FLORIDA PRISON LEGAL

PERSPECTIVES

Prisoner Beaten and Choked; Guards and Officials Fired, Resigned and Reassigned; Death Threats Reportedly Made to Whistle blowing Officer

Four guards at the Southwest Florida Hendry Correctional Institution on March 16, 2007, allegedly for beating and choking a prisoner unconscious in a confinement unit at the prison, reportedly because he had filed grievances about the confinement area. FDOC Secretary Jim McDonough ordered that Sergeants Randy Hazen, William Thiessen and Phillip Barger and Correctional Officer Gabriel Cotilla be fired and said the four could also face criminal charges.

According to the Department of Correction's investigation, the incident began March 14 when prisoner Charles Gundlah, who is serving a life sentence for murder, was removed from his cell by the four guards and taken to an area out of sight of security cameras and beaten in the face and on his head before being choked unconscious because he had filed a grievance two days earlier complaining about denial of medical treatment and harassment by guards.

When Gundlah was returned to his cell and the shift changed officers, Sergeant Bruce Sooy said he noticed fresh bruises on Gundlah's neck and reported it to medical and higher officials. FDOC investigators determined that the four guards did beat and choke the prisoner.

On March 21 Secretary McDonough (living up to his previous warning to corrupt and abusive FDOC employees that he is not a man to be trifled with) had Hendry CI Warden Carol Starling, 53, and Assistant Warden Jim Tridico, 62, removed from their posts pending reassignment and he fired Colonel William Avant, 40, who was in charge of security at the prison. McDonough said Avant was fired because he was responsible for the safety of everyone at the prison "every minute, every day." And that was "absolutely not" done in Gundlah's situation.

"It's been over a year since we made very clear what the standards are and the vast majority of the department has come to understand that," McDonough said. "Some of the officers, and perhaps some of the leaders thought they could take the law onto themselves." A couple of days after being suspended Starling and Tridico were allowed to resign. However, the incident was far from being over.

According to FDOC reports, on the evening of the day that he was fired Avant held a party at his state-supplied housing on prison grounds, with the gues. list reportedly including the guards who had been previously fired. Around 9:15 that night, three phone calls were made from the party to the prison threatening Sgt. Bruce Sooy's life for reporting the assault on Gundlah. Some party-goers reportedly then drove through the prison parking lot threatening other staff members.

Hendry County Sheriff deputies were called to the staff housing area and additional staff was called in from other institutions to ensure the security of the 1,2062-bed prison. McDonough ordered the prison to be locked down.

On the day following the party, 10 FDOC employees were placed on paid leave while a major, the classification supervisor and a secretary were fired for their alleged roles in the party and other activities, according to McDonough.

Sooy was promoted to major.

Another day passed and McDonough's office announced that of the 10 placed on paid leave a captain and a correctional officer were being transferred to another prison; 5 more officers, including a lieutenant, had been fired; and three others would continue on leave as the investigation continued.

Hendry CI Chaplain Robert Wiederman was among those still under investigation. Reportedly, he had sent three e-mails to McDonough the day after the party asking him to be lenient with prison leaders. What alarmed him most, said McDonough, was that a chaplain who is suppose to be concerned about and guiding the spiritual life of the prisoners had sent him one e-mail suggesting that the officers may have made a "mistake for the right reason."

James Brown, William Diaz, Kevin Filipowicz, Tina Morgan and Stephen Whitney were the 5 dismissed in that latest round of firings.

McDonough promoted Vickie Langford from assistant warden to be warden at Hendry CI. Colonel James Blackwood from Okeechobee CI and Colonel John Palmer from Santa Rosa CI were promoted to assistant warden positions at Hendry CI. ■

FLORIDA PRISON LEGAL

Perspectives

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Fla. Supreme Court Reaffirms *Schmidt v. Crusoe:* New Problems Created

by Sherri Johnson

The lead article in Volume 12, Issues 5 & 6 of *FPLP*, entitled "Circuit Court/DCA Engaged in Crusade to Roll Back Court Access for Collateral Criminal Proceeding Litigants," concerned an important case affecting Florida state prisoners, *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003) (which held that Florida's Prisoner Indigency Statue, § 57.085, Fla. Stat., does not apply to collateral criminal court proceedings filed by prisoners). That article also detailed the steps that some lower courts have taken to ignore the *Schmidt* decision, impede and actually obstruct prisoners' access to the courts, and to try to persuade the Florida Supreme Court to recede from *Schmidt*.

Shortly after that issue of *FPLP* was published the Supreme Court rejected those lower courts' efforts and reaffirmed its 2003 decision in another case involving prisoner Dan Schmidt. *Schmidt v. McDonough*, 32 Fla.L.Weekly S16 (12/21/06). However, as discussed below, the legal reasoning in that latter decision (referred to as "*Schmidt II*" herein) is arguably infirm where it appears that the Supreme Court sought to pacify the lower courts by holding that even though prisoners' collateral criminal proceedings are not subject to the prepayment and lien provisions of § 57.085, they are still subject to the indigency certification requirements of § 57.081, Florida's general indigency statute.

Already *Schmidt II* is causing problems, with at least one lower court twisting the decision on its head to continue the campaign to impede and obstruct prisoners' court access. But, if nothing else, the issues are being narrowed. Unfortunately, it may take federal litigation to straighten out the mess that has evolved over time and that acts to block prisoners' court access in Florida.

Schmidt I

In the first Schmidt decision the Florida Supreme Court held that indigent prisoners who bring legal challenges that could conceivably reduce the amount of time spent in prison, termed collateral criminal proceedings (e.g. challenges to gain time forfeitures, prison disciplinary actions involving loss of gain time, adverse parole decisions, etc.), are exempt from the prepayment and inmate account lien provisions of § 57.085, Fla. Stat., Florida's Prisoner Indigency Statute, that was enacted in 1996 to reduce (so-called) frivolous inmate lawsuits. As pointed out by the court in that case § 57.085 itself contained a provision stating that it did not apply to criminal or collateral criminal proceedings. But lower courts, primarily the Second Judicial Circuit Court and First District Court of Appeal, where the majority of such prisoner legal actions are filed, were ignoring that exemption provision and requiring compliance with § 57.085 no matter what prisoners filed in those courts.

Following *Schmidt I* it was thought that those lower courts would begin complying with the law and the

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high court's decision. It was not to be. Those lower courts continued to illegally block and impede collateral criminal prisoner litigants' court access through intentional misapplication of § 57.085. (See the article cited above for a more detailed examination of *Schmidt I* and the lower courts' actions.) Those courts sought to force the Supreme Court to reverse its decision in *Schmidt*.

Unknown to many, however, prisoner Dan Schmidt had another case pending in the Florida Supreme Court that the court had stayed and put on hold while it observed the effect that its first decision had.

Schmidt II

The first case brought by Dan Schmidt and ruled on by the state Supreme Court was pretty much straight forward. Schmidt had filed a petitioner for writ of mandamus in the circuit court challenging prison disciplinary action that resulted in a forfeiture of gain time. Schmidt sought to proceed as an indigent, but the circuit court sought a filing fee or affidavit of indigency and six-month printout of Schmidt's inmate account pursuant to § 57.085, the Prisoner Indigency Statute. Schmidt responded that he was not subject to those requirements because his mandamus action was a collateral criminal proceeding exempt from § 57.085. The circuit court rejected that contention. And when Schmidt sought a writ of prohibition in the First DCA that court also sought to force Schmidt to comply with § 57.085 to proceed in that court, or face dismissal. Schmidt then turned to the Supreme Court with a mandamus petitioner for require the lower courts to comply with § 57.085(10), which exempts collateral criminal proceedings from the rest of the provisions in § 57.085. That case resulted in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003) ("*Schmidt I*," herein).

The second case filed by Schmidt and that now has been decided by the Supreme Court ("Schmidt II," herein) was not so straight forward.

Schmidt had received a second disciplinary report and had more gain time taken for disobeying an order concerning the use of a computer in a computer class. He also was kicked out of the class. He again ended up filing a mandamus petition in the circuit court, this time, seeking not only the return of the forfeited gain time (like in his first case) but also seeking to have the court order that he be allowed to return to the computer class.

Again, like in the first case, the circuit court tried to make Schmidt comply with § 57.085 provisions to proceed as an indigent. Again, Schmidt refused to do so and sought a writ of prohibition from the appeal court, which again also sought to force Schmidt to comply with § 57.085. When Schmidt refused to comply the appeal court dismissed his prohibition petition followed by the circuit court dismissing his mandamus petition.

Schmidt then sought to appeal the dismissal of the mandamus petition. And again, the first DCA sought to

force him to comply with § 57.085 to proceed on appeal as indigent.

