; lack of recreation, legal and religious access; and restrictions on visitation canteen and property. Perhaps because of its size and the number of Defendants, it took almost a year for the amended complaint and its appendix to be served. By then I was no longer housed in CM or even at Everglades CI. Tom and Darryl therefore caught the brunt of staff's wrath at Everglades CI for their involvement.

From the beginning, my strategy was always to convince the Florida Justice Institute (hereinafter "FJI") to weigh in as our attorneys and seek class certification. I had no illusions that by ourselves the three of us could conduct the massive discovery or hire the necessary experts we would need if we hoped to prove our claims. Additionally, without counsel we'd never have a class certified by the court. So, it was to my utter relief that in late 1999 both FJI and Florida Institutional Legal Services agreed to represent us.

As neither myself, Tom, nor Darryl remained in CM at this point, the representation agreement we signed provided that we would be dropped as Plaintiffs upon the filing of a second amended complaint. This was fine with us as our motivation for bringing suit had always been to try and bring sanity to the CM program, rather than personal notoriety.

How was it then that I remained as lead Plaintiff? When the Department moved to dismiss they accused our counsel of trying to start a new case with a new set of Plaintiffs. As I had exhausted several issues none of the new Plaintiffs had, I was retained because, under 42 U.S.C. § 1997e(a) exhaustion is mandatory *prior* to bringing suit. Moreover, because I'd been in CM twice, had an extensive disciplinary record and was serving a life sentence, my release from CM status did not moot my claims. This is a prime example of the "capable of

repetition yet evades review" exception to the mootness doctrine. There was a reasonable probability, given my unique circumstances, that I could be returned to CM and again be affected by the challenged rules. So I was retained while Tom and Darryl were dropped when the second amended complaint was filed in November 1999.

The new complaint added a dozen or so new Plaintiffs FJI and FILS had recruited, each with, so it seemed, his own personal nightmare of experiences in CM. The new complaint also distilled all our previous claims into a single claim—that the totality of the circumstances in CM caused an overall deterioration in physical and mental health and constituted cruel and unusual punishment. I no longer have this document and, lamentably, can only recall the names of two of my co-plaintiffs: Frank Lowry and Alvin Few. Although I have no firsthand knowledge of what they had to endure through their involvement, based on my own experiences in the Department, I'm certain they all suffered retaliation to one degree or another. It's just the nature of the beast.

Once we were represented by counsel, things progressed swiftly. Within 8 months the Department's motion to dismiss was defeated and a class was certified. Discovery commenced soon thereafter. It was less than a year after class certification that the department signaled a willingness to settle the claim. It was the attorneys and staff at both FJI and FILS who deserve the lion's share of credit for the generous settlement terms extracted from the Department. A pro-se prisoner could have never dreamed for such in the short time span in which it occurred.

There have been some prisoners I've encountered who've accused the attorneys of selling us out and not holding out for better terms or concessions. I would point out that Judge Huck himself stated the Department's settlement terms were far more generous than anything he would have ordered. These naysayers remind me of the admonition my friend David Beebe would give whenever I'd rage about what I perceived were the failings of Florida Prison Legal Perspectives: "Where's your newsletter Mark?" Yes indeed, to those who cast aspersions on what was accomplished I'd make the same admonition: "Where's you lawsuit?"

Today, the CM program is far better than it was in 1996 when I entered it, even where the Department hasn't strictly adhered to the terms of the settlement agreement. Progress, when it comes to prison litigation is slow and measured in small increments. No matter how small the improvements may have seemed to some, they were improvements nonetheless.

For those now in CM status who are reading this, I'm glad to have been able to help ease your lot. I was never able to enjoy the fruits of our labor (nor do I have a desire to), but given the chance would do it all over again. For those who've never been in CM and for those who have but are now in population, I sincerely hope you all can look to what *we did* and gain some inspiration. Only through such a unity of purpose can anything truly be accomplished. And for those persons whose names I mentioned above, who, while contributing to the struggle, never shared in the celebrity (and infamy) our victory unwittingly bestowed upon me alone, I hope what I've written here will, at long last, give you the credit you all deserve.

CM Litigation Update

Recently the CM litigation underwent a change in judges. A conflict of interest arose when Judge Huck's son became the Chief Assistant Attorney General for the Southern District. As a result Judge Huck recused himself. The new judge is Judge Graham. It is not known, and yet to be seen, whether this is an improvement or not.

According to our class counsel, the injunction in the CM case was going to be dissolved under the time limit provisions for same in the Prison Litigation Reform Act (PLRA), but that they were going to court with evidence of the Department of Correction's non-compliance with the injunction. This would extend the time on the decree should the judge give us a favorable ruling.

Finally, according to our class counsel, the Department has moved to change venue to the U.S. District Court for the Middle District of Florida in Jacksonville. The basis for their motion is that there are no longer any Close Management units in the Southern District. Attorney Peter Siegel spoke with me recently and we discussed this development and he wasn't sure at that time whether to oppose that motion of not. One thing is for certain, transferring the case to Jacksonville would not be in our best interests. ■

-Book Review-

Disciplinary Self-Help Litigation Manual. *Daniel E. Manville, P.C., author and publisher, 2004, softcover, 421 pages, prisoner price $34.95, non-prisoner price $64.95 (includes shipping and postage). Order from: Daniel E. Manville, P.C., P.O. Box 20321, Ferndale, Michigan 48220.*

Review by Sherri Johnson

Prisoners interested in defending themselves or assisting their fellow prisoners with in-prison disciplinary charges and proceedings now have a new and powerful weapon in their arsenal. That weapon is the brand new *Disciplinary Self-Help Litigation Manual* by Daniel E. Manville, attorney and co-author of the widely-known *Prisoner's Self-Help Litigation Manual, 3rd Edition.*

If there's one thing common about being in prison, it is that at some point you very likely are going to run afoul of the rules. Prisons have lots and lots of rules, too many to memorize and many that just don't make good sense. But break just one rule and the odds are you're in fairly serious trouble, facing confinement and loss of gaintime, or visitation and other privileges, or extra work. The same can happen even when you didn't break a rule, but are charged with it all the same. And, if you're like most prisoners, you know you have some rights associated with in-prison disciplinary proceedings, but don't know a lot about the subject, and it's difficult to find someone else who does when you need them. So, you pay the penalty – right or wrong. But it doesn't have to be that way.

Obviously written with the purpose of providing prisoners with a comprehensive tool to allow them to protect themselves while incarcerated, Dan Manville's *Disciplinary Self-Help Litigation Manual* will also be useful to prisoners' advocates needing a concise and insightful secondary research manual concerning prison discipline and disciplinary proceedings.

Anyone familiar with the *Prisoner's Self-Help Litigation Manual* (found throughout prisons nationwide and having provided prisoners with information on federal civil right litigation through three editions) will instantly recognize the layout and detail that went into the *Disciplinary Self-Help Litigation Manual*.

Divided into nine chapters, followed by an appendix and full table of cited cases, Manville's new manual is well written and easy to use. Chapters are logically arranged, set up to guide the user through a step-by-step examination of prison disciplinary systems and preparing for and self-representation at each step in the disciplinary process. There are also chapters that thoroughly discuss litigating disciplinary guilty findings in state and federal courts, providing hundreds of citations to supporting and relevant cases in each chapter. There is also an extensive chapter devoted to a summary of what the law is in each state concerning prison disciplinary proceedings. And there is a handy table of cases for both state and federal cases cited in the text making it easy to use as a research tool.

Overall, Dan Manville has produced a needed manual to guide prisoners and their advocates through the often misunderstood and confusing topic of prison discipline litigation. ■

Jobs Hard To Find For Ex-Offenders

by Linda Hanson

Job candidates with criminal pasts are less likely to be called back after a job interview, according to a study by a sociologist at Northwestern University in Evanston, Illinois. While 34 percent of whites without a criminal record received a call back, only 17 percent of whites with a criminal record were asked to come back. African-Americans fared even worse. Just 5 percent of black applicants with criminal records got called back.

More than 40 percent of employers would probably or definitely not be willing to hire an applicant with a criminal record, according to a 2001 survey of 619 organizations in Los Angeles. More than a third said their response would depend on the applicant's crime.

For many employees and job seekers with a criminal past, the economic climate poses a major hurdle. It's a drastic reversal. Just a few years ago, a booming economy and tight job market meant employers were increasingly willing to tap non-traditional labor pools, including ex-offenders. But today, with an abundance of candidates and a scarcity of jobs, employers are less willing to take a risk— and that means workers with criminal records are facing uncertain employment futures. That means thousands of workers and job seekers are affected. An estimated 5.6 million adults have been imprisoned at some point, according to 2001 data from the Bureau of Justice Statistics. Millions more have convictions that never led to incarceration.

The tough job market is coming as an increasing number of ex-offenders — more than 600,000 — are released from prison each year. Past research has shown that those with a job are less likely to commit another crime, but statistics paint a grim picture for ex-offender job seekers.

A number of states have laws that bar employees with criminal records from working in a host of industries. For example, Florida prohibits potential employees from working in occupations that requires a state license such as general contractors, x-ray technicians, and air conditioning installers. Most of these draconian laws were passed during the get-tough war in the 1990s. The laws were aimed at protecting public safety and keeping ex-offenders with specific criminal pasts from working with vulnerable populations. But in essence it stymies the ex-offenders ability to successfully integrate back into society.

Some ex-offenders and legal aid groups are filing lawsuits or lobbying to relax or even repeal those laws. However, many employers claim there are legitimate concerns. In many states, employers who hire ex-offenders with specific criminal records can be held liable if another crime is committed. Such hires can be costly according to a report in the quarterly journal, Public Personnel Management.

According to the report, employers have lost more than 79 percent of negligent hiring cases with an average settlement of more than $1.6 million. Traycee Klein, a New York employment lawyer at Epstein, Becker and Green recognized the injustice of denying employment to ex-offenders, but on the other hand, look at the potential liability the employer can face. It's definitely a delicate balancing act.

Some penal experts, union leaders, and ex-offenders say the security concerns go too far. The International Longshore and Warehouse Union has been fighting a push to run background checks on dockworkers in California. Members of Congress called for the checks to enhance security following the September 11 terrorist attacks, but union leaders say it amounts to harassment and could cost workers their jobs.

Background check providers say such snooping is necessary because ex-offenders may not always be truthful on job applications. But some former prisoners say the reason they omit information is that it's the only way to get a job.

For ex-offenders who have been incarcerated for extended periods of time, it is not enough to omit criminal convictions. The gap in resumes or job applications often trigger suspicion, which leads to an unsuccessful job interview.

With an unemployment rate of 6 percent in October 2003, compared with 4 percent in 2000, there are more job candidates to draw from for the type of lower-wage jobs typically held by ex-offenders.

Average quarterly earnings of ex-offenders in studies range from $1,000 to $2,000. Nearly half of ex-offenders are African-American, a minority group that already has a higher unemployment rate than the national average. And while two-thirds of employers would hire an applicant with a spotty work history, just 20 percent said that they would definitely or probably consider hiring an applicant with a criminal history, according to a study led by Georgetown University.

Those most willing to hire applicants with criminal records are in manufacturing, construction, and transportation – all jobs with minimal customer contact.

While the reticence to hire ex-offenders has persisted for years, the issue is causing growing concern now because of the surge in the nation's prison population. "It's an issue of growing importance because there are a record number of people coming out of prison," says Mark Mauer, assistant director of The Sentencing Project in Washington, an organization that conducts criminal justice policy analysis.

Finding employment is not the only barrier for ex-offenders to deal with. Other problems such as finding transportation to get to a job, money to purchase clothes for work and interviews and how to function in the workplace all contribute to the employment quagmire.

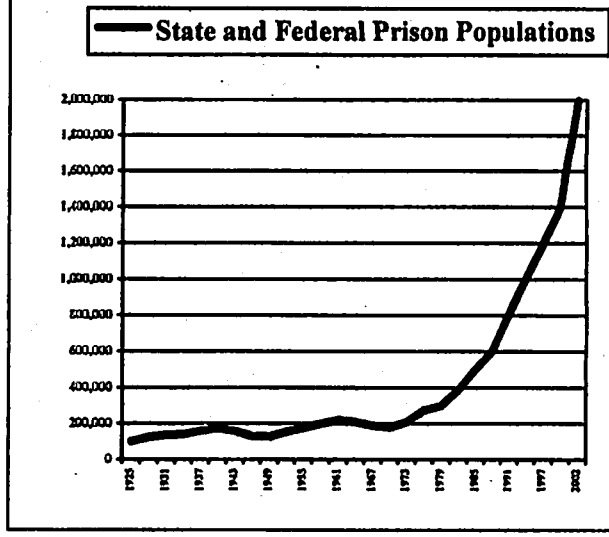
It's not just recent offenders who have to worry. The heightened attention to security means even some seasoned employees with long-ago convictions are running into problems as companies carry out background checks on current employees.

In many states employers can legally refuse to hire an ex-offender only if the crime committed suggests the person may pose a threat in specific jobs. But those who lie on a job application often have scant legal protection. ■

Prison Perspectives...

Incarceration: 1925-2002

The American prison system of the past thirty years has been characterized by a population increasing exponentially in response to shifts towards mandatory minimums and determinate sentencing. Persons convicted of a crime today are far more likely to be sentenced to incarceration and will spend a longer period of time in prison than their counterparts in past decades. During 2002, the nation's state and federal prison and local jail populations swelled to over 2 million for the first time in history. These trends have contributed to prison overcrowding and state governments being overwhelmed by the burden of funding a rapidly expanding penal system. The results of these decisions have prisons filled with large numbers of non-violent and drug offenders (over 50 percent in both state and federal prisons) at an annual cost of incarceration of $20,000 or more, along with increasing evidence that large-scale incarceration is not the most effective means of achieving public safety.



Florida Corrections Commission Wants "Elderly Age" of Prisoners to be Considered 59 to Save Money

by John Hudson

There is a debate in corrections circles as to what age should be considered elderly. The Florida Department of Corrections supposedly uses age 50, arguing that an inmate ages faster than the average person on the outside. The Florida Corrections Commission, which provides oversight and makes Budget and Policy recommendations, has suggested increasing the age to 59-and-over to give prison officials a smaller, more manageable elderly population. In other words, to save money.

Florida's prison system has seen it's age 50-and-over inmate population grow by more than 10 percent in the past year to 8,625, or more than 10 percent of the total prison population of more than 79,000.

The cost of healthcare for prisoners is no doubt increasing dramatically. In the past 5 years, the state's prison population has grown about 17 percent, while medical costs have jumped nearly 26 percent (from about $223 million in Fiscal Year 1998-99, to more than $280 million in Fiscal Year 2002-03).

A House Corrections Committee report shows that kidney failure, heart disease, lung cancer, and other cancers, are more prevalent among older-than-50 inmates than among those younger.

To deal with the increasing number of elderly inmates and to reduce health-care costs, special units located at prisons in Raiford, Zephyrhills, Miami, Lowell and Wakulla have been opened, or are opening, to house elderly inmates.

It is apparent that the state is taking steps to rein in the costs of housing and providing health care for older prisoners simply by increasing the age to be considered eligible. With lengthy prison terms imposed, very little gain-time given, a Parole Commission paroling almost no one, and a growing prison population, the problem of housing older inmates in the system can only get worse.

[Editor's Note: When it was first created by the Legislature, and for its first few years, the Florida Corrections Commission exhibited an effort to provide unbiased oversight of the FDOC. That appeared to change with more recent appointments to the Commission, which is now loaded with commissioners with FDOC or law enforcement backgrounds. A telling omission is that the Commission does not include any prisoner family members or advocates to provide even an appearance of balanced oversight. – bp] ■

Florida's Elder Prisoner Population (Ages 50 and older)

Year	Total Pop	Elder Pop	% of Pop
1990	42,735	1,991	4.66%
1992	47,012	2,336	4.97%
1994	56,052	2,946	5.26%
1996	64,333	3,672	5.71%
1998	66,280	4,588	6.92%
2000	71,233	5,605	7.87%
2002	73,343	6,802	9.28%
2003	76,653	7,636	9.96%

(2002 and 2003 statistics as of May 31, of each year, all others as of June 30 of each year.)
Source: FDOC statistics.

Cost of Caring for Elderly Prisoners

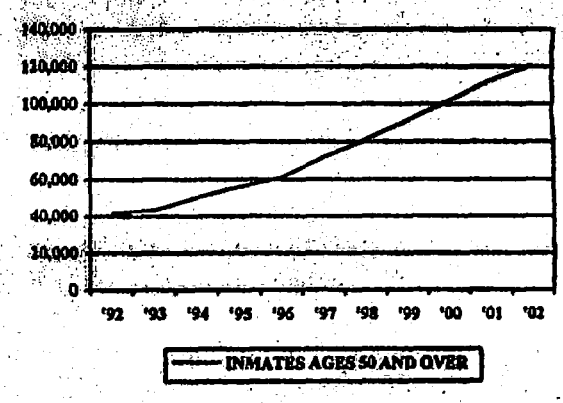
Most Florida prisoner medical care is provided inside state prisons but some outside medical care is needed for specialized services. While elderly prisoners (ages 50 and over) made up 9.28 percent of the prison population in 2001-2002, they were responsible for a significant portion of the outside medical costs.

- 25% of hospital bills
- 22% of ambulatory surgery episodes
- 26% of costs for ancillary care episodes
- 30% of costs for inpatient emergency care episodes.

Source: FDOC Financial Records.

Aging Prison Population

Inmates ages 50 and over in state and federal prisons throughout the United States.



Source: Criminal Justice Institute's Corrections Yearbook
Chart by *FPLAO, Inc*

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Most criminal defendants in a pretrial posture must face the difficult decision of whether or not to accept a plea offer made by the State. Often the offer will be calculated to be less than the sentence that the defendant would likely receive if found guilty at trial. Such a tactic is used to encourage defendants to plead guilty and to lessen the courts' and the State's caseloads. Plea bargaining is a legitimate and useful aspect of our criminal justice system. And, when used properly can often benefit all parties involved. But, one concern that a person facing charges should not have is that he will be punished for rejecting a plea offer and taking his case to trial. And, when judges inject themselves into the plea process, there is sometimes the possibility that the defendant will be treated differently at sentencing after a trial. This article deals with the problem of judicial vindictiveness at sentencing.

An accused person should not have to worry that a judge will sentence him more harshly if the accused elects to pursue his constitutional right to a trial by jury. Unfortunately, judges do sometimes act vindictively and sentence defendants more harshly when a case has gone to trial. When a court is exercising its discretion to devise punishment for a convicted defendant, the law forbids it to take into account the defendant's refusal to accept a plea offer. McDonald v. State, 751 So.2d 56 (Fla. 2nd DCA, 2000). And, if a judge takes part in the plea negotiations, the judge should not punish a defendant for refusing a plea offer. Id. When the sentencing judge has been involved in the plea negotiations and then later imposes a harsher sentence after a trial, the sentence is presumed to be vindictive. Id.; *See also*, Stephney v. State, 564 So.2d 1246 (Fla. 3rd DCA 1990). The presumption can only be overcome if the record affirmatively demonstrates that the defendant's insistence on a trial was given no consideration in the sentencing. MacDonald at 58; and, North Carolina v. Pearce, 395 U.S. 711 (1969).

A sentence can also be presumed vindictive if a defendant is sentenced more harshly by the same judge after a successful appeal. Harris v. State, 653 So.2d 402 (Fla. 4th DCA 1995). Likewise, a sentence will be presumed vindictive if the same judge imposes a harsher sentence after a successful collateral (postconviction) attack. North Carolina v. Pearce, 395 U.S. 711 (1969), recognizes that due process of law requires that vindictiveness against a defendant for having successfully attacked his or her first conviction must play no part in the sentence he or she receives after a new trial. Thus, when a trial court imposes a harsher sentence at a second sentencing proceeding, a presumption of vindictiveness arises. If a sentence is presumptively vindictive for any of the above reasons, the sentence should be vacated and the case should be remanded for resentencing.

It is important to note that for a sentence to be presumed vindictive, the judge who imposes the sentence must be the same judge that was involved with the plea negotiations and/or original sentencing. *See*, Richardson v. State, 821 So.2d 428 (Fla. 5th DCA 2002). Where there is no presumption of vindictiveness (because of a different sentencing judge) the burden is on the defendant to prove actual vindictiveness on the part of the court. Id. Obviously it is difficult to prove actual vindictiveness on the part of a new sentencing judge unless there are actual comments by the judge which clearly demonstrate said vindictiveness.

The presence of a vindictive sentence is fundamental error which can be raised on direct appeal, even in the absence of an objection by trial counsel. *See* Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA, 1988). Therefore, a vindictive sentence can and should be raised on direct appeal. Unfortunately, those reading this article are most likely already done with the direct appeal and looking toward the possibility of raising a vindictive sentencing issue in a postconviction motion. As such, it is important to recognize that a straight vindictive sentence issue (i.e., the sentence should be vacated because it is presumptively vindictive) will not succeed in a collateral attack such as a Florida Rule of Criminal Procedure 3.850 Motion for post conviction relief. This is so because arguments that were, or should have been, raised on direct appeal are not cognizable in a postconviction motion. *See* Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995).

If one wishes to raise an issue of vindictive sentencing after a direct appeal has concluded, said issue can be raised in one of several ways. Firstly, it can be alleged that trial counsel was ineffective for failing to object to a vindictive sentence. Such an issue is cognizable in a 3.850 postconviction motion because the issue of ineffectiveness of counsel is generally not one that is cognizable on direct appeal. *See*, Lawrence v. State, 691 So.2d 1168 (Fla. 1997); and, Cowan v. State, 725 So.2d 1153 (Fla. 2nd DCA 1998).

Another way that a vindictive sentencing issue can be raised after a direct appeal is in a Florida Rule of Appellate Procedure 9.141(c) petition for writ of habeas corpus to the appropriate district court of appeal. Said petition should allege the appellate counsel was ineffective for failing to raise the vindictiveness issue on appeal.

Detailed advise on both 3.850 motions and 9.141(c) petitions can be found in previous Post Conviction Corner articles. Therefore, the author will not go into detail about how to pursue such actions in this article. Nevertheless, it is important for anyone alleging ineffectiveness of counsel to remember that said ineffectiveness must be demonstrated to satisfy the two pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). In other words, before relief can be obtained, it must be demonstrated that counsel performed deficiently and that the performance actually prejudiced (had a negative impact) on the outcome of the case.

There is very little authority to offer guidance on the appropriate remedy for a vindictive sentence. In McDonald v. State, 751 So.2d 56 (Fla. 2nd DCA, 2000), the Second District Court of Appeal of Florida made note of the dearth of guiding case law on the subject, stating that there is very little authority to offer guidance on the appropriate remedy other than to suggest that "appropriate remedies must be fashioned case by case." Ultimately, in McDonald it was determined that the appropriate remedy was to reverse the vindictive sentences with directions to the trial court to resentence McDonald to the sentence that was offered at the pretrial conference and during the recess at trial. Id. Therefore, it would perhaps be wise to request relief pursuant to McDonald. Thus, the appropriate relief (in the plea offer context) may be to be resentenced pursuant to the original (and more lenient) plea offer. Or, if the vindictiveness occurred after an appeal or collateral attack, it may be wise to request resentencing to the originally imposed (and more lenient) sentence. The goal of raising a vindictive sentencing issue is ultimately to reduce one's current sentence. Therefore, it is suggested that one request the appropriate remedy (whatever that may be), as provided for in McDonald, when there has been vindictive sentencing. Obviously the appropriate remedy would be a sentence which places the accused in the position he or she would have been in the absence of the judicial vindictiveness.

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.

LEGISLATIVE WATCH BY JOHN HUDSON

The information contained in this section is compiled from published Session Laws and may be useful to or impact Florida prisoners. This section is an information source designed to provide accurate information concerning the latest in Florida law. Occasionally, Legislative Watch will publish other items of interest related to Florida's legislative such as upcoming bills, legislative history, and bios on current legislators. New law and pending bills will be clearly identified to avoid confusion as to what is law and what is not.

Single Subject Requirement of Law and Legislative Acts in General

Florida Constitution Article 3, section 6, states in part that "every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." This constitutional provision is commonly referred to in the legal world as the "single-subject rule."

The single-subject rule guards against "logrolling" a practice whereby several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue. The rule also enables voters to avoid having to accept part of a proposal which they oppose in order to obtain a change which they support.

Basically, logrolling is the exchange of political favors by the trading of votes among legislators to gain support of measures that are beneficial to each legislator's constituency. It is also defined as the Legislative practice of including several propositions in one measure of proposed constitutional amendments on law so that the Legislature or voters will pass all of them, even though these propositions might not have passed if they had been submitted separately. (Black's Law Dictionary, Seventh Edition.)

Many states have constitutional single-subject clauses similar to Florida's that prohibit this practice of "logrolling" when enacting laws.

The single-subject clause addresses two parts of the law: (1) the body of the law; and, (2) the title of the law. The first part of the single-subject rule simply requires that only one subject be addressed in the law. The purpose for the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" (disguise or cover) for dissimilar legislation having no necessary or appropriate connection with the subject matter. *State v. Lee*, 356 So.2d 276, 282 (Fla. 1978).

The second part requires that the subject be briefly expressed in the title. The purpose of the title requirement is to put people who may be subject to the law, other lawmakers, and other interested persons on notice of the nature and substance of the law and, at a minimum, inform them of the need to further inquire into the specifics of the legislation. See *State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc.*, 665 So.2d 1127, 1130 (Fla. 1st DCA 1996). The title may identify a broad or restricted subject, but it must be accurate and not misleading. *Id.*

When a law violates the single-subject clause, it cannot be assumed that a majority of the legislators assented to it. When the Legislature passes a bill in violation of the single-subject rule it is assumed, without inquiring into the particular facts, that the unrelated subjects were combined in one bill in order to convert several minorities into a majority. The one-subject rule declares that this perversion of majority rule will not be tolerated. The entire act is suspect and so it must all fall.

In determining whether the act of law complies with the constitutional provision shown above, one must look at title to the charter or session laws in question. The subject of the law must be briefly expressed in the title and be logically connected to the purpose, or object, contained therein.

The "subject" of the act is matter to which it relates, while "object" thereof is purpose to be accomplished.

An example of a legislative enactment of law that violated the single-subject rule was Laws of Florida, Chapter 95-184. This wrongfully enacted law caused huge judicial expense associated with the resentencing of thousands of Florida prisoners after the Supreme Court's ruling in *Heggs v. State*, 759 So.2d 620 (Fla. 2000).