Schmidt went back to the Supreme Court with another mandamus petition seeking to bar the appeal court from dismissing his appeal. The appeal court went ahead and dismissed the appeal when Schmidt failed to pay a filing fee or comply with § 57.085, but the Supreme Court stayed the case anyway while it proceeded to resolve Schmidt's first case.

Most notably, in the second case Schmidt claimed he not only was not required to comply with § 57.085 provisions but that he also should not be required to comply with the general indigency certification requirements of § 57.081, Fla. Stat. He also claimed that a "mixed" petition—one in which a civil claim (his seeking reinstatement to the computer class) is piggy-backed onto a gain time claim (a true collateral criminal claim)—is also exempt from the prepayment and lien requirements of § 57.085. The state responded claiming the *Schmidt I* was wrongly decided and asking the court to overrule it.

As to Schmidt's first claim, that he is not required to comply with §§ 57.085 or 57.081 indigency provisions because his underlying mandamus petition was a collateral criminal proceeding and is in the nature of a habeas petition, the Supreme Court agreed with him—in part. With respect to § 57.085, Schmidt is correct concerning the gain time issue, the court decided. But he is incorrect in claiming that he is not subject to § 57.081, wrote the court. The court did not explain why § 57.081 would apply to collateral criminal proceedings if, as is fairly indisputable, they are "in the nature of a habeas petition," as they certainly are considering their history. Instead, the high court simply interpreted the language of § 57.081, which specifically exempts prisoners "as defined in § 57.085" from the general indigency statue provision to mean that such exemption only applies to non-collateral criminal proceedings that are subject to § 57.085 provisions.

Next, the Supreme Court, however, rejected Schmidt's claim that "mixed" petitions, those containing civil claims piggy-backed onto a gain time (or true collateral criminal claim) are also exempt from § 57.085 provisions. (The court's reasoning on that claim is sound, in this author's opinion.)

The court reasoned, essentially, that prisoners cannot avoid or circumvent the § 57.085 requirements by piggy-backing civil claims that have nothing to do with duration of sentence onto collateral criminal (duration of sentence) claims in one proceeding.

In conclusion, the Supreme Court held that:

"[T]he filing of a mandamus petition raising a gain time claim is not free of costs, and that although such petitions are exempt from the prepayment and lien requirements of the prisoner indigency statute, §57.085, they continue to be subject to the certification requirements of the general indigency statute, §57.081. We also hold that 'mixed' petitions—petitions where civil claims are piggy-backed onto gain time claims—are not exempt from the prepayment and lien requirements of the prisoner indigency statute."

Thus, Schmidt's petition before the Supreme Court was denied and new games began in the lower courts.

Conclusion

Already orders have been seen issuing out of the Second Judicial Circuit Court following *Schmidt II* on pure collateral criminal mandamus cases claiming they are "mixed" petitions and therefore subject to (you guessed it) § 57.085 prepayment and lien provisions. These orders are claiming the petitions are "mixed" for a variety of reasons, e.g., that they are seeking "declaratory" relief, a civil relief, in addition to challenging, e.g., a gain time forfeiture, etc. Already new and unnecessary litigation is being spawned by that circuit court's determination to reduce its prisoner case load by intentionally and knowingly not following the law and instead trying to change the law at the expense of justice and constitutional rights.

It is fortunate few post conviction motions are filed in that court, since they are also collateral criminal proceedings potentially affecting the duration of a sentence, like a gain time forfeiture challenge. Otherwise that court would likely be trying to charge a filing fee or requiring § 57.081 or § 57.085 compliance on post conviction motions also to reduce the number of them filed. So far that hasn't happened, but since such post conviction proceedings are clearly offspring of state habeas corpus, just like the mandamus petitions challenging duration of sentence issues are, can it be very far down the road? Therein lies the fallacy of the Supreme Court's reasoning in *Schmidt II*, and probably the basis of a federal constitutional challenge to using indigency statutes and costs to impede and obstruct access to the courts to protect a liberty interest. ■

FDOC Secretary Mandates That Employees Get Physically Fit

Recently Florida Department of Corrections (FDOC) Secretary Jim McDonough directed Florida prison employees to either get physically fit or risk demotion or losing their jobs. McDonough, a retired Army colonel, who was picked to run the state's prison system last year after the former secretary, James Crosby, was force out for corruption, sees staff fitness as a high priority and key stage of cleaning up the system after years of corruption and underperformance.

No doubt McDonough was astonished when he first took over the FDOC and traveled to institutions around the state and observed firsthand the general sloppiness, obesity, and poor physical condition of his correctional staff.

McDonough's proposal would require that prison guards, regardless of rank or assigned duty, meet minimum physical fitness requirements, according to age, such as running a mile-and-a-half in a set time and doing a set number of push-ups. Those who repeatedly fail to meet the standards would face action that could result in demotion or dismissal.

Getting tough is the right approach to straighten out the FDOC that is still reeling from corruption scandals that came to light over the past two years and reach all the way to the top positions in the department, says McDonough.

"The two key elements of the job are being able to protect the public and being able to protect each other," McDonough said. "It may mean coming to the aid of a colleague, dashing two or three hundred yards, and, under stress, handling themselves and calming an issue. At any given moment, that might suddenly require agility, strength, and stamina."

While Gov. Charlie Crist has expressed approval of McDonough's fitness plans, the union that represents many prison staff, the Florida Police Benevolent Association, has expressed dissatisfaction, not with the plan per se, but with McDonough's mandating it. FPBA executive director David Murrell says the union is concerned that McDonough could be changing the terms of guards' employment without proper consultation (presumably with the FPBA). Murrell claims the physical fitness requirements should be voluntary and come with a bonus (from taxpayer monies) for compliance.

McDonough said he has listened to the concerns, the union was represented on the panel that drew up the criteria for the plan, and he believes that 75 to 80 percent of the department's rank and file are in favor of the plan. He said he intends to have the program up and running by the middle of this year.

Exhibiting his attitude, McDonough, who is nearing retirement age himself, said he'll not ask anyone to do anything that he's not prepared to do himself. He says he'll be the first to take the fitness test and intends to meet the minimum standards for the youngest age group.

McDonough, leading by example, was also the first to take a drug test after he started mandatory testing of employees a year ago following a scandal involving former and then-current prison staff smuggling, distributing and using illegal steroids.

[**Sources**: FDOC Memorandum to Employees, 12/07; AP News; *Christian Science Monitor* 1/30/07] ■

Lawsuit Nets Prison Nurses Almost $1 Million

TALLAHASSEE—In January '07 a jury awarded almost $1 million to 12 women nurses who worked at a North Florida prison who had sued the state claiming that a sexually hostile workplace violated their civil rights.

A federal court jury in Panama City reached its verdict in January, over six years after the nurses at Washington Correctional Institution first complained that prison officials weren't doing enough to protect them from prisoners who, while the nurses made their rounds, used graphic language and masturbated toward them. That latter practice is known in prison slang as "gunning" in the Florida prison system and only started after female prison employees sued over two decades ago for increased opportunities to work in male prisons and around male prisoners.

This suit involved prisoners who were housed in long-term solitary, sensory-deprivation confinement called Close Management at Wash CI. The nurses said they repeatedly filed disciplinary reports against offending prisoners who talked vulgarly to them or masturbated in their sight while they dispensed medication in the confinement areas and that they complained to their superiors, to no avail.

After a weeklong trial before U.S. District Court Judge Richard Smoak, the jury of four women and four men found in favor of the nurses and awarded them $990,000 in damages for emotional distress. Individual damages to the 12 nurses ranged from $37,500 to $97,500, depending on how long the nurses had been employed at Washington CI.

"I'm so thankful that the jury believed in us because something had to be done," said Nurse Kathleen Rudolph, 54, of Fountain, Florida, whose complaints started the lawsuit. Rudolph, who worked at the prison for 12 years, said officers discouraged her and other nurses from filing complaints or refused to process disciplinary reports against prisoners because they were not detailed enough. "This would happen on a daily basis," claims Rudolph.

One of the nurses' attorneys, Wes Pittman of Panama City, said prison officials could have taken minimal steps to stop the prisoners' offensive behavior, such as having guards accompany nurses on their rounds or insisting that prisoners be clothed.

In apparent response to the lawsuit the Department of Corrections changed its rules last year to make the intentional exposure of genitals or masturbating by a prisoner subject to 60 days in disciplinary confinement and loss of 90 days gain-time. That penalty will be as ineffective as the prior penalty, claim some critics, mainly other prisoners who have a unique and personal insight into what works and doesn't work inside prison.