In *Heggs*, the Supreme Court held that act containing sentencing guidelines and provisions addressing domestic violence injunctions violated the single-subject rule. Following their precedent in

Thompson, the Court believed 95-184 violated the single-subject rule because it embraced civil and criminal provisions that were not logically connected.

In *Thompson v. State*, 717 So.2d 538 (Fla. 1998), the Court held Chapter 95-182, which addressed violent career criminal sentencing, was unconstitutional because the enactment embraced civil and criminal provisions that had no "natural or logical connection."

That chapter's objectionable civil provisions addressed domestic violence injunctions (civil) *and* career criminal sentencing (criminal). Basically, the Legislature "logrolled" three unpopular domestic violence bills in to the popular career criminal bill.

Chapter 95-184 was characterized as "an act relating to the justice system." The Chapter Law is comprised of 40 sections. Section 1 provided that the act may be cited as the "Crime Control Act of 1995."

However, the act actually addressed four different subjects: criminal sentencing, defining substantive crimes, monetary compensation for crime victims, and civil remedies for victims of domestic violence. Because the domestic violence provision was a civil matter not naturally connected to the remaining criminal subject matters contained in the act, it contained more than one "subject" as legally defined in this instance and therefore violated the single-subject rule.

In Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 515 So.2d 217 (Fla. 1987), the Court explained how laws that violate the single subject rule generally are "cured":

At every odd-year regular session, the legislature, as part of its program of continuing revision, adopts the laws passed in the preceding odd year as official statute laws and directs that they take effect immediately under the title of "Florida Statutes" dated the current year. In *Santos v. State*, 380 So.2d 1284 (Fla. 1980), the Court held that when laws passed by the legislature are adopted and codified in this manner, the restrictions of Article 3, section 6, pertaining to one subject matter and notice in the title no longer apply. Accord: *State v. Combs*, 388 So.2d 1029 (Fla. 1980). As seen, a law passed in violation of the requirements of Article 3, section 6, is invalid until such time as it is reenacted for codification into the Florida Statutes. See: *Thompson v. Intercounty Tel. & Tel. Co.*, 62 So.2d 16 (Fla. 1952).

The Preface to the official Florida Statutes illustrates how the biennial adoption process works. In essence, the Preface explains that, during the biennial adoption process, the Legislature amends sections 11.2421, 11.2422, 11.2424, and 11.2425, Florida Statutes, to prospectively adopt as the official statutory law of Florida those portions of the statutes that are carried forward from the preceding regular edition of the Florida Statutes. Thus, the general rule for "curing" laws that violate the single-subject rule is through the biennial adoption process.

Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds that it violates the single-subject requirement of Article 3, section 6, of the Florida Constitution. (The single-subject requirement of Article 3, section 6, only applies to "chapter laws," and sections of the Florida Statues need not conform to the requirement.)

Accordingly, the *Heggs* court eventually ruled the law, Chapter 95-184, was "cured" upon the biennial reenactment on May 24, 1997. This gave those whom had offense dates lying from October 1, 1995, the date the invalid law went into effect, until May 24, 1997, the date of biennial reenactment, to challenge their sentences.

Chapter 95-184 is only one example of the lawmakers violation of Article 3, section 6, of Florida's Constitution. Others have taken place and more will most likely occur.

It should also be noted that since 1999, the Florida Statutes have been published in their entirety annually. With the change to annual publication of the Florida Statues, the Adoption Act is now submitted to the Legislature to be enacted every year instead of biennially, while the "curing period" remains two years.

To this writer, the notion that an enactment of law that is void for logrolling can somehow become valid by virtue of the biennial reenactment, which is itself the ultimate example of logrolling, escapes my personal logic. After all, why should any rule or subsequent act subvert a constitutional requirement that was intended to prevent the subversion of the most basic prerequisite to the exercise of Legislative power, i.e., that a law can be enacted only if it is approved by a majority of Legislators, as found in Act 3, section 7, Florida Constitution. The single-subject rule is supposed to assure that it is carried out by preventing logrolling. Why give lawmakers an out? ■

> Half the truth is often a great lie.
>
> Benjamin Franklin 1758

FDOC Secretary Draws Fire For New Probation Policy

In what critics said is an attempt to deflect controversy over the Florida Department of Correction's perceived mishandling of an alleged probation violation by Joseph P. Smith, who was charged with the murder of 11-year-old Carlie Brucia, DOC Secretary James Crosby told two Senate committees he has ordered probation officers to stop writing recommendations to judges whether probation violators should be jailed.

Crosby's announcement of the new policy, which he claims is legal because no law requires such recommendations, drew criticism from several state senators. If Crosby proceeds with the new policy, several senators said, the Legislature should reverse it with a law requiring such recommendations. "I believe that more information to the court is crucial, not less," said Sen. Alex Villalobos, R-Miami.

Crosby's defense was that probation officers often don't know all of the 150,000 people on probation in Florida. "That is somewhat of a myth, as to how much knowledge a probation officer has," said Crosby.

Leon Circuit Court Judge James Hankinson said probation officers are the ones who know probationers best. "If they have an opinion, I want to hear it," said Hankinson.

Senators also criticized the criminal history reports being provided to judges by FDOC employees. Hankinson said criminal background reports that judges often receive are "inaccurate, incomplete or confusing."

The processing of probation violators has been under increase scrutiny since Carlie Brucia was abducted and killed in Sarasota in February. Joseph Smith, her alleged killer, was on probation for cocaine possession at the time of the crime. In December he was called before the court for failing to pay court fees, a condition of his probation. The judge, however, said he was prevented by law from revoking Smith's probation because probation officers had failed to furnish evidence that Smith had "willfully" refused to pay. Florida law prohibits incarceration for failing to pay costs or fees imposed as a condition of probation unless evidence is presented a probationer has the ability to pay and just chooses not to do so. Some critics, including Carlie's family, questioned why Smith was on the street when he had been called up for a probation violation.

It is expected that the Legislature will pass new legislation this year to tighten up the probation system in Florida following the nationwide attention that Carlie Brucia's murder received. It is unclear at this time where changes will be made. Already last year Crosby had instructed probation officers to implement a "zero-tolerance" for even minor probation violations in order to flood the prison system with new admissions to force the Legislature to fund new prison construction. This year Crosby, in league with Gov. Bush, is again calling for almost another $100 million to fund even more prisons for largely non-violent offenders.

[Source: *St. Petersburg Times*, 3/10/04; FDOC *Correctional Compass*, Nov / Dec 2003; FDOC records] ■

GPS Tracks Offenders

This September, President Bush is expected to announce a grant of $21 million to establish Family Justice Centers in 12 U.S. communities. Law enforcement agencies across the state aren't waiting. Hillsborough County Sheriff's Office is pursuing the funding of 30 GPS ankle bracelets to monitor the movements of those wearing them. Pinellas County already uses the satellite-based Global Positioning System to track criminal offenders on work release or probation. The Pinellas County Sheriff's Office has a pilot GPS program with VeriTracks that allows about 60 inmates on work-release to go home at night with an ankle bracelet and a small box that records their movements. The GPS system uses "passive monitoring," meaning information on the inmate's travels is downloaded every 24 hours to a central database.

Another 30 bracelets are used for Pinellas defendants who have been released from jail on their own recognizance but have to return for a court date. Those ankle bracelets use active monitoring which tracks the defendants constantly.

Both versions of the VeriTracks system correlate the bracelet data with crime reports, so the sheriff's officials can see whether crimes were committed where the monitored defendants roamed.

Last month, the Florida House heard from VeriTracks representatives, who want the state to invest in a $35 million GPS package that would track more than 10,500 serious criminal offenders upon their release.

[Source: *St. Pete Times*, 3/10/04] ■

Therapeutic Jurisprudence

by Anthony Stuart

"You Are Hereby Sentenced To Yoga Class." Sound wacky? Well, Judge Larry Standley of Harris County, Texas, does not seem to think so. This is the sentence he tacked on as a condition, on impulse, to an already agreed upon punishment to a man for slapping his wide in a domestic dispute.

Judge Standley stands by his sentence and hopes the combination of traditional punishment and a mind-and-body-stretching yoga class will help the man control his behavior. He says, it certainly can't hurt.

Judges such as Standley are bucking a trend of the past decade to stiffen sentences and make punishment more uniform. The state legislatures and sentencing commissions, faced with budget deficits and overcrowded prisons, are taking notice of this creative sentencing too. In the past three years, at least a dozen states, including Alabama, Arkansas, Connecticut, Delaware, Kansas, Maryland, Michigan, and Utah, have begun to examine and revamp sentencing policies.

These judges are feeling hamstrung by proscribed sentencing guidelines, so they are taking advantage of the leeway some of them have. They are imposing these odd sentences because they're just plain frustrated with repeat offenders or wanting a way to avoid sending first and small-time offenders to overcrowded jails. Teach them a lesson without ruining their lives with prison time is the idea.

Though it is mostly municipal courts, which generally handle traffic and misdemeanor cases, that have more of a leeway to impose such creative type sentences, there are some state felony judges that also have leeway to alternative sentences or add other conditions to them.

Right now though, no one is sure whether these types of sentences work better than plain old time in the slammer, but it is a start to hopefully show that rehabilitation does work instead of the present warehousing of prisoners, as practiced in Florida. Finally, there is a door being opened because these, "Judges see a problem, [with the warehousing of prisoners instead of rehabilitating them] and they want to solve that problem," says Malcolm Young. Young is an executive director of The Sentencing Project, a non-profit organization in Washington, D.C., which promotes more effective sentences and less reliance on prisons to reduce crimes. He says, "Judges want to make sentencing more meaningful than it is now."

Some other creative sentencings used that are mindful of rehabilitation are like the methods Judge Frances Gallegos of Santa Fe, New Mexico, uses. People she has convicted of domestic violence or fighting are often sentenced to a twice-a-week New Age anger-management class that is held in the courthouse lobby, where it is transformed with candles, mirrors, and aromatherapy (the use of aromas, such as herbs, for therapy), where offenders experience tai chi no less, meditation, acupuncture and even Eastern philosophy as a means of controlling rage. Gallegos calls her methods "therapeutic jurisprudence." She herself sometimes attends these classes and exercises this therapy right along side the offenders to which she has sentenced. Though she is criticized and ridiculed as coddling criminals, she knows it is helping to rehabilitate them and keep them out of prison. "If I did not have the latitude that I do to create these programs to find different solutions to all the social problems I see, I wouldn't want to be here," Gallegos says. "It's really been kind of a mission for me. I'm maybe the most notorious judge in the state of New Mexico."

In Coshocton, Ohio, Judge David Hostetler was following the creative sentencing trend when just recently he ordered a man to jog for an hour every other day around the block where the jail is located. The man had ran away from police after a traffic accident he was involved in. In 2001, Hostetler had received world-wide attention about his odd sentencing when he ordered two men, who had thrown beer bottles at a car and taunted a woman, to dress in women's clothing and walk down Main Street.

As Judge Hostetler says, "Creative sentencing is not a substitute for jail overall." Offenders need the threat of jail or prison to compel them to do the alternative sentences that will hopefully rehabilitate their criminal thinking and fly right.

Judge Mike Erwin of Baton Rouge, Louisiana, first ventured out of the rule book in the early 1990s. A young man had hit an elderly man in an argument that was over something really stupid. Erwin ordered him to listen to a John Prince song entitled 'Hello In There,' which is about lonely old people and write an essay about it. Erwin says he thinks it really had some impact on the young man. Also, in trying to make people reflect on their actions, Judge Erwin had imposed a creative sentence on four college students who stole an exotic bird from a pet store. When he asked the offenders, "How did anyone think this was a good idea?", and they couldn't answer, Erwin fined them and made them write "I will not do stupid things" 2,500 times, plus an essay.

Some of the creative sentences that judges have imposed are not so wacky but still makes the person think about their wrongdoing and are considered by some to be down right mean and cruel. Like when a Butler County judge in Pennsylvania made an offender carry around a photograph of the man she killed. The offender's lawyer and family said, "We believe it was cruel and morbid." It was the family of the victim that chose the photograph — it was of the man she killed laying in his coffin.

I don't know about you, but I'm glad that there are people in the judicial system that are finally seeing that rehabilitation does work. I can only hope that the trend will grow and show the citizens that it does. In agreeing with what Judge Erwin says, "We've got so many problems with poverty, education, and drugs, we'll never get to the root of the problem. I just try to grab at some of the ones who are sinking and try to save them."

[Source: *USA Today*, 2/24/04]. ■

Nurses Indicted in Murder of Teen

On January 27, 2004, two nurses who worked for Miami Children's Hospital under a contract with the 226-bed Miami-Dade Regional Juvenile Detention Center were

charged with murder and manslaughter for allegedly failing to treat a 17-year-old inmate who died of a ruptured appendix after three days in pain.

A Miami-Dade county grand jury indictment charged the women skipped examinations or falsified medical records on Omar Paisley, who spent his last days "in agony lying on a concrete bed," the panel's report said.

The grand jury also ended a nine-month investigation by calling for wholesale changes in health care, staffing, and surveillance at the jail, offering 20 recommendations to "prevent another unnecessary death."

Although reserving indictments for the nurses only, the panel criticized the jail staff broadly and said several people played roles in Paisley's death. The grand jury openly declared they were appalled at the utter lack of humanity demonstrated by many of the detention workers charged with the safety and care of our youth.

At every turn in their investigation, the grand jury claimed they were confronted with incompetence, ambivalence, and negligence on both jail staff and its medical contractors. The grand jury noted in frustration that the state agency itself is immune to criminal indictments. One Miami lawmaker has called for the removal of the agency's secretary, Bill Bankhead, while Gov. Jeb Bush defended the wayward secretary.

[Source: *Press Journal*, 1/28/04] ■

Unsearched FBI Files May Affect Defendants Nationwide

In an alleged oversight that could affect cases nationwide, the FBI hasn't routinely searched a special computer space where agents store investigative documents to see whether the materials should be sent to defense lawyers, Congress or special investigative bodies.

The existence of the unsearched "I-drive" computer files, brought to the attention of the Associated Press by concerned FBI agents, could give lawyers an avenue to reopen numerous cases to determine whether documents that could have aided the defense of defendants were withheld.

The FBI is uncertain about the nature or breadth of the documents on the computer space and has asked its internal investigation unit, its inspection division, to determine how many documents on I-drives in FBI offices did not make it into official case files.

If many documents are found, a review would begin to determine whether they should have been turned over to defense lawyers.

Robert J. Garrity Jr., the FBI deputy assistant director in charge of records management, said the I-drive was created in 1996 and agents use it to upload investigative documents like interview reports, investigative inserts, and teletypes so their supervisors can approve putting them into the FBI's official case files, which still are in paper format.

Garrity acknowledged that those records that do not get into the FBI's official case files or its automated computer case system would not be searched for material that should be turned over to defense lawyers.

Under a landmark Supreme Court case, *Brady v. Maryland*, prosecutors and police are required to disclose all materials that might help defense lawyers prove the innocence of their clients.

[Source: *St. Petersburg Times*, 3/3/04] ■

U.S. Supreme Court to Consider Effectiveness Standards for Attorneys and Segregated Prison Cells

The U.S. Supreme Court announced it will consider effectiveness standards for attorneys, focusing on a Florida case of a condemned man whose lawyer admitted his guilt.

In 2000 the Florida Supreme Court ordered a new trial for Joe Elton Nixon who was convicted in the 1984 murder of Jeanne Bickner near Tallahassee.

At issue in the case is the decision of Nixon's public defender to tell jurors the woman died a "horrible, horrible" death and that his client was guilty, in hopes that his candor would persuade the jury to spare Nixon's life. The strategy did not work. Nixon was sentenced to death.

An appeal by Nixon, handled by a new attorney, reached Florida's high court in 1987. The court sent the case back to the trial judge in Leon County for a hearing on whether Nixon, who had refused to attend his trial, had explicitly agreed to the defense strategy. Two years later, the judge ruled that Nixon's new lawyer hadn't proved lack of consent.

In 1990, the Florida Supreme Court upheld Nixon's conviction. It received the case again as the result of a new appeal begun by another attorney. The Court ruled that the question on consent had never been resolved and ordered a new trial.

In its rehearing argument, the state said Florida justices were wrong to rule that "consultation and acquiescence was not enough." The state further argued that "the Florida Supreme Court failed to give any deference to trial counsel's strategic choices or to his evaluation of the risks of contesting guilt when the evidence of guilt was overwhelming."

Nixon had agreed to plead guilty in Bickner's murder in exchange for a life sentence, but the prosecutor refused, according to court records. So, his lawyer told jurors there was no doubt of his guilt, but the real question was whether he deserved to die.

Nixon's trial counsel said he told him of his plans and that he did not object.

Nixon did not attend his own trial; he refused to enter the courtroom. The judge held a hearing in a cell to make sure Nixon was waiving his right to attend the trial. Nixon told the judge he wanted another attorney and that he would disrupt the trial otherwise.

The Supreme Court will hear arguments in the fall. The case is *Florida v. Nixon*, 03-931.

In another case accepted by the U.S. Supreme Court for review, the Justices will consider whether state prisons may separate new inmates by race as a safety measure. Fifty years ago the Court declared racial segregation unconstitutional in public schools.

California routinely assigns newly arrived black prisoners to bunk only with other black prisoners for three months or more, and likewise assigns white and Asian inmates to cells with others of their race or ethnicity.

A black prison inmate challenged the practice as a violation of his constitutional right to equal treatment. He also argued the policy flouts previous Supreme Court rulings striking down segregation in other areas.

"Intentional state racial segregation has been outlawed in this country for over half a century," argued lawyers for the prisoner.

Prison officials say housing inmates by race helps keep prisoners safe from racial violence, and note that wardens also look at factors such as an inmate's age and health in deciding who rooms with whom.

Segregation is temporary, California Attorney General Bill Lockyer told the Supreme Court in a court filing, and the policy applies only to the two-person cells in which inmates are housed when they first enter the prison system or when they are transferred from one prison to another.

During this period, inmates are assigned to two-person cells according to whether they are black, white, Asian or "other." Within those categories, prison authorities also separate certain groups by national or geographic origin. For example, they do not house Japanese and Chinese inmates together.

The rest of the prison system is not segregated, and inmates are often allowed to eventually choose their cellmates without regard to race. The San Francisco-based 9th Circuit Court of Appeals ruled against the prisoner last year.

Prison officials had sound reasons to want to separate inmates by race, and did not treat one race better than another, the appeals judges said.

The Supreme Court will hear the case of *Johnson v. California* in the fall, and rule by July 2005. ■

Federal Habeas Corpus in State Prison Disciplinary Challenges

by Oscar Hanson

After years of silence, the Eleventh Circuit Court of Appeals has finally spoken on the issue of whether a state prisoner challenging disciplinary proceedings in federal court must utilize Section 2241 or 2254. For anyone familiar with the 11th Circuit, their long and tortuous opinion should surprise no one.

The appeal that lead to the published opinion came from Florida prisoner Daniel Clark Medberry who filed separate habeas corpus petitions challenging two separate prison disciplinary actions against him. The district court denied both petitions. Pursuant to 28 U.S.C. 2253 (c), the 11th Circuit granted a certificate of appealability (COA) on very limited issues. Does that give you a clue to how the court ruled? Don't make presumptions, the outcome is not always what it seems.

The relatively simple issue of whether habeas petitions challenging prison disciplinary proceedings should be evaluated under 2241 or 2254 has become complicated, if only in appearance. The volume of habeas corpus litigation in the federal courts has led to the use of casual language when describing the procedures and remedies available to prisoners seeking relief. The 11th Circuit recognized that this lack of precision has, over time, created unnecessary confusion.

The Court's opinion attempts to clear up some of the confusion by holding that Medberry's petition was "authorized" by Section 2241, but it also is "governed" by Section 2254 because he is in custody pursuant to the judgment of a state court.

For the sake of completeness, the Court looked at the history of federal habeas corpus focusing specifically on the following discrete points in time: (1) the 1789 grant to the federal courts of the limited power to grant writs of habeas corpus; (2) the 1867 Amendments to the federal habeas statutes; (3) the 1874 codification of the statutes; (4) the 1948 recodification; (5) the 1966 Amendments; and (6) the 1996 AEDPA Enactment (Antiterrorism and Effective Death Penalty Act).

After reviewing the relevant history the Court determined that there are two distinct means of securing post-conviction relief in the federal courts: an application for a writ of habeas corpus governed by 2241 and 2254 and a motion to vacate a sentence governed by 2255. Because the post-conviction statutes are complicated and cumbersome, oftentimes the federal courts found it convenient to refer generally to cases implicating these statutes as "habeas corpus cases."

The Courts also employed seductively simple shorthand references such as 2241 petitions, 2254 petitions, and 2255 petitions. However, they conceal important distinctions between the two remedies according to the 11th Circuit.

In drawing the distinction, the Court expounded on the narrower of the two remedies: the Section 2255 motion to vacate a federal prisoner's sentence. Section 2255, as the Court explained, permits federal prisoners under sentence to move the federal court to vacate their sentences only if: (1) "the sentence was imposed in

violation of the Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence is "otherwise subject to collateral attack." See: 28 U.S.C. Section 2255.

Turning to the writ of habeas corpus proper, the Court first pointed out that the writ of habeas corpus is a single post-conviction remedy principally governed by two different statutes. Compare 28 U.S.C. 2241 and 2254. According to the 11th Circuit, these are identical statutory references of the writ of habeas corpus and must be read as referring to the same remedy, citing *Sorenson vs. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

While the Court recognized previous rulings citing both of the statutes that apply to a state prisoner seeking the writ of habeas corpus, the Court claimed the difference between the two statutes lies in the breadth of the situations to which they apply. Section 2241 provides that a writ of habeas corpus may issue to a prisoner in the following five situations:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law or nations; or

(5) It is necessary to bring him into court to testify or for trial.

Section 2254, on the other hand, applies to a subset of those to whom Section 2241 (c)(3) applies, i.e., it applies to "a person in custody pursuant to the judgment of a State court" who is in custody in violation of the Constitution or Law or treaties of the United States. Thus, according to the 11th Circuit, Section 2254 (a) is more in the nature of a limitation on authority than a grant of authority. The Court asserts that Section 2254 presumes that federal courts already have the authority to issue the writ of habeas corpus to a state prisoner, and it applies restrictions on granting the Great Writ to certain state prisoners – i.e., those who are "in custody pursuant to the judgment of a state court." This, according to the 11th Circuit, indicates that it is not itself a grant of habeas authority, let alone a discrete and independent source of post-conviction relief.

The Court found nothing in the history of 2254 to suggest that this section is anything more than a limitation on the preexisting authority under 2241 (c)(3) to grant the writ of habeas corpus to state prisoners. The court interpreted the 1948 codification that created 2254 as merely a codified judge – made restriction on issuing the writ of habeas corpus as authorized under 2241. Because it was merely declarative of judicial limitations imposed on habeas relief under 2241, 2254 could not possibly have created a new post-conviction remedy. Section 2254 (a) merely specifies the class of state prisoners to which the additional restrictions of 2254 apply. In sum, the Court believes 2254 is not an independent and additional post-conviction remedy for state prisoners; there is but a single remedy, the writ of habeas corpus.

In an attempt to harmonize 2241 and 2254, and thus answer the much debated question finally brought to a head in the present appeal, the 11th Circuit turned to the canon of statutory construction that the more specific takes precedence over the more general. See: *Edmond vs. United States*, 520 U.S. 651, 657 (1997).

Applying this canon of statutory construction, the Third Circuit Court of Appeals concluded that an application for a writ of habeas corpus by a state prisoner serving his sentence is subject to the requirements of 2254. See: *Coady vs. Vaughn*, 251 F. 3d 480, 485 (3rd Cir 2001).

The Third Circuit stated that both Sections 2241 and 2254 authorize a prisoner to challenge the legality of continued state custody, but that to allow the prisoner to file his petition in federal court pursuant to Section 2241 without reliance on Section 2254 would thwart Congressional intent. The 11th Circuit agreed with this analysis.

The 11th Circuit's reading of 2241 and 2254 as governing a single post-conviction remedy, with the 2254 requirements applying to petitions brought by a state prisoner in custody pursuant to the judgment of a state court, gives meaning to Section 2254 without rendering 2241 (c)(3) superfluous. Under the 11th Circuit's reading, there remain some state prisoners to whom 2254 does not apply. Section 2254 is limited to state prisoners in custody pursuant to the judgment of a state court. However, state pre-trial detention, for example, might violate the Constitution or the laws or treaties of the United States. Yet a person held in such pre-trial detention would not be in custody pursuant to the judgment of a state court. Such a prisoner would file an application for a writ of habeas corpus governed by 2241 only, according to the 11th Circuit. The Court claims that to read Sections 2241 and 2254 other than as the court did would effectively render 2254 meaningless because state

prisoners could bypass its requirements by proceeding under Section 2241.

To underscore its reasoning, the 11th Circuit stated that if 2254 were not a restriction on 2241's authority to grant the writ of habeas corpus, and were instead a freestanding, alternative post-conviction remedy, then 2254 would serve no function at all. It would be a complete dead letter because no state prisoner would choose to run the gauntlet of 2254 restrictions when he could avoid those limitations simply by writing Section 2241 on his petition. In addition, the Court stated that all of Congress's time and effort in enacting 2254, amending it in 1966, and further amending it in 1996 with the provisions of AEDPA would have been a complete waste. Section 2254 would never be used or applied, and all of the thousands of decisions over the past half-century from the Supreme Court and other federal courts interpreting and applying the of 2254 would have been pointless.

Medberry's argument centered around the fact that Section 2254 does not apply where the exact custody of which he complains is from the result of an administrative proceeding, which are not state court judgments. But the Court reasoned that the administrative proceedings are merely ancillary to the underlying state court judgment.

After establishing that state prisoners must utilize Section 2254 if indeed their petition falls within the ambit of 2254, the Court addressed the issue of whether prisoners are required to obtain a certificate of appealability to proceed on appeal from a denial at the district court level. Medberry argued that the Section 2253 (c) (1) (A) COA requirement does not apply to his petition because the detention of which he complained of arose out of a prison disciplinary proceeding and not "out of process issued by a State court." The 11th Circuit disagreed.