"Frankly, I am as disgusted as any other person, just like the majority of prisoners are, by the few sick prisoners who 'gun' female employees. Most prisoners shun the 'gunners,' they are often mentally ill to begin with," said O. H., a prisoner at Sumter CI. "But the problem goes deeper. Most of the ones who engage in such behavior towards female employees are mentally ill, but most also understand that their behavior is wrong. When caught, the DOC simply locks them up in confinement for a while, something they don't mind. There is no therapy or counseling given to try to change their behavior and no prosecutions for committing what is, in fact, a crime—something that would probably get their attention when they have to spend more time in prison," O. H. said.

Another prevalent problem is that some female FDOC employees actually invite and encourage such prisoners. The reality is that most women who choose to work in prison are not physically attractive. Exposed to a large population of sexually-deprived men who give them more attention than they have ever had and often working in housing areas where they easily can view male prisoners unclothed, in the showers, and in personal situations, for some female employees the temptation is too much.

Ask any Florida prisoner if he has ever known a female employee to flirt with prisoners, or while working alone in a dormitory or housing area to encourage (often selected) prisoners to take a shower or masturbate where the female employee can see and watch, and most prisoners will tell you there are always female staff like that at every institution. "The FDOC doesn't want the public to know that, but that's the way it is," said Mike Tunsell, a prisoner who spoke with *FPLP* staff. That, says Tunsell, encourages the "gunners," who see other prisoners allowed and encouraged by female staff to engage in sexual behavior. Thus, the "gunners'" belief that they too can develop a personal relationship with a female employee is constantly reinforced.

Another problem is where unscrupulous female employees use a fabricated charge of sexual activity against innocent prisoners who the employee doesn't like or wants to get for some reason. In prison disciplinary proceedings such a charge by a female staff member is considered to be substantiated by the mere allegation of it, and thus is indefensible.

According to many prisoners (who *FPLP* staff have spoken with) it is ironic that Washington CI nurses brought and won such a lawsuit, no doubt including many of the same nurses who have conspired with prison guards to cover up the widespread abuse of prisoners that Washington CI is notorious for. It is very likely, such prisoners say, that the reason the nurses were able to claim that no action was taken on their disciplinary reports against prisoners who offended them is because no paperwork was created from the real punishment metted out by prison guards. Washington CI has a system-wide reputation for skipping the reports and going straight to the beating and pepper-spraying of prisoners.

The lawsuit brought by the Washington CI nurses, now that it was successful, may spur even more such suits. Already prison nurses in Lake and Martin Counties have similar lawsuits pending.

[**Source:** *St. Petersburg Times*, 1/31/07] ■

Family Settles Lawsuit Over Prisoners Beating Death by Prison Guards

MIAMI—In late January '07 the family of a prisoner who died after being brutally beaten, kicked and stomped by a gang of Florida State Prison guards in 1999 agreed to settle their lawsuit against the former warder of the prison and the guards for $737,500.

Relatives of Frank Valdes, who was on Florida's death row for having killed a prison guard in a botched attempt to help another prisoner escape and who was himself beaten to death by several prison guards while handcuffed and helpless, agreed to settle the suit after 7 years of litigation. Their attorney, Guy Rubin, said the settlement included attorney fees and costs.

Valdes died after being attacked by the gang of prison guards on X-wing at Florida State Prison. An autopsy found that he suffered almost all of his ribs being broken, numerous fractures and internal injuries. Boot-prints were prominent on his body. The prison guards claimed Valdes killed himself by throwing himself off his bunk onto the floor. Four guards who were charged in his death were later acquitted at a trial held in the small town near the prison where prisons dominate the economy.

In addition to suing the guards who were involved in murdering Valdes, his family also sued former Florida Department of Corrections Secretary James Crosby who was the warden at FSP in 1999 when Valdes was killed and who, the lawsuit claimed, was partially responsible for Valdes' killing in that he allowed a culture of prisoner abuse and beatings to exist at FSP during his tenure there.

After Valdes was killed Crosby quickly rose in the prison system and in 2003 was picked by former Gov. Jeb Bush to be the DOC chief. Crosby, however, was forced to resign in 2006 when being investigated for corruption by both state and federal authorities. Crosby later was charged accepting illegal kickbacks from a prison canteen vendor, a federal charge to which he pleaded guilty. Crosby is scheduled to be sentenced in April '07. His sentencing had been put off at least twice as he continued to provide federal prosecutors with information about corruption within the FDOC.

The attorney for Valdes' family said they were glad the lawsuit was finally over and that they prevailed,

but that they felt that the state's response was "too little, too late."

[Source: Associated Press, 1/30/07] ■

Big Changes at Sumter C.I.

by Doctour Roul

For almost a decade, Sumter C.I. in West Central Florida has been the institution of choice for many of the system's older and wiser prisoners. Located about an hour north of Tampa and an hour west of Orlando, the relaxed atmosphere has been one in which a man could do some serious time. Then, just a few years ago, Colonel Daniel Olinger arrived and things began to change.

Towers went up in the middle of the compound, many of the huge oak trees were cut down, and yellow lines were painted on the sidewalks. Colonel Olinger quickly became known for his unwritten rules, the violation of which would land a prisoner in confinement. As a parade of wardens came and went, the Colonel showed no sign of moving on. He was considered a loose cannon; inmates and staff would avoid him, if at all possible. And then things got worse.

In late 2006 a sudden swap of Assistant Wardens for Programs (AWP) between Sumter C.I. and Polk C.I. was orchestrated by the powers that be. Sumter's Jimmie Atmore was exchanged for Polk's Greg Williams. The immediacy of the exchange was unusual and appeared to strengthen the rumor that Greg Williams had come under investigation at Polk C. I. for having the P.R.I.D.E. furniture build a pair of poker tables for him, under the table. But Williams was no stranger to Sumter C. I.

The new AWP had been a classification officer at Sumter under the notorious tyrant Donnie Simpson only four years before. That Williams somehow was fast-tracked for promotion, going to Tomoka, Union, and Polk before returning to Sumter, seems to prove that Secretary McDonough's housecleaning had not been complete. Now he was back at Sumter C. I. and, as supervisor to many who were once his supervisors, he had obviously not forgotten the many slights he had suffered nor was he willing to forgive. Donnie Simpson was Williams' first target.

That Simpson created for much of his staff an environment that can easily be described as hostile is, perhaps, an understatement. One staff member who declined to be named said that Williams caught "pure hell" working under Simpson. And, suddenly, there was a new sheriff in town.

Within a few months of Williams' return to Sumter C. I. as the AWP, Donnie Simpson's thirty-something year reign over the Classification Department ended. Simpson was gone—no notice, no farewells, no retirement party. And then Greg Williams scanned the landscape looking for his next target.

Many days Williams would walk the compound with an "East Unit" look on his face. On other days he would have problem cases and "writ writers," he called them, brought to his office, often in handcuffs. He would investigate grievances with thuggish insinuations, behavior, or language.

During an interview over grievances regarding Sumter's mail room practices, Williams began by telling Edwin "Hawk" Beatty and Richard Geffken that he was going to send them to Century C.I. Beatty says that the AWP told him "I don't like your writ-writing ass," that Williams verbalized his anger by saying, "You're cookin' my grits, boy!", and that he asked if the two prisoners knew that he could have his officers "chain you over a barrel."

Obviously, Williams thought that his lack of professionalism and thug mentality was shared by the other staff there. His statements to Beatty and Geffken were witnessed by Sgt. Carter and C.O.I. Harold Meyers, two professionals who were apparently as shocked by the outbursts as the two prisoners. Later, Officer Meyers asked Beatty to "leave me out of this," seemingly a reference to a grievance to follow, and Sgt. Carter, when asked the next day by Beatty what Williams meant, remained silent for a minute then declined to comment.

As Beatty shared the interaction with others, much debate centered around what the AWP meant by his threat to chain the two prisoners "over a barrel." Many of the old-time prisoners thought the comment reminiscent of the old movie *Deliverance* where a man was chained to a tree to prevent resistance during a homosexual rape. Beatty's request for clarification, sent to the AWP, somehow got torn in half and then taped back together before being returned. And the response failed to clarify Williams' statements to the two prisoners.

Wisely, Beatty grieved the threats and requested that no retaliatory transfer be allowed. Shortly afterwards, Geffken was transferred to Mayo C.I.

Sometime around Thanksgiving of 2006 Mr. Williams contracted with Sumter's P.R.I.D.E. print shop to prepare some work for his church group. The order went through the proper channels, was completed and delivered. Later, however, as if in defiance of his experiences with Polk C.I.'s P.R.I.D.E. and the poker tables, the AWP asked an inmate at Sumter's P.R.I.D.E. print to create a database for his church group to use to maintain financial records. This job, as the one at Polk C.I., was under the table, no purchase order, no payment to be rendered. Although Sumter's P.R.I.D.E. print doesn't do database work, inmate employees there had the skill to create what the AWP wanted. Supervisors and inmate employees feared Williams too much to refuse.

As one prisoner labored for nearly an entire week, being paid by P.R.I.D.E., the AWP sat beside him for hours explaining what the database was to do. When the database was finished, it was burned onto a disc so that

Williams could take it out of the prison to his church group.

The AWP gained, in his personal capacity, from the inmate labor that created the database. In addition to avoiding the cost of having the database created legally, the AWP gained social standing and influence with his church group by being able to obtain the free technology.

As autumn settled in at Sumter C.I., Mr. Williams had seemingly selected his next staff target for retaliation. His victory over Donnie Simpson had obviously increased his belief that he had total control over the institution, and he had other past wrongs to right. So, using the M.I.S. staff person, Mr. Dan Bazela, as a front, the AWP launched his attack on Dr. Roger Smith and the Education Department.

S.C.I.'s Education Department is known by prisoners throughout the state as being one of the best in the system. Using the most advanced technology available, the department is completely computerized and offers four vocational courses, ABE and GED classes, Special Ed classes, Boot Camp classes, and Enhancement Programs. Greg Williams correctly assumed that an attack on the computers used by staff and aides could potentially cripple Dr. Smith's department. So a witch hunt began.

Under the ruse of searching for unauthorized music on aides' computers, several machines were confiscated, the department's LAN system was removed and several other machines were left in pieces in an aborted attempt to uninstall Windows XP. The effect was catastrophic and brought the department's daily operations nearly to a halt.

One staff member who refused to be named because of career and retaliatory concerns, said that Dr. Smith was angered and humiliated, often spoke of purchasing some rolodex files to replace the computers, and was embarrassed when regional and Central Office requested data that he could no longer supply. Years of data and correspondence were lost to the attack. But why attack a department that could, and would, make the AWP look good?

Several staff members, also afraid to be named, said that Dr. Smith and Mr. Williams had had "bad blood" before Williams left his position under Donnie Simpson. About five years before, they say, when Dr. Smith and Donnie Simpson were close friends and fellow department heads, Dr. Smith had publicly embarrassed and humiliated the then-Classification Officer Greg Williams. Though full details were not given, they say that in an open meeting Williams had verbally exposed his incompetence and Dr. Smith berated him.

The story goes on to say that the incident was so harsh that, before the day was over, Dr. Smith received e-mails and phone calls from people who were not present but had heard about it, congratulating him for the way he put Williams in his place. The rural, southern, educated culture group to which both Smith and Simpson identified with, may have contributed to the eagerness with which the black, inexperienced, and slow-witted Williams was attacked. But an old adage advises one to be careful whose butt they kick moving up or down the career ladder because you may be forced to kiss it later. Obviously, Simpson and Smith paid no heed to this.

While the attack on Dr. Smith and his department was escalating, a high-echelon administrative meeting was held to discuss the events. Among those present were the Warden (who was "retired" and allowed his two Assistant Wardens to oversee daily operations), both Assistant Wardens, and Dr. Smith. Another afraid-to-be-named staff member told of that meeting:

The Assistant Warden of Operations (Security) attempted to call Williams (the AWP) off of the Education Department. As the Warden sat back and refused to get involved, Williams displayed his thuggish nature by shouting down the AWO. As a result, Williams' attack would continue.

During the ongoing attack to discredit and embarrass Dr. Smith, someone suggested that Education aides were plotting to crash the FDOC network from their PC's in the Education Department. Because Williams was known to have a grudge to settle with Dr. Smith, and because he was by this time actively attacking inmate education aides in the hope of embarrassing Dr. Smith, it is believed by many that he was behind this absurd claim. Also contributing to this is that the M.I.S. staff person, Dan Bazela, admitted that he believed Williams had used him to attack Dr. Smith for personal reasons. An investigation by the Inspector General's Office quickly showed the claim to be false. The target was, all along, Dr. Smith and his department.

As a part of his effort to discredit Dr. Smith and the Education Department, Williams zeroed in on one particular education aide who was in a key position. Williams had that prisoner brought to his office in handcuffs twice, tried to get him to agree that one of the teachers was bringing contraband to education aides and, when this netted no results, accused the aide of having sex with boot camp inmate students in the education building. This charge, however, was refuted by five staff members who were always present if the aide was near a boot camp inmate. It was physically impossible due to the direct and constant supervision, but Williams would bring it up again later, thereby ignoring staff's word in his attack on Dr. Smith.

When the AWP could produce no charges against the aide he had selected for attack, he proceeded to punish the prisoner anyway. The aide was fired from the education department, moved out of his one-man cell, and later put on what amounted to house arrest for three weeks before being locked up for investigation and transferred a significant distance from his family. And still, the AWP's thuggish behaviors became more evident.

Greg Williams, the AWP, had seemingly never paid much attention to the S.C.I. Lifers' Group, other than to periodically deny a request from them regarding new self-betterment programs. He refused repeated invitations to attend their meetings and failed to show up at their Sponsor Appreciation event in October 2006. For the first time in the group's 13-year history, Williams was the only AWP who refused to sign certificates the group issued and instead, affixed his name to them with a rubber stamp. But events developed that forced him to take notice of the group.

In late 2006, one of the Lifer's Group sponsors asked a prisoner to create a program for the Lifers' that would target parole-eligible inmates. The Parole Commission had been paying more attention to the group and would soon be having parole-eligible men sent to Sumter to participate in the program.

In February 2007, a proposal for a transition-type program was submitted to the Lifers' Board of Directors and sponsor. At that point the prisoner who created the proposal warned the board members not to forget Mr. Williams. They all knew how difficult he could be. But Williams was left out of the loop.

The Lifers' sponsor took the proposal to Secretary McDonough and someone in central office sent an e-mail to the warden at Sumter asking for input. The Warden and the AWP were completely in the dark regarding the proposal. Left to handle the situation and develop a response for his superiors in Tallahassee, Williams had three members of the Lifers' Board of Directors and the prisoner who created the proposal brought to his office.

Over a three-hour inquisition period, the AWP allowed his anger to show as he yelled, threatened, and humiliated the prisoners. Williams talked about his "n--- (testicles) being on the line" (a reference to his lack of awareness about the proposal when asked for input from his superiors), and said that before he allowed his "n ... be cut off" he would "cut off all of (the prisoners') n ..." He threatened one of the men by saying he would have him "shoveling snow in the Panhandle." Williams also ranted that none of the prisoners were "safe at Sumter" because he himself was not safe there either. As an apparent reference to the investigation from Polk C.I., Williams pointed to some boxes on his office floor and said that he keeps his "s... packed." The meeting was extremely hostile.

The result of that interview with the AWP was to ban three of the prisoners from the Lifers' Group and the prisoner who created the proposal was, in effect, placed on house arrest for three weeks when he was then locked up and transferred to an institution where his family could not visit. Only one of the prisoners in the AWP's office that day received no punishment.

Only a week before the proposal inquisition by the AWP, the Lifers' Group was preparing to elect a new president. On the evening of the election, the group's parliamentarian, who had been seen hugging the AWP at a Black History Month program and claimed to be a college fraternity brother to him, pointed out a prisoner in the group. Those listening heard him say, "This is the man that Mr. Williams wants for president. Don't you think you should want him too?" That night the Lifers' Group 13-year history of unimpeded elections ended. Mr. Williams' puppet, the man who would not be punished the next week at the proposal inquisition, became president of the Lifers' Group.

Throughout January and February of 2007, Mr. Williams' baser instincts, combined with a lack of respect for his staff, became more obvious. A newly-hired and yet to be certified female C.O.I. was taken out of the dormitories and given the administrative duty of accompanying the AWP, spending time in his office, and running errands for him. The AWP could say that it had nothing to do with her being a young, pretty, black female, but staff openly grumbled about the assignment. Many prisoners made lewd comments as the 20-something-year old C.O.I. accompanied the 60-something year old rough-looking Williams nearly everywhere he went.

It was also during the first months of 2007 that Mr. Williams began taking command of the ICT. Where previously duty was alternated between the Colonel, the AWO, and others, Williams became a regular fixture on the ICT. And his iron grip could only rival that of his one-time supervisor Donnie Simpson.