The Court explained that the Section 2253 (c) (1) (A) COA requirement applies where the "detention complained of arises out of process issued by a State court." The Court determined Medberry espoused far too narrow a reading of this language. Medberry's incarceration originated in state court process — a judgment sentencing him to a term of years. The term of imprisonment ordered by the state court had not yet expired. The prison disciplinary board has no authority to change the judgment. What the board has the power to do, however, is release him early or to delay his earlier release. The prison disciplinary action of which Medberry complained would not have occurred had he not in the first instance been convicted and sentenced through the state court process, wrote Circuit Judge Black.

In sum, the 11th Circuit held that Medberry's petition was subject to both Section 2241 and 2254 and that he is required to have a COA in order to obtain review in their Court as to the merits of his challenges to the disciplinary proceeding. In their sardonic conclusion the Court denied Medberry's COA request and cited what has been their blanket approach and resolution to virtually all COA requests: Medberry failed to make a substantial showing of the denial of a constitutional right. Maybe the Court can devote as much attention to the question of what it takes to make such a substantial showing as they did in this opinion because its obvious nobody else seems to know, at least not in this circuit.

[Editor's Note: The full text of this diatribe can be read in Volume 17 of the Florida Law Weekly Federal. See: *Medberry v. Crosby*, 17 Fla.L.Weekly Fed. C79 (11th Cir 11/25/03)]. ■

Florida Parole
Parole Revocations
Technical Violations vs. New Offense Violations

The majority of parole revocations of Florida parolees are for technical violations. Very few parolees have their paroles revoked for committing a new offense while on parole. Under Florida Parole Commission policies, even a minor violation of a technical condition of parole may result in revocation of parole and a return to prison. This chart shows the parole revocations for the past ten years.

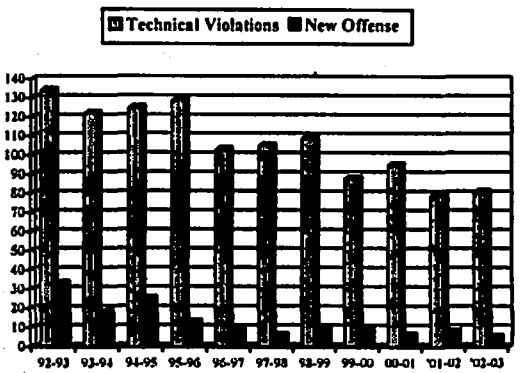
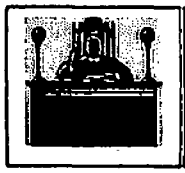


Chart Values

Fiscal Years	Technical	New Offense	Totals
92-93	134	33	167
93-94	122	18	140
94-95	125	25	150
95-96	129	13	142
96-97	103	9	112
97-98	105	6	111
98-99	109	9	118
99-00	88	10	98
00-01	95	6	101
01-02	79	8	87
02-03	81	5	86

Prepared by the FPLAO Parole Project



NOTABLE CASES

BY OSCAR HANSON & ANTHONY STUART

The following are summaries of recent state and federal cases that may be useful to or have a significant impact on Florida prisoners. Readers should always read the full opinion as published in the Florida Law Weekly (Fla. L. Weekly); Florida Law Weekly Federal (Fla. L. Weekly Federal); Southern Reporter 2d (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

Muhammad v. Close, 17 Fla.L.Weekly Fed. S171 (2/25/04)

A Michigan prisoner, Shakur Muhammad, brought a federal civil rights violation lawsuit against prison official Mark Close alleging that Close charged him with threatening behavior and subjected him to mandatory prehearing confinement in retaliation for prior suits and grievances he had filed against Close. Under Michigan prison rules mandatory prehearing confinement was required because of the seriousness of the charge.

At the disciplinary hearing six days later Muhammad was acquitted of threatening behavior, but found guilty of the lesser infraction of insolence, for which prehearing confinement was not mandatory. Muhammad was sentenced to 7 additional days of confinement and 30 days loss of privileges for insolence.

After, presumably, exhausting all administrative remedies, Muhammad filed his federal suit alleging retaliation. In amending his original complaint Muhammad did not challenge his conviction for insolence (in fact he admitted he was insolent) or the subsequent disciplinary action taken against him on that charge. Instead, the amended complaint only sought $10,000 in compensatory and punitive damages "for the physical, mental, and emotional injuries sustained" during the six days of prehearing confinement mandated by Close's overcharging Muhammad with threatening behavior that's attributable to Close's retaliatory motive.

After discovery, the Magistrate Judge recommended summary judgment for Close asserting that Muhammad had failed to present sufficient evidence of retaliation to raise a genuine issue of material fact. The District Court Judge adopted the recommendation.

Muhammad appealed to the Sixth Circuit Court of Appeals. That court, in an unpublished opinion, affirmed the summary judgment, but not for the same reason as the District Court. The appeals court affirmed by holding Muhammad's action was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because, claimed the court, Muhammad sought expungement of the misconduct charge from his prison record. Relying on circuit precedent, the appeals court held that an action under 42 U.S.C. § 1983 to expunge the misconduct charge and for other relief occasioned by the misconduct charge could only be brought after satisfying *Heck's* "favorable termination" requirement. (*Heck* established that a litigant must first resort to state litigation or federal habeas corpus opportunities to challenge an underlying conviction or sentence where success in a § 1983 civil rights suit would implicitly question validity of the conviction or duration of sentence. [The *Heck* principle was extended to prison disciplinary proceedings in *Edwards v. Balisok*, 520 U.S. 641 (1997].) Thus, the Circuit Court maintained a split on the applicability of *Heck* to prison disciplinary proceedings in the absence of any implication going to the fact or duration of the underlying sentence. Four other circuits have taken a contrary view.

Muhammad sought certiorari review from the Supreme Court, which was granted. The high court determined the appeal court's decision was flawed as to fact and law. The high court noted Muhammad did not seek expungement of the misconduct charge (he sought damages for retaliation, a finding of which would not overturn the misconduct charge or punishment for same).

As to applying *Heck*, the high court held the appeal court erred there too by mistakenly applying *Heck* categorically to all suits challenging prison disciplinary proceedings, regardless of whether they implicate the validity of the disciplinary conviction and / or duration of time to be served (where forfeiture of gain time would be involved) or not. The high court noted the Magistrate Judge expressly found or assumed that no gain time credits were eliminated by Muhammad's prehearing confinement, thus the high court noted, *Heck* did not apply since Muhammad's § 1983 did not raise any claim on which habeas relief could have been granted.

Close tried to claim at the Supreme Court level that if Muhammad's § 1983 were successful Muhammad would be entitled to restoration of some gain time credits, but the high court said that since that was not alleged in either the district or appeal court Close could not raise it now.

The case was reversed and remanded for consideration of

summary judgment on the issue of whether Muhammad had presented (or can present) sufficient evidence of retaliation to raise a genuine issue of material fact, as initially determined in the district court.

FLORIDA SUPREME COURT

Crosby v. Bolden, 29 Fla.L.Weekly S75 (Fla. 2/12/04)

Initially the Florida Supreme Court accepted jurisdiction to review *Bolden v. Moore*, 28 Fla.L.Weekly D187 (Fla. 1st DCA Jan. 8, 2003), a decision of a district court of appeal certifying a question to be of great public importance. Upon reflection and further consideration, the Court exercised its discretion and discharged jurisdiction. The holding of the district court remains intact, which decided that the Florida Department of Corrections had no statutory support for tolling Bolden's conditional release supervision on one expired sentence while he continued to serve another incarcerative sentence imposed as part of related offenses. The DCA distinguished Bolden's case from the Supreme Court decision in *Evans v. Singletary*, 737 So.2d 505 (Fla. 1999), where the Court held that the DOC may use an unexpired conditional release eligible sentence to determine the length of supervision and then toll the running of that supervision period until the inmate has been released from prison. This ruling applied to "unrelated" crimes, not "related" as in the *Bolden* case.

Topps v. State, 29 Fla.L.Weekly S21 (Fla. 1/22/04)

On June 12, 2001, Martha M. Topps filed a petition for writ of mandamus in the Florida Supreme Court challenging the Stop Turning Out Prisoners Act, which amended various statutes to require that inmates serve eighty-five percent of their criminal sentences in prison. Topps alleged that the Florida Legislature should not have been permitted to pass a law reducing the amount of gain time an inmate could receive because the Legislature should have accomplished the result through the mechanism of a constitutional amendment. The Supreme Court denied the petition by simply issuing an unelaborated order denying relief. Topps filed another petition for writ of mandamus asserting the identical issue.

In the case above, the Supreme Court denied the petition based on the application of the doctrine of res judicata. However, the Court did establish a new principle of law for future circumstances where the same procedural vehicle or claim for relief is sought following the adjudication of the claim in a previous proceeding.

In the past the doctrine of res judicata barred relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. This doctrine only applied where the merits of the cause were addressed. Although it is clear that a decision on the merits must have been made before res judicata became applicable, Florida case law has been totally unclear and often in conflict as to whether an unelaborated denial of relief related to extraordinary writ petitions should be considered a decision on the merits.

Now, the Supreme Court has mandated that unelaborated denials in extraordinary writ cases shall not be deemed denials on the merits. The Court reasoned that it is not unreasonable nor does it impose an unnecessary burden upon courts to require that all Florida courts enter orders that can be clearly understood in terms of scope and impact of the determination upon the parties and to be uniform in the application of Florida law.

State v. Giorgetti, 29 Fla.L.Weekly S95 (Fla. 3/4/04)

The Supreme Court exercised jurisdiction to review a decision from the Fourth District Court of Appeal on a question the court certified to be of great public importance. The Supreme Court rephrased the question as follows: Does the crime created by the sexual offender registration statutes require the State to prove knowledge of the registration requirement by the offender as an element of the crime? The Court answered the question in the affirmative holding that before an offender may be held criminally liable for failing to register pursuant to sections 943.0435 and 944.607(9), the State must prove that he was aware of a registration requirement.

DISTRICT COURT OF APPEAL

Maynard v. Department of Corrections, 29 Fla.Weekly D303 (Fla. 1st DCA 1/29/04)

Florida prisoner Maurice Maynard appealed an order by which his civil action against the Department of Corrections was dismissed upon a finding that the appellant failed to provide the Department of Insurance with the presuit notice required by section 768.28(6)(a), Florida Statutes (2000). Although the appellant apparently sent notices to several entities, those notices, the appeal court claimed, did not fully satisfy the requirements of section 768.28(6)(a), and the action was properly dismissed.

Maynards' claim was based on negligence while he was housed at Liberty Correctional Institution. In proceeding on his claim against the DOC the appellant relied on the state's waiver of sovereign immunity set forth in 768.28, FS, but this statute expressly precludes the action unless a written claim is first presented to the appropriate agency *and* the Department of Insurance.

See: 768.28(6)(a). The presuit notice requirement is a condition precedent, see 768.28(6)(b), which serves the purpose of giving the appropriate entities an opportunity to investigate and time to respond. E.g. *Metropolitan Dade County v. Reyes*, 688 So.2d 311 (Fla. 1996); *Cunningham v. Department of Children and Families*, 782 So.2d 913 (Fla. 1st DCA), rev. denied, 797 So.2d 585 (Fla. 2001). And as an aspect of the sovereign immunity waiver, the section 768.28(6)(a) notice provision is *strictly construed, with strict compliance required.* E.g. *Levine v. Dade County School Board*, 442 So.2d 210 (Fla. 1983).

In this case the Court found Maynard completely failed to notify the Department of Insurance, thus the action was properly dismissed.

Forbes v. Crosby, 29 Fla.L.Weekly D488 (Fla. 1st DCA 2/24/04)

From time to time we publish opinions of the district court that discuss a previously established point of law. We do this not to be redundant but to ensure new readers or prisoners are familiar with the relevant point of law. This is one of those instances.

Florida prisoner Everitte Forbes filed a petition for writ of mandamus in the circuit court challenging the forfeiture of 60 days of gain time as a result of prison disciplinary proceedings. A show cause order was issued and, after considering the DOC's response, the mandamus petition was denied. Forbes sought certiorari review in the district court.

Forbes alleged that the circuit court erred in acting on his mandamus petition *without* affording him time to file his reply to the DOC's response, citing *Bard v. Wolson*, 687 So.2d 254 (Fla. 1st DCA 1996). The DOC moved to relinquish jurisdiction to the circuit court, essentially agreeing with Forbes's argument on this point. But instead of relinquishing jurisdiction, the First DCA found that the appropriate disposition in this circumstance was to grant the petition, and quash the circuit court order with directions for further proceedings on the merits of Forbes's reply to the DOC's response.

Pearson v. State, 29 Fla.L.Weekly D492 (Fla. 1st DCA 2/26/04)

Philip Pearson challenged a trial court order that denied his motion for post conviction relief alleging ineffective assistance of trial counsel. The DCA concluded that counsel was not ineffective for failing to move for dismissal of charges of robbery with a deadly weapon and grand theft on the ground that the statute of limitations had expired because the information was timely filed within the limitations period, which was tolled during defendant's continuous absence from the state.

The Court held that there was no requirement that the defendant's absence from the state must hinder the state from proceeding with the prosecution. Instead, the DCA recognized that the case law from the Second DCA added this requirement first to section 775.15(5), and later to section 775.15(6). See: *State v. Miller*, 581 So.2d 641, 642 (Fla. 2d DCA 2001) (holding where the defendant's absence from the state is not the fault of defendant and does not hinder prosecution, the statute of limitations is not tolled pursuant to section 775.15(5), FS); *Netherly v. State*, 804 So.2d 433, 436-37 (Fla. 2d DCA 2001) (holding where the state is unable to demonstrate that the defendant's absence from the state delayed prosecution, the statute of limitations is not tolled pursuant to section 775.15(6) FS).