While sitting on the ICT, Williams' lack of professionalism evidenced itself through his rough language and his countermanding of announced team decisions. The AWP routinely changed team decisions after they were announced to the prisoners. He instituted a racial balance in the vocational classes and in both of Sumter's P.R.I.D.E. facilities that prevented them from hiring whites. And he told one black prisoner who had asked for help getting a job at P.R.I.D.E. that he (Williams) would get him a job there as soon as he got some of those "white boys" out of P.R.I.D.E. Suddenly, because Mr. Williams, skills, TABE scores, and waiting lists no longer mattered with respect to placement in many jobs at Sumter C.I.

At one ICT meeting, after the prisoner's job reassignment had been announced, the AWP loudly called the prisoner's name and said, "If you f... this up, you know what time it is!" The prisoner, and the others who heard this, didn't know for sure what time it was other than it was time for Secretary McDonough's housecleaning to reach into Region III.

The AWP also made rude, thuggish comments to staff members. One newly-promoted sergeant told inmates that, at his promotion ceremony, after completion, the AWP made rude comments regarding how the staff member didn't deserve the promotion and that he, the AWP, would have blocked it if could have. The sergeant

added that the Colonel came to his aid verbally and chastised the AWP for his rude comments.

As February 2006 unfolded, Mr. Williams appointed a black school teacher to chair the Black History Month committee (and notified everyone except that teacher), and then he (Williams) and his "associate" Ms. Finger, micromanaged all programs that month. The AWP constantly made demands on performers, berated them for any perceived shortcomings, cursed at them, and punished some who failed to meet his expectations.

One Hispanic prison who declined to sing in the choir for Black History Month was fired from his job as the Chapel janitor. Members of the Soul Band reported that the AWP cursed them for trying to ask questions about his demands and threatened to transfer them if they didn't perform to his expectations. One of them was transferred the second week of March.

Another prisoner, one who writes radical rap lyrics with racial undertones auditioned one of his pieces for the AWP. Williams correctly told the prisoner that the piece was too radical to perform in front of the whites-included audience but added that the prisoner would be welcomed to perform it at his (Williams') church.

The AWP constantly badgered performers during the Black History Month programs, changing their duties at the last minute, and threatening and cursing them. At one point he went to the rec yard and ordered prisoners to come in to the gym and participate or face disciplinary action. He evicted members of the audience who failed to give performers or speakers standing ovations, and constantly begged outside speakers for donations in public.

As February ended, word quickly spread that the Warden was being swapped to Polk C.I. for Warden Don Merritt. Prisoners and staff alike silently rejoiced; Merritt had been the Warden at Polk when Mr. Williams was forced to relocate, less than a year ago, to Sumter. Don Merritt was known as a proactive Warden, a fair man, who would allow no thuggish behavior from his staff. Everyone prayed that Greg Williams was on his way out of Sumter.

One department head who doesn't want to be named said that "Greg Williams is self-destructing. It is only a matter of time, but everyone believes it will be soon." Hope exists.

Secretary McDonough has made it clear that he will clean house. He showed this in Region I and parts of Region II. Hopefully, he will discover the scattered pockets of corruption, unprofessionalism, thug administrators, and misplaced officials in the system and make some more changes. There is no place in a state department for men such as Greg Williams. The sooner he is gone, the sooner the department can begin to recover. **[Editor's Note**: The opinions expressed in the above article are those of the author and not of *FPLP* or its staff. However, *FPLP* does invite commentary and opinion articles from its readers for possible publication. *FPLP* is especially interested in "inside" information that is factual and correct about illegal activities and/or wrongdoing by prison staff in Florida prisons. Mail containing confidential legal information may be sent to one of FPLAO's attorneys as "Legal Mail" addressed to the attorney, Florida Prisoners' Legal Aid Org., Inc., PO Box 1511, Christmas, FL 32709-1511] ■

From the editor . . .

Welcome, to a new issue of *FPLP*. As you can see looking through this issue, there have been some significant developments since the last issue. Against most prisoners' expectations, former FDOC secretary James Crosby and his "good" buddy, former regional director Allen Clark, were actually sentenced to prison for one of the many crimes that they committed during their tenures with the department. One can only wonder, however, what charges were dropped against them in exchange for their guilty plea to the one charge. While several actors involved in their sentencing expressed that "justice was done," it seems justice might have been better served if the two had been charged and sentenced to serve their time in a Florida state prison. Perhaps at Florida State Prison, sharing the cell on X-Wing where Frank Valdes was murdered under Crosby's watch. Unfortunately, after the two did everything in their poser to make it miserable for Florida prisoners throughout their careers, they will probably do their time at a "county club" federal prison. But at least there was a measure of justice, truly signaling that things are changing.

And then there was the incident at Hendry CI recently. A prisoner beaten and choked by three ranking guards and a female CO I. Because he had filed a grievance! No doubt, while he was handcuffed behind his back, as it usually happens. Not that uncommon an incident at many Florida prisons. What was uncommon was a guard with enough integrity to report the incident and, finally, a secretary who knows what must be done to promote responsibility, accountability, and professionalism. But as Mr. McDonough knows, it is going to take more work to weed out elements and a culture of corruption and abuse that took decades to develop.

At the same time that the incident was happening at Hendry CI I was going through an experience myself. Without any apparent reason, I and 28 other prisoners were packed up and transferred from Sumter CI and scattered out to institutions around the state, most further from our families. I, along with a few other guys, wound up after a 1 1/2 week transfer through two reception centers, at Mayo CI. I'll write more about that experience and my new location in a future issue.

For now, I won't ask you to "enjoy" this issue, but it is hoped the information herein is interesting and useful. If you are not a member of *FPLP*'s parent organization, FPLAO, I urge you to become a member and encourage others to join. Every member receives *FPLP*. If you are a member and haven't made a donation recently, please consider doing so. Your support is what makes it all possible.

I wish all *FPLP* readers the best. And to my fellow prisoners: I urge you to stay strong, be respectful to yourself and others, and strive to be a good person-- changed from what we once were. Later. *Bob Posey, Editor*

POST CONVICTION CORNER

by Loren Rhoton, Esq.

As has been discussed numerous times in previous articles, there are important periods of limitations to keep in mind with any postconviction case. In many cases, once the periods of limitations lapse, a criminal defendant will be unable to successfully pursue what may have once been viable collateral remedies. Nevertheless, even with older cases there can still be avenues for relief. Sometimes, even when the two year period of limitations for filing a Rule 3.850 motion has lapsed, an attack on the legality of a sentence itself can still result in positive results. An illegal sentence can be attacked at any time. *See* Florida Rule of Criminal Procedure 3.800(a). The focus of this article will be possible collateral attacks on illegal habitual felony offender sentences.

One such situation where an older sentence can be corrected years later relates to the legality of the habitual violent felony offender statutes in effect from October 1, 1989 through May 2, 1991. In State v. Johnson, 616 So.2d 1 (Fla. 1993), the Florida Supreme Court ruled that amendments to the Florida Habitual Felony Offender Statute in effect from October 1, 1989 through May 2, 1991, was unconstitutional in violation of the Florida Constitution's single subject requirement. The amendments in question specifically added the habitual violent felony offender category for any defendant who was previously convicted of aggravated battery. The upshot of Johnson is that any habitual violent felony offender sentence, based upon a prior offense of aggravated battery, which was imposed for an offense occurring within the window period (October 1, 1989 through May 2, 1991) is illegal and should be corrected.

Considering the fact that habitual violent felony offender sentences can be substantially enhanced, the correction of the illegal sentence could result in significant reductions of lengthy sentences. An attack on an illegal sentence per Johnson should be pursued under a Rule 3.800(a) motion to correct illegal sentence. There is no period of limitations for the correction of such an illegal sentence so the motion would not be time barred.

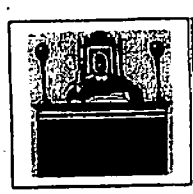
Another improper habitualization situation which my office has seen just recently relates to the imposition of habitual offender sentences on capital offenses (i.e., first degree murder or capital sexual battery). *See* Mishoe v. State, 601 So.2d

1284 (Fla. 5th DCA 1992) [habitual violent felony offender does not apply to capital offenses]; and, McClain v. State, 612 So.2d 664 (Fla. 2nd DCA, 1993) [capital felonies are not subject to enhancement provisions of habitual felony offender statute]. Also, any habitual offender sentences imposed on life felonies which occurred prior to October1, 1995, do qualify for correction under Rule 3.800(a) as illegal sentences. *See*, Nathan v. State, 689 So.2d 1189, *fn.*4 (Fla. 2nd DCA 1997). If qualifying capital or life felony offenses have been habitualized then they should be corrected. The removal of the habitual designation can result in potentially reduced sentences.