The First DCA analyzed each of these holdings and agreed that the Second DCA's decision in *Miller* appeared to be proper because the dispositive issue under section 775.15(5) is whether the state's delay in prosecution is reasonable. Thus, in considering the reasonableness of the delay, it is appropriate to look to whether the defendant's absence from the state hindered the prosecution. The DCA, however, disagreed with the Second DCA's holding in *Netherly* because section 775.15(6) does not require that the delay in prosecution be reasonable in order for the statute of limitations to be tolled. Based on the express language of section 775.15(6), prosecution in this matter was timely commenced, as Pearson was continuously absent from the state and his absence resulted in the tolling of the statute of limitations.

The First DCA denied Pearson's claim and certified conflict with the Second DCA's holding in *Netherly*.

Ondrey v. Patterson, 29 Fla.L.Weekly D522 (Fla. 2d DCA 2/27/04)

In this civil action case, Florence Patterson, as the personal representative of the estate of her son, John W. Patterson, sued Mark Ondrey, a corrections officer with the Pinellas County Sheriff's Office, and others, for the wrongful death of John Patterson. John committed suicide while he was being held in the Pinellas County Jail. In a motion for summary judgment, Corporal Ondrey alleged that the principles of sovereign immunity and qualified immunity precluded suit against him. The trial court denied Ondrey's motion and on certiorari review, the Second DCA concluded that the trial court did not depart from the essential requirements of the law and, therefore, denied Ondrey's petition for review.

The facts of this case show that John Patterson turned himself in to Sheriff officials after he learned that there was a warrant for his arrest for violation of probation. At booking it was discovered that John was taking medications that had been

prescribed for depression and bipolar disorder with psychotic features. John admitted to a prior suicide attempt and based on that information a psychiatric assessment was performed. The assessment records reflect that John was anxious, manic, and fearful. and that he displayed some confusion. Prior to going to jail, John had been hospitalized for depressed mood and suicidal ideation. John was held at the jail in a psychological observation unit from September 28, 1999, until his death on October 1, 1999. Corporal Ondrey was on duty in the unit between 3:30 P.M. and 11:45 P.M. on September 30, 1999, during which time he had contact with John Patterson.

In his affidavit and deposition testimony, Ondrey acknowledged that he observed John weaving something with a shoelace and that he asked John what he was doing. John allegedly stated he was making a cross, Ondrey took the lace as contraband. Ondrey stated he was unaware of any information that John was suicidal or had a history of psychological symptoms.

A fellow jail inmate neighboring John's cell testified in deposition that he saw John using a rosary string to try and commit suicide. Tajhon Wilson reported this to Ondrey who discounted John's suicide attempt.

The trial court found that the cumulative effective of Wilson's deposition testimony raised a substantial question of material fact for resolution by a jury concerning Ondrey's immunity. Assuming that a jury believes Wilson's testimony, the DCA agreed with the trial court that the jury could conclude that corporal Ondrey's failure to act under the circumstances amounted to a wanton and willful disregard of John's safety since John's suicide attempt was ultimately successful.

Bradford v. State, 29 Fla.L.Weekly D521 (Fla. 2d DCA 2/27/04)

This case is a "must read" for any prisoner who accepted a plea agreement and now contemplates filing for post conviction relief on newly discovered evidence.

Florida prisoner Kenneth Bradford pleaded guilty to multiple robbery charges and later filed a motion for post conviction relief pursuant to Rule 3.850, Fla.R.Crim.P., based on newly discovered evidence. Bradford attached an affidavit from Kendrick Cunningham who stated that Adrian Evans, the man who implicated Bradford in one of the robberies, admitted to Cunningham that he had an agreement with police to implicate Bradford but that Bradford did not actually commit the robbery.

The circuit court applied the newly discovered evidence standard set forth in *Jones v. State*, 591 So.2d 911 (Fla. 1991), in denying Bradford's motion.

On appeal the Second DCA recognized that the *Jones* standard was virtually impossible to apply because there was no trial and no evidence introduced. Any determinations as to the nature and admissibility of the evidence would be speculative. The DCA stated that the circuit court should have applied the more appropriate standard for withdrawal of pleas after sentencing, which requires the defendant to prove that withdrawal of his plea is necessary to correct a manifest injustice, citing *Miller v. State*, 814 So.2d 1131 (Fla. 5th DCA 2002); *Scott v. State*, 629 So.2d 888 (Fla. 4th DCA 1993).

In applying the more appropriate standard, the DCA conclude the circuit court properly denied Bradford's claim because he failed to allege that withdrawal of his plea is necessary to correct a manifest injustice. The Court, however, did affirm without prejudice the circuit court's order allowing Bradford to file a timely, facially sufficient motion to withdraw his plea based on newly discovered evidence.

Frett v. State, 29 Fla.L.Weekly D344 (Fla. 2d DCA 2/4/04)

Clarence Frett appealed his multiple convictions and argued that his convictions should be reversed because he was not present during critical stages of the criminal proceedings against him.

Prior to the trial date, Frett filed a motion to dismiss his court-appointed counsel, Tracy Lee. A hearing was held in which Frett, Lee, and the prosecutor were present. During the hearing Lee also asked that he be discharged as Frett's counsel, noting that he was concerned that he would be the subject of a bar grievance. However, the court inquired of both Lee and Frett and concluded that Lee's representation of Frett was adequate. Consequently, the court did not allow Lee to withdraw.

The morning of the trial, Lee asked for an ex parte communication with the court. While the prosecutor was advised that a dialogue between Lee and the court was about to take place, Frett was not likewise informed. During the ex parte hearing, Lee moved to withdraw as Frett's counsel because he was "very concerned about his ability to effectively represent him." The court again denied the motion and noted that there had been an ex parte discussion, but Frett was not informed of its nature or substance.

On appeal the Second DCA determined Frett was prejudiced by his absence because, without knowledge of counsel's statement that he could not be effective, Frett could not decide whether he wanted counsel to remain on case or move to dismiss counsel and take advantage of an opportunity to represent himself. The Court reversed and remanded for a new trial.

Fuller v. State, 29 Fla.L.Weekly D364 (Fla. 5th DCA 2/6/04)

Florida prisoner David Fuller appealed the circuit court's decision which denied his motion to correct

an illegal sentence. The DCA decided that a probationary sentence on one count could not be ordered to run consecutive to habitual offender sentence on another count where both counts involved crimes that arose from a single criminal episode. The Court reasoned that once a habitual offender sentencing scheme is utilized to enhance a sentence beyond the statutory maximum on one or more counts arising from a single criminal episode, consecutive sentencing may not be used to further lengthen the overall sentence.

[**Editors Note:** This holding is in conflict with *Davis v. State*, 710 So.2d 1051 (Fla. 1st DCA 1998) and the Firth DCA recognized and certified conflict.]

State of Florida v. Schreiber, 29 Fla.L.Weekly D338 (Fla. 4th DCA 2/4/04)

The State petitioned for a writ of certiorari to review a Broward County Circuit Court order which granted Schreiber's petition for writ of prohibition and remanded her case to the Broward County Court for an order of discharge. The Fourth DCA granted certiorari and quashed the Circuit Court's order on prohibition.

Respondent Jennifer Schreiber was charged by information with two misdemeanors, driving under the influence (with property damage) and driving under the influence. She moved to suppress the results of her blood test, and filed a motion to dismiss as well, apparently moving to strike a UBAL (unlawful blood alcohol level) allegation from the information as an alternative theory of prosecution. The State moved to transfer the case to the central courthouse to accommodate the request to have the case tried by jury. The case was transferred and reassigned. The reassigned judge later recused himself. The case was subsequently transferred to a successor judge.

On July 3, 2001, respondent filed a Notice of Expiration of Time for Speedy Trial, based on Florida Rule of Criminal Procedure 3.191. The trial court held a hearing within five days as required by the rule. The trial court ordered that respondent be brought to trial within ten days. It set the case for trial on July 18, 2001, the fifteenth day of the window recapture period. The day before that was reserved for hearing pending motions. At that hearing, the trial court granted respondent's motion to suppress blood samples obtained by the Davie Police Department, and granted her motion to strike certain language from the information. The state sought to appeal these trial court orders, and filed a motion for extension of time on July 18, 2001, the trial pending appeal and after mandate, pursuant to Florida Rule of Criminal Procedure 3.191(i)(4). The trial court granted the motion for extension.

On July 18, 2001, the State filed its Notice of Appeal upon a question certified to the Fourth District Court of Appeal from the county court. After rehearing, the Fourth DCA issued its final decision and opinion in *State v. Schreiber*, 835 So.2d 344 (Fla. 4th DCA 2003), affirming in part and reversing in part with remand to the trial court. Mandate issued February 7, 2003.

Before the appeal was decided, on July 19, 2001, respondent moved for final discharge, and the trial court denied the motion on that date.

Once the appeal was decided, on April 1, 2003, respondent filed in the circuit court, a petition for writ of prohibition to prohibit the trial court from exercising any further jurisdiction over the case beyond an order discharging her from prosecution. Respondent argued that the State's motion for extension of time pending appeal was not legally or procedurally valid because it was not filed until the five/ten day recapture window period. The circuit court agreed and granted prohibition.

On Certiorari review the Fourth DCA determined the circuit court departed from the essential requirements of the law in finding that the county court did not have authority to stay proceedings and extend the speedy trial pending the state's appeal of the county court's order on respondent's motion to suppress because the state's motion for extension of time was not filed until the recapture window under Rule 3.191. The Court reasoned that Rule 3.191(i) has been expressly interpreted by the supreme court as authorizing a state motion for extension of speedy trial time, as long as it is made during the speedy trial period, including the recapture period. ■

IN THE NEWS

AR – In Jan. '04 prison officials said that prisoners who believed they had been bitten by brown recluse spiders may actually have fallen victim to staph infections. Several prison systems and jails have reported prisoners being infected with an apparently new strain of treatment-resistant staph infection, often believed to be brown recluse spider bites because of manner in which it eats flesh.

CA – A study reported in January '04 showed young inmates in the state's prisons being caged, drugged and inadequately treated. For punishment the inmates are often locked in wire cages. Inadequately trained therapists frequently treated inmates suffering mental illness and substance abuse problems with prescription drugs instead of providing proper therapy. "The vast majority of the young inmates who have mental health needs are made worse instead of improved by the correctional environment," reported University of Washington child psychologist Eric Trupin and forensic psychiatrist Raymond Paterson of Washington, D.C. "We have got a serious problem, and before another teenager commits suicide, the California Youth Authority has got to get its act together," Sen. Gloria Romero said, who chairs a corrections oversight committee. She further stated, "This is not the 1930s. Even in mental hospitals, I thought we'd gotten rid of these practices long ago."

CA – During Mar. '04 eight prisoners at a privately-operated prison, Eagle Mountain Community Correctional Facility, were charged with murder in connection with a riot in Oct. '03 that left two prisoners dead. Six other prisoners were also charged with assault with a deadly weapon. According to prison officials, the riot lasted 90 minutes and involved 150 prisoners pitting a group of Hispanic and white prisoners against a group of black prisoners.

CT – According to results of a survey released during Mar. '04, 52% of Connecticut residents polled said that prisoners have too many rights. The poll, conducted by the University of Connecticut, also found that 41% said that rehabilitation is the goal of prison compared to 24% who said the goal is punishment.

FL – On Feb. 13, 2004, the superintendent of the Miami-Dade Regional Juvenile Detention Center, George LaFlam, resigned as the state finished an investigation into the June 2003 death of 17-year-old Omar Paisley at the facility. The boy died over a period of several days from a burst appendix. LaFlam's resignation came two weeks after two nurses were charged with third-degree murder and child abuse manslaughter for allegedly skipping examinations or falsifying medical records in connection with Paisley's illness and subsequent death. (See article in this issue.)

[Source: *Lakeland Ledger*, 2/14/04]

FL – During Feb. 2004 eight prisoners at Florida State Prison, the state's maximum security prison, went on a hunger strike to protest confinement conditions at the prison. The prisoners claimed they were being denied basic human needs such as recreation, decent food, visitation and access to canteen items. Reportedly, four of the prisoners gave up the strike after only a few days. All of the strikers were housed on the disciplinary wing at the prison. According to past reports from human rights groups, Florida State Prison is among the worst prisons in the U.S. with conditions there generally described as inhumane.

FL – During February the Fifth District Court of Appeal ruled that a former Orlando sex-crimes detective who pleaded guilty to having a sexual relationship with a teenage girl did not deserve the lenient sentence he received. The court overturned the sentence of Edwin Mann, who must now be re-sentenced on three counts of lewd or lascivious battery and one count of lewd or lascivious molestation. Orange Co. Circuit Court Judge John H. Adams had sentenced Mann to two years of house arrest followed by 25 years of probation in Nov. 2002, but the appeals court said Mann's crimes require at least a 25 year prison sentence based on sentencing guidelines.

FL – During Feb. '04 officials broke ground on a new prison in rural Franklin County, an area of the state expected to grow over the next several years. Franklin Correctional Institution, as it will be called, will be a 1,335-bed prison and construction is projected to be completed and begin accepting prisoners in June 2005. It will become the 57th major prison in the state. The prison will cost taxpayers $53.5 million.