Another situation to keep an eye out for is the imposition of consecutive habitual and nonhabitual sentences in a case where the offenses arose out of a single criminal episode. In this scenario, when a court imposes a habitual offender sentence, it cannot impose a consecutive non-habitual offender sentence. Once the court lengthens a sentence under the habitual offender statute, it cannot further lengthen it by making sentences consecutive. *See*, Dawson v. State, 32 F.L.W. D590 (Fla. 5thDCA 2007).

The above scenarios are but a few legitimate collateral attacks on older, otherwise time-barred, cases. Illegal habitual offender sentences certainly are not limited to the situations addressed above. The above are merely illustrative of the fact that even with older cases, there still can be opportunities to collaterally attack and reduce sentences. Other important cases to consider as far as illegal habitualization of a sentence are: Young v. State, 716 So.2d 280, 281 (Fla. 2nd DCA,1998) [convictions for life felonies occurring prior to October 1, 1995, are not subject to habitual violent offender treatment under section 775.084(4), Florida Statutes (1989)]; Lee v. State 731 So.2d 71 (Fla. 2nd DCA, 1999) [If a defendant who has been sentenced as a habitual offender can prove that his prior offenses do not qualify him as a habitual offender, he will have established that his sentence is illegal]; Ford v. State, 652 So.2d 1236 (Fla. 1st DCA,1995) [Habitual offender sentence could not be based on prior convictions that were all entered on same date; sequential convictions were required to support habitual offender status]; Johnson v. State, 795 So.2d 1085 (Fla. 2nd DCA, 2001) [Movant who received a habitual violent felony offender sentence for armed robbery was entitled to hearing on motion to correct illegal sentence based on his contention that, under sentencing statute in effect in 1995, it was improper to count prior convictions for which he was placed on community control and adjudication was withheld].

Any of the above-addressed situations may or may not apply to any given case. They are cited for the purposes of illustration. If you do have an habitualized sentence, it is advisable to thoroughly investigate the legality of said sentence. If the habitualization has occurred illegally, there may be viable grounds, such as, but not limited to) those addressed herein, to collaterally attack your sentence. □



NOTABLE CASES

ANTHONY STUART

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

UNITED STATES SUPREME COURT

Cunningham v. California, 20 Fla.L.Weekly Fed. S67 (1/22/07)

John Cunningham, pursuant to a certiorari petition, presented the U.S. Supreme Court with the question of whether California's determinate sentencing law (DSL), which places sentence-elevating fact-finding within the sentencing judge's province, violates a defendant's right to trial by jury as safe-guarded by the Sixth and Fourteenth Amendments.

In Cunningham's particular case, the offense he was convicted of, under California's DSL, provides a punishment by one of three precise terms of imprisonment: a lower term of 6 years, a middle term of 12 years, or an upper tem of 16 years. The DSL obliges the judge to sentence a defendant to the middle 12 year term, unless the judge finds one or more additional "circumstances in aggravation." (In California's Rules of Court "circumstances in aggravation" are defined as facts that justify the upper term. Those facts, the Rules provide, must be established by a preponderance of the evidence.) Based on a post-trial sentencing hearing, the judge found six of such aggravating facts and sentenced Cunningham to the upper term of 16 years imprisonment. Both California's Appeal Court and State Supreme Court upheld the sentencing.

On review, the U.S. Supreme Court cited to its decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); and *United States v. Booker*, 543 U.S. 220 (2005).

After it explained those cases and opinions, in *Cunningham*, the U.S. Supreme Court held that the California DSL, by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.

Therefore, on that issue, Cunningham's case was reversed in part, and remanded for further proceedings consistent with the U.S. Supreme Court's opinion.

Lawrence v. Florida, 20 Fla.L.Weekly Fed. S84 (2/20/07)

Gary Lawrence sought certiorari review in the U.S. Supreme Court presenting, in pertinent part, the question of whether time in seeking certiorari review from the denial of state post-conviction relief tolls the one-year statute of limitations for seeking federal habeas corpus relief.

The U.S. Supreme Court answered and held the one-year statute of limitations for seeking federal habeas corpus relief from a state court judgment *was not* tolled during the pendency of a petition for certiorari to the U.S. Supreme Court seeking review of a denial of state post-conviction relief.

SUPREME COURT OF FLORIDA

In Re: Standard Jury Instructions In Criminal Cases (2006-3) 32 Fla.L.Weekly S49 (Fla. 1/25/07)

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (the Committee) petitioned the Florida Supreme Court to amend the Florida Standard Jury Instructions in Criminal Cases.

The amendment, proposed Dec. 14, 2006, and filed under Report No. 2006-03, regarded the Standard Jury Instruction in Criminal case 3.6 (g)—Justifiable use of Non-Deadly Force. The Committee recommended to: (1) delete the words "beyond a reasonable doubt" where they appear in two places of the instruction; (2) to add language to the directions as to when the part of the instruction concerning when the use of non-deadly force is not justified, so as to clarify that it should be given only when the defendant has been charged with more than one forcible felony, pursuant to the decision in *Giles v. State*, 831 So.2d 1263 (Fla. 4th DCA 2002); and (3) to update the instruction's history contained in the "Comment" section of the instruction.

After consideration of the Committee's report and its motion to expedite proceedings in the cause, the Florida Supreme Court granted the motion and authorized the publication and use of the revised instructions.

Gaston v. State, 32 Fla.L.Weekly S78 (Fla. 2/8/07)

Mario Gaston sought review of the Third District Court of Appeal's decision in *State v. Gaston*, 911 So.2d 257 (Fla. 3d DCA 2005), because it was in conflict with the decision made in *Green v. State*, 895

So.2d 441 (Fla. 4th DCA 2005), quashed in 944 So.2d 208 (Fla. 2006).

In the trial court, Gaston had sought to withdraw his guilty plea of carrying a concealed firearm that was entered a decade earlier. Gaston had asserted in his motion that the trial court did not advise him his plea might subject him to deportation and that he was subsequently advised by an immigration attorney that he was subjected to deportation proceedings if he applied for residency. The trial court granted Gaston's motion to withdraw his plea and the State appealed.

On appeal in the Third District the trial court's order was reversed, where it was opined that Gaston had not stated a prima facie case by pleading that he was specifically threatened with deportation because of his plea, thus issued the certified conflict with Green.

The Florida Supreme Court in *Peart v. State*, 756 So.2d 42 (Fla. 2000), had held that a defendant "must be threatened with deportation resulting from the plea" to establish prejudice arising from a trial court's failure to advise defendant of deportation consequences in entering a plea. *However*, in *Green*, the Fla. Supreme Court receded from that statement and instead, held that "henceforth, *it is the fact that the plea subjects the defendant to deportation*, rather than a specific threat of deportation, *that establishes prejudice*."

The Third District had applied the *Peart* standard instead of the corrected standard in *Green* when it reversed Gaston's case. Accordingly, the Third District's decision was quashed and Gaston's case was remanded for reconsideration in light of the Florida Supreme Court's decision in *Green*.

In Re: Amendments To Florida Rule of Criminal Procedure, Rule 3.800, 32 Fla.L.Weekly S78 (Fla. 2/8/07)

On its own motion, the Florida Supreme Court amended Rule 3.800(a). The amendment added the requirement that an order denying a motion to correct an illegal sentence under Rule 3.800(a) expressly state that the movant has the right to appeal within thirty days of rendition of the order. All comments that the Florida Supreme Court received regarding the amendment were in support of the addition.

Accordingly, Rule 3.800(a) was amended and became *effective immediately* upon the release of the opinion.

DISTRICT COURTS OF APPEAL

Brooks v. Fla. Parole Commission, 32 Fla.L.Weekly D3 (Fla. 1st DCA 12/19/06)

Alphonso Brooks appealed the denial from a circuit court regarding his mandamus petition that challenged the Florida Parole Commission's decision to suspend his presumptive parole release date and not to authorize his effective parole release date. The circuit court had further ordered a lien to be placed on his prison account for the mandamus filing fees.

On appeal, the appellate court found no merit in Brooks' claims regarding the lower court's order of denial. However, it was found that Brooks' argument that he is exempt from the placement of a lien on his prison account did require Brooks' be granted relief on that issue. The appellate court agreed with Brooks, in that his challenge was a collateral criminal proceeding and the prison indigency lien provision did not apply. Brooks' position is supported by *Spaziano v. Fla. Parole Commission*, 31 Fla.L.Weekly D1597b (Fla. 1st DCA 2006).

Accordingly, to the extent of the lien issue, the cause was reversed and remanded with instructions to the lower court to remove the lien from Brooks' prison account.

[Note: Also See other recently decided cases similar to Brooks' case regarding Parole Commission challenged issues being exempt from the prison indigency statute's lien provision: *Miller v. Fla. Parole Comm'n*, 32 Fla.L.Weekly D423 (Fla. 1st DCA 2/8/07); *Jones v. Fla. Parole Comm'n*, 32 Fla.L.Weekly D131 (Fla. 1st DCA 12/28/06); *Anderson v. Fla. Parole Comm'n*, 32 Fla.L.Weekly D133 (Fla. 1st DCA 12/28/06)].

Nolin v. State, 32 Fla.L.Weekly D27 (Fla. 2d DCA 12/20/07)

Ralph Marvin Nolin appealed his judgment and sentence based on his contentions that the trial court erred in denying his dispositive motion to suppress cannabis seized from a warrantless search.

In the trial court, during the suppression hearing, an Officer Rogers testified that he had responded to the Nolin's residence based on a domestic disturbance dispatch, issued in response to a neighbor's call. Upon arriving at the residence he heard doors being slammed within the area of Nolin's home. Officer Rogers stated that he then proceeded to the backyard area where he observed evidence of broken glassware and when he looked into the porch area to the inside of the backdoor "everything looked fine."

Subsequent to Officer Rogers arriving at the Nolin's home, two other officers had arrived also. It was testified that when they arrived they heard incoherent screaming. When they knocked and announced their presence, they stated that all sounds within the home stopped. Because the "sounds" of this silence was disturbing to the officers, it was decided they do a welfare check. To implement the welfare check, the officers entered through the porch area where Officer Rogers used a "multipurpose tool" to

unlock the back door. Inside, the officers found the Nolins and while two officers spoke with them, another officer performed a nonconsensual protective sweep of the home. Subsequently, in another room adjacent to or near the room where the Nolins were found, cannabis was discovered on a dresser.

On appeal, it was noted that "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." See: *Payton v. New York*, 445 U.S. 573, 586 (1980). It was opined however, that because there was a compelling need to check on the welfare of the Nolins, the officers' *initial* warrantless *entry* was lawful. Once the seed of concern for the Nolins' welfare was dispelled, there was no justification to conduct a more intrusive search, which produced the cannabis. The search that revealed the cannabis was clearly outside the parameters authorized by *Maryland v. Buie*, 494 U.S. 325 (1990).

Therefore, the appellate court found that suppression of the physical evidence was required, and ordered Nolin's conviction and sentence to be reversed and the case remanded with directions to discharge Mr. Nolin.

Damiano v. State, 32 D30 (Fla. 4th DCA 12/20/06)

Charles A. Damiano presented an issue to the appellate court where a circuit court had re-sentenced him, imposing an upward departure sentence based on a prior conviction that had been already considered in the calculation of the presumptive guidelines sentence.

During Damiano's resentencing, his prior criminal record, including a prior conviction for robbery with a firearm (which the lower court based its upward departure on), was factored into his presumptive guideline sentence score. As a written justification for departing from the guidelines, as aggravating circumstances, the lower court checked the block on the standard sentencing form that provides: Primary offense is scored at level 7 or higher and the defendant has been convicted of one or more offenses that scored, or would have scored, at an offense level or 9 or higher. Damiano objected to the departure sentence and appealed.

The applicable principles for departure sentences based on aggravating circumstances are: A trial court may impose such departure only when a defendant's conduct "is so extraordinary or egregious as to be beyond the ordinary case." See: *State v. McCall*, 524 So.2d 663, 665 (Fla. 1988). "Moreover, where factors are already taken into account in calculating a guidelines score, those same factors may not also be used as aggravating circumstances for a departure sentence." See: *Brown v. State*, 763 So.2d 1190, 1192 (Fla. 4th DCA 2000). As the First District of Florida has explained, "we find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity." See: *Burch v. State*, 462 So.2d 548, 549 (Fla. 1st DCA 1985), approved in *Hendrix v. State*, 475 So.2d 1218, 1220 (Fla. 1985).

In other words, Damiano's prior robbery conviction was counted against him in determining his presumptive guidelines score and then again for purposes of upward departure. The appellate court opined that not only was this logic rejected by it in *Brown*, but also by the Second District in *State v. Valdes*, 842 So.2d 859, 861 (Fla. 2d DCA 2003) ("The [Florida Sentencing] guidelines have factored in prior criminal records in order to arrive at a presumptive sentence...To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines." (quoting Hendrix, 475 So.2d at 1219/20)).

Accordingly, and based on *Brown*, Damiano's upward departure sentence was quashed and the case was remanded back to the trial court for imposition of a guidelines sentence.

Scott v. McDonough, 32 Fla.L.Weekly D77 (Fla. 1st DCA 12/21/06)

In Charles Scott's appeal of his mandamus petition dismissal, the appellate court found no error in the circuit court's decision to impose liens and partial prepayment obligations against Scott's inmate trust account.

Scott argued that the lower court was in error to dismiss his petition when failed to comply with the order requiring him to prepay $9.00 in costs and fees pursuant to section 57.085, Florida Statutes. However, Scott's mandamus petition merely sought to compel the Department of Corrections to address the merits of his administrative grievance appeal, which the DOC had deemed untimely.

The appellate court opined that the mandamus proceeding could not, in any way, directly affect Scott's time in prison. In *Schmidt v. Crusoe*, 878 So.2d 361, 367 (Fla. 2003), it was held that an action which directly affects an inmate's time in prison is collateral criminal in nature and is not subject to the Prisoner Indigency Statue. Therefore, it was found that Scott's petition *did not* qualify as a collateral criminal proceeding, and the imposition of the liens and prepayment obligations under section 57.085(4) and (5), Florida Statutes, was appropriate.

Scott's second point on appeal, however, was found to have merit. The appellate court opined that it was error for the circuit court

to dismiss an action for failure to prepay fees and costs where a lien placed by the DOC prevents the inmate from complying with the prepayment obligations. See: *Harper v. Moore*, 737 So.2d 1232 (Fla. 1st DCA 1999); and *Huffman v. Moore*, 778 So.2d 411 (Fla. 2001). Scott was unable to make the prepayment because, and the account record showed, every withdrawal was made by DOC to satisfy the lien, leaving nothing for Scott to withdraw to comply with the partial prepayment obligation.

As a result, the lower court's order of dismissal, because Scott failed to comply with his prepayment obligations, was reversed and the case was remanded with directions for the lower court to determine whether Scott had funds available for the prepayment required.

Al-Hakim v. McDonough, 32 Fla.L.Weekly D88 (Fla. 1st DCA 12/22/06)

Marzug Al-Hakim presented the appellate court with a mandamus petition dismissal in which the lower court deemed it as unauthorized on the ground that his claim was required to be raised by a rule 3.850 motion.

Al-Hakim's mandamus petition alleged his challenge was to the Department of Corrections' interpretation of the sentences previously imposed, i.e., the amount of jail credit which the DOC applied to Al-Hakim's concurrent sentences. As such, the appellate court opined that mandamus was the proper remedy. See: *Green v. Moore*, 777 So.2d 425, 426 (Fla. 1st DCA 2000).

Accordingly, the circuit court's order of dismissal was reversed and Al-Hakim's cause was remanded with directions for the lower court to address the merits of the mandamus petition.

Jackson v. State, 32 Fla.L.Weekly D112 (Fla. 4th DCA 12/27/06)

In Donell Jackson's case, the Fourth District has taken a closer look at its opinion in *Johnson v. Moore*, 744 So.2d 1042 (Fla. 4th DCA 1999), and has receded from that decision.

In *Johnson*, the appellate court had opined that where a defendant whose counsel has withdrawn under *Anders v. California*, 386 U.S. 738 (1967), and who has failed to file his own brief, cannot seek relief for ineffective assistance of counsel.

Jackson, after his appellate counsel had withdrawn from the under *Anders*, failed to file his own initial brief to identify any matter he felt should be addressed. After an independent review of Jackson's appeal and finding no basis for a reversal, the appellate court dismissed the appeal. Then Jackson filed a petition that alleged ineffective assistance of appellate counsel.

In deciding to accept review of Jackson's petition, the appellate court had noted that the two of its sister courts has disagreed with the *Johnson* decision. See: *Hollinger v. State*, 749 So.2d 534, 535 (Fla. 5th DCA 1999) and *Barber v. State*, 918 So.2d 1013 (Fla. 2d DCA 2006). Thus, in light of those courts' opinion, review on the merits of Jackson's petition was accepted. And, although it denied the petition, under Jackson's case the Fourth District Court of Appeal has receded from its decision in *Johnson*.