FL – On Mar. 8, 2004, Florida corrections and probation officers, by the hundreds, met in Tallahassee to lobby legislators for increase pay and better working conditions. The rally was sponsored by the Police Benevolent Association, a law enforcement union. The officers complained to legislators that the officer-to-inmate ratio is widening as many officers leave for higher-paying jobs and as the prison

population grows it is creating bad working conditions. They complained that their 9% pay increase over the past three years barely beats inflation. Legislators overseeing budget appropriations promised to consider the complaints, but Gov. Jeb Bush later weighed in against any further pay increases for the next two years.

IL – During Mar. '04 Gov. Blagojevich signed a bill that will provide more than $1 million to nine wrongfully convicted former death-sentenced prisoners pardoned by former Gov. George Ryan. The former prisoners will receive $60,150 to $161,000 each.

KS – Officials in Florence charged the city's suspended police chief with two counts of sexual battery. The city counsel had suspended Police Chief Merlin Stout in Feb. '04 after he was arrested for improperly touching a woman in a restaurant.

KY – Corrections Commissioner John Rees said private businesses could take over food service at state prisons as early as this year. He claims the move could save enough money at the state's 12 adult prisons to raise the salary of prison guards, which ranks 49th in the U.S. Rees said the state wouldn't seek bids unless it concluded that a private company can provide food services for less money than it has been costing the state.

LA – Webster Parish Clerk of the Court Sueleth Frazier turned herself in during Jan. '04 after charges were filed against her for felony theft and malfeasance in office. Prosecutors claim she pocketed $130,000 in public funds.

LA – The Louisiana State Supreme Court refused to consider an appeal from prison journalist Wilbert Rideau, including a request to move his murder re-trial out of Lake Charles. Rideau was granted a new trial because blacks were excluded from Calcasieu Parish grand juries four decades ago. He was convicted three times for the killing of a bank teller in a robbery in 1961 and sentenced to death each time. His death sentence was commuted to life in prison in 1972.

LA – Orleans Parish authorities filed a lawsuit in February against LSU Hospital for the alleged dehydration death of a prisoner two years ago. The lawsuit claims the LSU Health Services Center was contracted to run the prison's psychiatric ward but left it understaffed at the time that Shawn Duncan, 24, died.

LA – Two prisoners were killed at the Louisiana State Penitentiary during Feb. '04. The warden said after the deaths that a sweep through the prison's dormitories, cell blocks and other areas where prisoners work and congregate by 200 prison guards did not discover any weapons or contraband. (Yeah, right.)

MI – A report commissioned by the state and released in Nov. '03 said that as many as 18,000 of the state's 48,000 prisoners have hepatitis C, but only 55 were being treated for the life-threatening disease. Officials said budget restrictions prevented them from treating every infected prisoner, which could cost $130 million a year. They also say the drugs aren't guaranteed to work, and cite to cure rates of 50% to 70% for the potentially fatal liver infection.

MS – State corrections officials said prison guards did nothing wrong in the days before the hanging death of Christopher Smiley, a convicted killer. Smiley was allegedly found dead in his cell Nov. 26, 2003, and officials claim it was a suicide according to an investigation. However, prisoners who were interviewed say Smiley was beaten by prison guards. The prison's investigation concluded that the prisoners were lying.

National – Two more states, New York and Wisconsin, dropped out of a multi-state crime database program that civil liberty groups have called an invasion of privacy. New York officials said they withdrew from the Matrix database over questions about federal funding for the program and its potential benefits. Matrix lets states share criminal, prison and vehicle information and cross-reference data with up to 20 billion records. Alabama, California, Colorado, Georgia, Kentucky, Louisiana, Oregon, S. Carolina, Texas, Utah and W. Virginia had already dropped out of the program or declined to join it. Connecticut, Florida, Michigan, Ohio and Pennsylvania remain in the Matrix.

National – During late Feb. '04 the U.S. State Department released its annual review of human rights around the world — grading each nation on its performances in several categories. Only one country escaped scrutiny, the U.S. itself. One area the report monitors is the functioning of prison systems. Some critics noted the irony of the U.S. criticizing other countries' prison systems, like Iceland — that has a total of 110 people in prison, when the U.S. has 2.2 million incarcerated — one quarter of the world's prisoners.

SC – During Mar. '04 prison officials in South Carolina said they were looking at privatizing food services in the state's prisons.

SD – During Feb. '04 a state legislative committee approved a bill that would abolish the death penalty is South Dakota. The measure, if passed, would also commute the sentences of four people currently on the state's death row. ■

EXCERPTS FROM "A CHECKERED PAST"

The following are excerpts of "A Checkered Past: A Memoir," by death row inmate William Van Poyck:

'I've sunk as low as it is possible to go'

"I've squandered away my entire life, thrown away everything I might have been. I could have been or done anything — doctor, lawyer, businessman, architect — I could have spent my life doing good and helping others. And yet I chose this. Why? How did I lose what I once had? Slowly, day by day. What do I have to show for my life at the end of the day? Nothing. My entire life — since age 11 — has been spent behind bars, confined like a beast in the zoo, with my highest aspiration being not to let the authorities break my spirit. And now I'm destined to die in prison, lost and forgotten, put to death by society like a rabid dog. I've sunk as low as it is possible to go, and life itself is utterly pointless. What the hell is wrong with me?"

'The inescapable crushing burden of guilt'

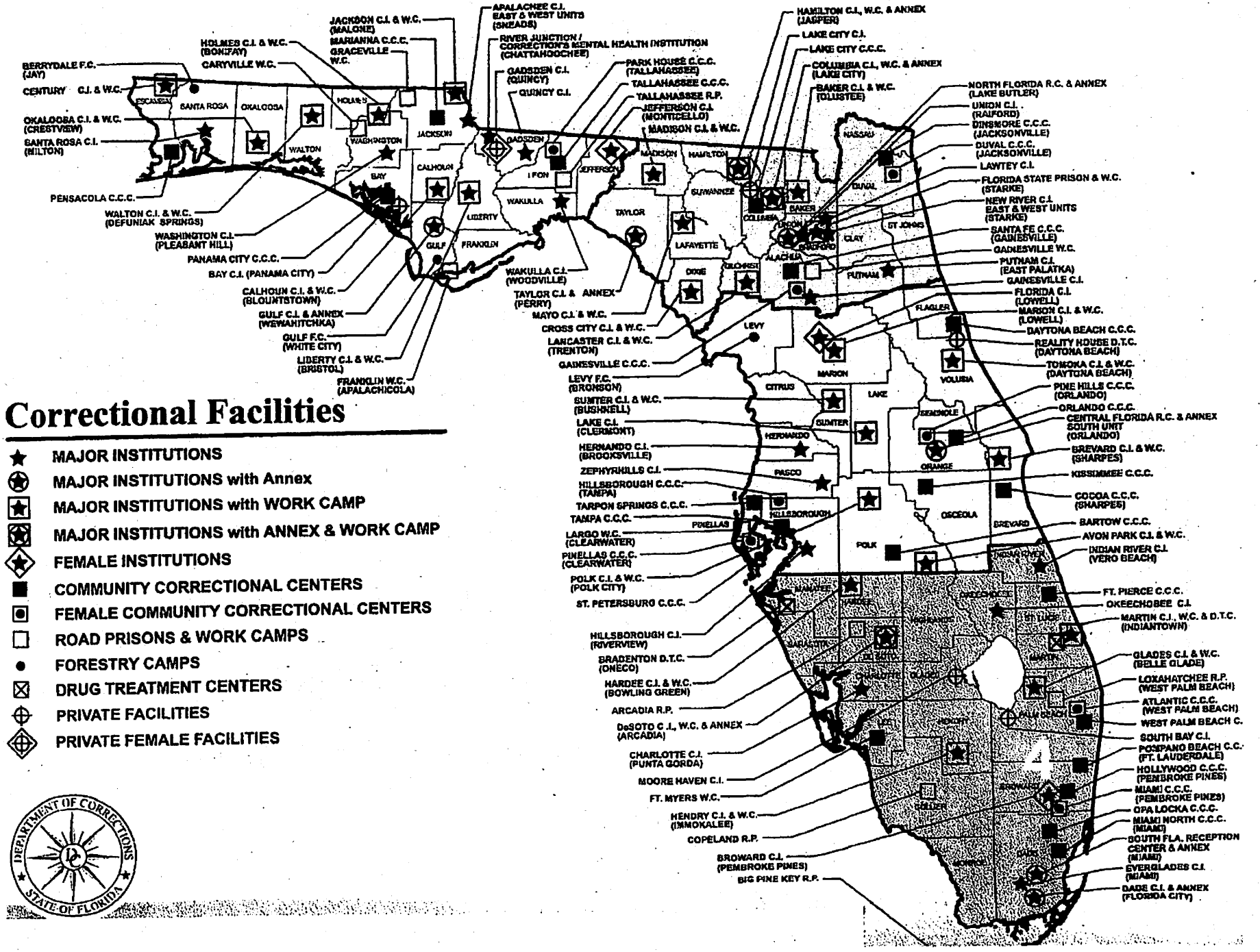
"Alone in my cell, staring at the ceiling, I ponder my bleak future, feeling totally numb, as if inhabiting a bad dream. The murder of a law enforcement officer during an escape attempt by a convicted felon on parole guarantees me a trip to death row. Yet the prospect of the death sentence I'm certain is coming is not what has deadened my spirit, it's the inescapable crushing burden of guilt pressing down upon me."

'Once you pick up a gun, all bets are off'

"Murder. The one sin I've feared may be unpardonable in God's eyes. And what if it is? What if I've finally crossed the demarcation line into utter damnation? The question gnaws relentlessly at my mind. All my life I've done my desperado thing, believing that I'm an affable thief, confident in my ability to plan everything so that nobody gets hurt. I'm just a romantic Robin Hood-type rogue, not a really bad guy, I've always assured myself. But I've been fooling myself. Once you pick up a gun, all bets are off; you cannot guarantee anything or plan against the unexpected."

'God was always there'

"All my life, I've run from God, rejecting Him, rebelling, going my way, depending on my own strength. But the spirit shows me, God was always there, His hand upon me, watching my every step, never giving up, never forsaking me."



Correctional Facilities

- ★ MAJOR INSTITUTIONS
- ⊛ MAJOR INSTITUTIONS with Annex
- ★ MAJOR INSTITUTIONS with WORK CAMP
- ⊠ MAJOR INSTITUTIONS with ANNEX & WORK CAMP
- ◈ FEMALE INSTITUTIONS
- ■ COMMUNITY CORRECTIONAL CENTERS
- ◉ FEMALE COMMUNITY CORRECTIONAL CENTERS
- □ ROAD PRISONS & WORK CAMPS
- ● FORESTRY CAMPS
- ⊠ DRUG TREATMENT CENTERS
- ⊕ PRIVATE FACILITIES
- ◈ PRIVATE FEMALE FACILITIES

DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

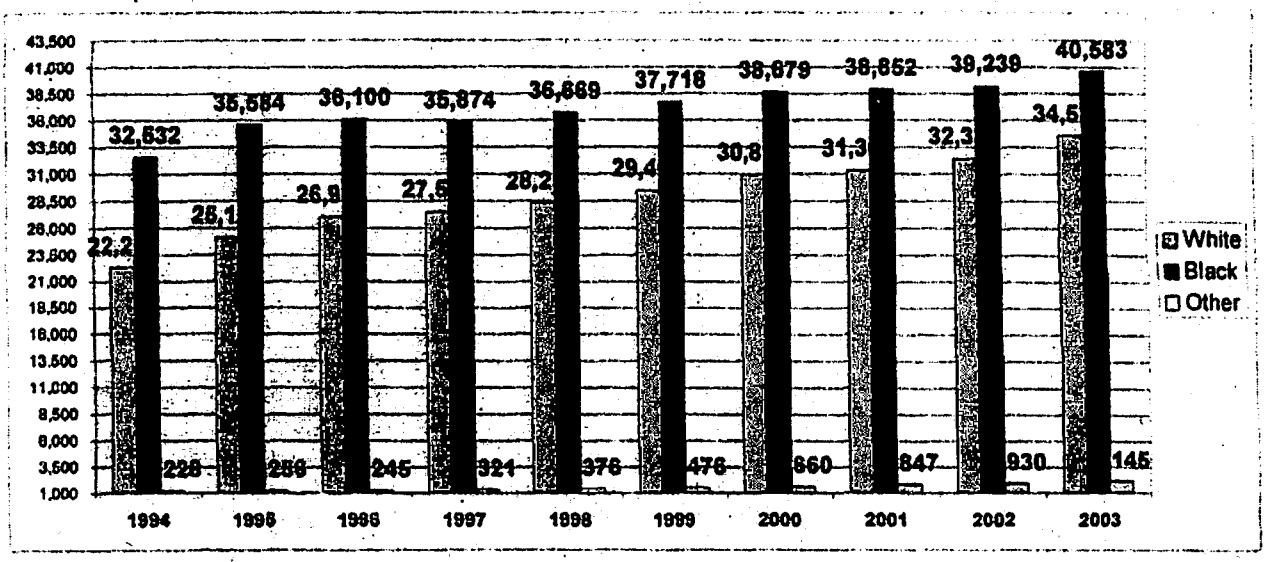
INMATE POPULATION ON JUNE 30, 2003

■ There are 21,264 more inmates in Florida prisons today than there were 9 years ago.

Inmate Population as of June 30th of each Year

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
TOTAL	**56,052**	**61,992**	**64,333**	**64,713**	**66,280**	**68,599**	**71,233**	**72,007**	**73,553**	**77,316**
GENDER BREAKDOWN										
Males	53,163	58,497	60,782	61,282	62,768	64,966	67,214	67,762	69,164	72,520
Females	2,889	3,495	3,551	3,431	3,512	3,633	4,019	4,245	4,389	4,796
RACE BREAKDOWN										
White	22,292	25,152	26,988	27,518	28,235	29,405	30,894	31,308	32,384	34,588
Black	32,532	35,584	36,100	35,874	36,669	37,718	38,679	38,852	39,239	40,583
Other	1,228	1,256	1,245	1,321	1,376	1,476	1,660	1,847	1,930	2,145
RACE/MALES BREAKDOWN										
White Males	21,117	23,658	25,437	26,048	26,731	27,818	29,094	29,373	30,383	32,244
Black Males	30,818	33,586	34,123	34,014	34,778	35,824	36,652	36,784	37,121	38,412
Other Males	1,228	1,253	1,222	1,220	1,259	1,324	1,468	1,605	1,660	1,864
RACE/FEMALES BREAKDOWN										
White Females	1,175	1,494	1,551	1,470	1,504	1,587	1,800	1,935	2,001	2,344
Black Females	1,714	1,998	1,977	1,860	1,891	1,894	2,027	2,068	2,118	2,171
Other Females	0	3	23	101	117	152	192	242	270	281

Inmate Population by Race on June 30, 1994-2003



FLORIDA DEPARTMENT OF CORRECTIONS
2002-03 ANNUAL REPORT

from the editor...

In the last issue of *FPLP* (Jan/Feb '04, pg. 5) it was noted that the FDOC has flip-flopped back and forth over the past year, agonizing over whether to ban the nationwide magazine *Prison Legal News*, or not, because it carries ads that offer services to help prisoners' families reduce monopolistic gouging from prison collect phone call rates.

In December prison officials re-imposed the ban on *PLN* and in January *PLN* filed suit in federal court, which got the FDOC's attention. On March 15 the Department re-re-reviewed the censorship decision and overturned it, saying now the phone ads present "no threat to security." What it is, the FDOC knows it can't successfully defend such censorship to a federal court. At most, however, the FDOC's lifting of the ban will only lessen its overall liability. The *PLN* suit will continue, seeking an injunction requiring the Department to provide proper notice when it acts to censor publications and seeking a declaration from the court that the FDOC's prohibition on prisoners writing for pay is unconstitutional.

Recently, *PLN* noticed all its Florida prisoner subscribers about the lawsuit and what it is doing to protect their right to receive that magazine.

In the last issue of *FPLP* it was also noted that information had been received that the FDOC's rejection and censorship of Volume 9, Issue 3 of *FPLP* had been overturned. That issue of *FPLP* first reported on the PLN rejections last year and included an article informing prisoners' families how they can set it up themselves to obtain lower rates on phone calls from incarcerated loved ones. The FDOC censored the issue, claiming it informed prisoners how to circumvent the prison phone system, which it did not.

However, the info received in December that the *FPLP* rejection had been overturned, was incorrect. Contact with the FDOC's central office in April resulted in us being informed that while the *PLN* rejections were overturned, that because the article in Volume 9, Issue 3 of *FPLP* informs "persons" how to "circumvent [FDOC] telephone policies" that issue of *FPLP* will continue to be banned from the prisons. With that, *FPLP* will also be filing a lawsuit against the FDOC contesting that censorship and the Department's publication rejection rules and procedures, which *FPLP* will maintain are unconstitutional under Florida's Constitution.

As past readers of *FPLP* already know, my wife, Teresa Burns Posey, currently has a legal action going challenging FDOC mail rules that, in part, restrict the amount and content of written materials (and photographs) sent to Florida prisoners. That case is pending in the First District Court of Appeals where the final brief was filed this month (April). We strongly believe the rules at issue will be invalidated. We will keep readers informed about that case as it proceeds.

The decision has also been made by our Board of Directors to file another lawsuit against the FDOC. That suit, which will be filed by mid-May, 2004, will seek a declaration that the FDOC practice of returning rejected mail to the sender without affording the *non-prisoner* sender the right to appeal the rejection to someone other than the original rejecter and without holing the mail at the prison to allow a meaningful appeal, is unconstitutional under the federal and Florida Constitutions. Injunctive relief will also be sought to force the FDOC to provide non-prisoner mail senders of Due Process when their mail is censored and rejected, which is not now being provided. If successful, incoming mail to prisoners that is arbitrarily rejected and returned to the senders.

Currently, Florida prisoner Mark Osterback has a federal lawsuit pending seeking to force the FDOC to hold rejected mail while *prisoners* have an opportunity to appeal the rejection. The federal court just ruled that issue will go to trial. We believe it's important to ensure that non-prisoners have the same opportunity and recognized right, thus our concurrent action.

Some may wonder, what is the big deal with all this activity around mail and publications going to prisoners? The "big deal" is protecting the right to speech, the right to send and receive communications and information, which is often the only thing preventing our prisons from becoming, again, the hell-holes of the past. Such right is the most precious and valuable right that prisoners and their outside loved ones have. That's why we with Florida Prisoners' Legal Aid Organization and *FPLP* have worked so hard over the years and will continue working hard to protect that right. But we do not work alone.

None of what we do would be possible without FPLAO's members and supporters, both free and imprisoned. You provide the encouragement and needed financial resources that keep FPLAO and this magazine going and working for us all. We at FPLAO and *FPLP* send our old and new members a big **Thank You**. We know you understand the struggle we are all in, its importance, and its continuing nature.

Members are asked to continue encouraging others – family members, friends, fellow prisoners – to become FPLAO members and join in the work being done. If you are reading this but aren't a member, I'm asking you to join us now. If you believe in the work being done for prisoners, their families and friends, but haven't made a donation recently, please consider sending a donation, in any amount, even a few stamps can help out, so that the work can continue and grow.

I believe you will find this expanded issue of *FPLP* useful and informative. In the next issue we will start carrying a new resource list, don't miss it. I wish all my brothers and sisters in the struggle well. Together, we will continue to make changes. – Bob Posey■

OPINION

A Prisoner's Thoughts About the Aftermath of Carlie Brucia's Murder

by John Hudson

Before I begin to write about how the February 2004 abduction and senseless murder of 11-year-old Carlie Brucia in Sarasota, Florida, affects our rights as a people, I want you to know I deplore crimes against innocent children. I want you to understand that I do not believe the majority of prisoners in this state, and country, feel any different. Most find such crimes deplorable and would probably love to get their hands on Carlie Brucia's murderer.

I write because I'm tired of the issue of the public's ignorant free-floating thoughts that because the accused whom allegedly murdered Carlie was previously convicted of crimes, etc., that he should never have been free, then the horrific act would not have happened. As prisoners and convicted felons, this is a major tenet and stigma against us – that we're all alike, no good, and never deserving to be free, ever.

More importantly, though , I've heard and read many free – floating thoughts from the public after Carlie's murder that the punishment for criminals is not tough enough. Mainly, these complaints are that there are too many legal loopholes that permit criminals to go free. Such talk is music to a politician's ear, giving him or her a platform to run for office on. After all, a society controlled by fear *will* elect them.

I agree, everyone's right in a civilized society is to be free of fear. It is true that many no longer feel safe in their own neighborhoods. People are robbed in the streets. People are shot without rhyme or reason. There's the senseless kidnapping of children like Carlie. I can understand how people can be angry that some criminals escape punishment through legal means, or, as some refer to, legal loopholes.

But, these so – called legal loopholes are everyone in this country's sacred rights. People know that. But people believe it is someone else, not they, who will need the protection of our constitutional rights. After all, only crooks get "crossways" with the law. So, they argue, we must stop the legal loopholes.

But what happens when it's their child who is arrested? Then they will mortgage their homes to bond them out of jail, or give up their life savings to hire an attorney to protect their child in court.

When they discover that the search was done without a warrant or cause, but that the object seized will be used against their child anyway; when they discover that their child's confession was coerced, but it will be used to incriminate their child anyway; when they learn that some criminal or jailhouse self-serving snitch has given perjured testimony in exchange for their freedom, but their child will be convicted on their testimony anyway; when they learn that the State has withheld evidence that tends to show their child is not guilty, but the jury made its' decision without having heard it; when they discover the State is free to violate their child's rights because Judges are no longer independent to make decisions because they were labeled "soft on crime"; and when they learn that their child, once in prison, has lost his or her rights as a human being and can be abused, even killed, by inmates and guards alike, maybe then they will remember that the loopholes that they have stopped prevented their child from receiving justice.

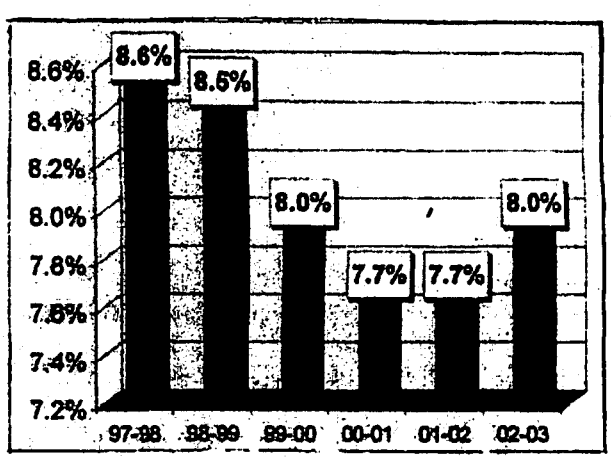
Hopefully, Carlie's killer will be convicted and punished using the evidence against him. If the government followed the law obtaining evidence, didn't add anything to it or take anything out, the prosecutor doesn't get over-zealous and presents the case fairly, then it shouldn't be a problem.

What's scary is that should people be so instilled with fear that they are willing to strip legal rights away from all, then the police will become handmaidens of power, trials will be nothing more than mockeries of justice, and the government will be free to ravage and pillage people with utter impunity. To some extent, this has already happened, but that's an article for another day.

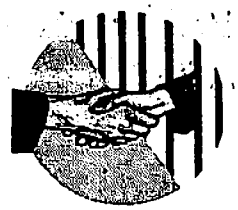
And so readers, although I understand and sympathize with the anger and fear over Carlie's murder, I believe it's wrong to label all convicted criminals "enemies of children," and, moreover, give up sacred constitutional rights out of fear or terror of any enemy. If this be not so, then we are all lost. ■

(FY 2002-03)

Percent of State General Revenue Budget Appropriated to Corrections



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
- ☐ $9 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 Organization, Inc. Please complete the above form and send it with the indicated membership dues or subscription amount to: *Florida Prisoners' Legal Aid Organization Inc., P.O. Box 660-387, Chuluota, FL 32766.* For family members or loved ones of Florida prisoners who are unable to afford the basic membership dues, any contribution is acceptable for membership. New, unused, US postage stamps are acceptable from prisoners for membership dues. Memberships run one year.**

MEMBERSHIP/SUBSCRIPTION RENEWAL

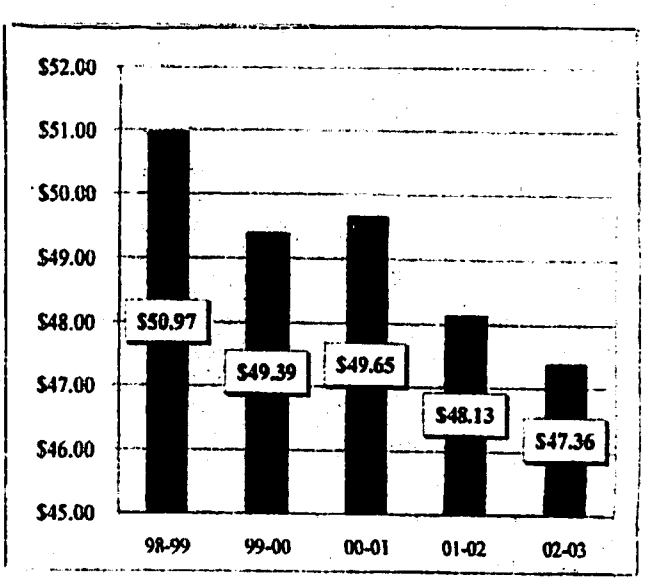
Please check your mailing label to determine your term of membership and/or last month of subscription to FPLP. On the top line of the mailing label will be a date, such as ***Nov 04*. That date indicates the last month and year of your current membership with FPLAO or subscription to FPLP. Please take the time to complete the enclosed form to renew your membership and/or subscription before the expiration date.**

Moving? Transferred? If so, please complete the enclosed address change form so that the membership rolls and mailing list can be updated. Thank you!

Laws and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up, and set to true time.

Henry Ward Breecher 1858

Inmate
Total Daily Cost
($17,286 annually in FY 2002-03)



SUBMISSION OF MATERIAL TO *FPLP*

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

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

PRISON LEGAL NEWS

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

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

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

Prison Legal News
2400 NW 80th Street
PMB 148
Seattle, WA 98117

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

Email PLN at:
webmaster@prisonlegalnews.org

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 660-387, Chuluota, FL 32766**

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