Pehringer v. McDonough, 32 Fla.L.Weekly D131 (Fla. 1st DCA 12/28/06)

Frank W. Pehringer sought certiorari review of a mandamus petition denial where he had challenged the outcome of a prison disciplinary proceeding that charged him with unauthorized use of drugs after a "for cause" drug test.

The Department of Corrections' (DOC) disciplinary report against Pehringer alleged that the "for cause" drug test administered to him yielded a positive result for the presence of cocaine. In the denial of Pehringer's mandamus petition, the circuit court found that the symptoms observed and alleged by DOC officials, prior to testing Pehringer, were sufficient to establish a basis for administering a "for cause" test. It was further found that the fact the incident report describing the symptoms of Pehringer, as observed, was not prepared before testing (as Pehringer argued was an error), did not entitle relief from the disciplinary action.

On certiorari review, the appellate court agreed with the above circuit court's findings. However, Pehringer had also contended that DOC officials failed to comply with mandatory testing procedures set forth in their own rules, which the appellate court opined *did have* merit for relief.

In Florida Administrative Code, rule 33-108.101(3)(b)(6), describing "specimen collection procedures," it is provided that "The tester shall give each inmate a closed specimen cup with an identification label containing the inmate's name and DC number prior to collecting the inmate's urine specimen. The tester shall ensure that the inmate acknowledges his or her correct identity information on the label of the specimen cup."

Pehringer had claimed from the beginning of his challenge that DOC officials provided him with an *un-labeled* specimen cup. Although this was asserted throughout Pehringer's challenge process, DOC had declined to ever address the allegation. Thus, it was concluded that the boilerplate denial of an allegation, declined to be addressed in either the disciplinary proceedings or the administrative grievance process, was insufficient to raise a material issue of fact, and Pehringer's factual allegation in such regard *should have been deemed to be admitted as true.*

As a result, it was found that DOC's failure to comply with its own rule governing specimen collection encroached upon

Pehringer's due process rights in the ensued disciplinary proceeding. See: *White v. Moore*, 789 So.2d 1118 (Fla. 1st DCA 2001).

Accordingly, the order denying Pehringer's mandamus petition was quashed, and the matter was remanded for the circuit court to conduct further proceedings consistent with the appellate court's opinion.

[Editor's Note: The potential ramifications of the appeal court's holding in this case could be significant in prison disciplinary challenge cases. Law clerks and other prison litigators should familiarize themselves with this case—bp.]

Esquivel v. McDonough, 32 Fla.L.Weekly D192 (Fla. 1st DCA 1/5/07)

Juan Leal Esquivel appealed an order that dismissed his mandamus petition for failure to pay a partial filing fee of $6.00 where he had sought to compel the Department of Corrections to permit visits from his minor sons.

Esquivel had initially filed his petition in the appellate court on May 14, 2002, where it issued a certificate of indigency and transferred the case to the proper circuit court. On September 26, 2002, the lower court dismissed the case because Esquivel had not filed a document the lower court considered necessary in order to determine whether Esquivel was indigent. Esquivel appealed and the appellate court reversed, stating it had previously issued the certificate of indigency in the case, and because there was no showing Esquivel's status as indigent had changed, and opined dismissal of the petition was unwarrahted. Thus, the case was remanded for the lower court to reconsider the question of Esquivel's indigency. See: *Esquivel v. Fla. Dep't of Corr.*, 866 So.2d 156 (Fla. 1st DCA 2004).

On March 12, 2004, the lower court determined Esquivel indigent, but he was able to pay part of his costs and fees and it directed him to a prepayment of $6.00 within a 30 day period or dismissal of the petition would occur. Esquivel sought certiorari review in the appellate court claiming he could not pay the $6.00, and attached a record of his inmate account that showed a zero balance back to November 2003. Review was denied without comment on November 3, 2004. See: *Esquivel v. Fla. Dep't of Corr.*, 867 So.2d 331 (Fla. 1st DCA 2004).

On January 10, 2005, Esquivel's petition was dismissed by the lower court because of the failure to pay the $6.00 prepayment. Esquivel claimed on appeal that his prison account has shown that he had no ability to pay even the nominal amount of $6.00.

In Esquivel's initial filings, May 14, 2002, his family had been sending as much as $40.00 a month, thus the lower court finding the ability for Esquivel to pay the prepayment of $6.00, which was not decided until March 2004. Thus, the lower court was basing its decision on the account record from 21 months earlier, and dismissed the petition relying on two and one half year old information.

The appellate court explained that when an inmate is required to pay part of the costs and fees related to litigation, section 57.085(4), Florida Statues (2004), provides: "The initial partial payment must total at least 20 percent of the average months balance of the prisoners' trust account *for the preceding 6 months* or the length of the prisoner's incarceration, whichever period is shorter."

The appellate court concluded that the basis for a partial payment, or for dismissal because of failure to pay, the ability to pay must be found in the six-month period preceding the court's determination, rather than the six months that had preceded the initial filing in the court, which in Esquivel's case was 21 months earlier.

Esquivel's case was reversed and remanded for further proceedings.

Martoral v. State, 32 Fla.L.Weekly D228 (Fla. 4th DCA 1/17/07)

Martin Martoral appealed the circuit court's decision that revoked his probation because he had changed rooms within a hotel at which he had been living and possession of cannabis discovered in a vehicle, in which he was found sitting with another person (with no evidence establishing the vehicle was owned or even regularly driven by him).

On appeal, the appellate court agreed with Martoral's contentions that there was insufficient evidence to support revoking his probation. No evidence in the record found Martoral was aware that the changing rooms within the hotel he was living would trigger his obligations regarding a change of address. Thus, no evidence was established for a "willful" violation.

In regard to the cannabis issue, the evidence produced was insufficient to prove by a *preponderance of evidence* that Martoral had dominion and control over the baggie of marijuana found in the dashboard compartment in a vehicle he was sitting in with another person.

As a result, the lower court's violation order and the imposed sentence were reversed and the case was remanded for further proceedings.

Dellofano v. State, 32 Fla.L.Weekly D251 (Fla. 5th DCA 1/19/07)

Michael Dellofano sought review of a summary denial of his "Motion for Judicial Enforcement of Plea Agreement and Sentence Intent."

Dellofano contended that the sentence that was imposed upon the

revocation of his probation was pursuant to a negotiated plea, but that intent of the parties involved and the sentencing court was thwarted by the Department of Corrections' forfeiture of his previously earned gain-time. Dellofano further contended that had he known he must serve additional time, he would not have pled guilty to the violation. As such, Dellofano sought in the lower court to be resentenced, minus the amount of days DOC forfeited.

In denying relief, the lower court cited to section 944.28(1), Florida Statutes, where it authorizes DOC to forfeit all gain-time. The lower court advised Dellofano that he should seek to challenge the DOC's forfeiture of the gain-time through the administrative grievance procedure because such forfeiture was beyond the court's control.

On appeal, it was noted that the DOC may revoke gain-time without being countermanded by a court. *However*, such forfeiture cannot thwart the terms contemplated in a plea agreement. See: *Barnett v. State*, 933 So.2d 1269 (Fla. 5th DCA 2006); *Dellahoy v. State*, 816 So.2d 1253 (Fla. 5th DCA 2002).

Accordingly, the trial court's denial of Dellofano's claim was vacated and the case remanded for a reconsideration. It was further instructed that if Dellofano's allegations are found to be true, the trial court should either resentence him in a manner that effectuates the plea agreement after considering the DOC forfeiture of gain-time, or allow him to withdraw his plea.

[**Note**: Judge J. Lawson specially concurred in the opinion of this case and noted, though, that there are *no* provisions in the Florida Rules of Criminal Procedure for Dellofano's styled motion (Motion for Judicial Enforcement of Plea Agreement and Sentence Intent). He opined that such issues should be filed under Rule 3.850. See: *Cichoski v. State*, 817 So.2d 695 (Fla. 4th DCA 2004). Judge Lawson further opined, noting Dellofano's motion had been filed under oath, that the lower court *should* have treated it as a rule 3.850 motion anyway.]

Stokes v. Florida Department of Corrections, 32 Fla.L.Weekly D242 (Fla. 1st DCA 1/19/07)

Robert M. Stokes, a Florida prisoner, sought certiorari review in the appellate court of a circuit court's order denying extraordinary relief from a disciplinary action that charged him with self-mutilation, which he claimed was a suicide attempt.

Stokes had sought review of his exhausted administrative remedies of the challenged disciplinary action by filing in the circuit court a petition for writ of certiorari. That petition was *properly* construed by the lower court as a mandamus petition. See: *Woullard v. Bishop*, 734 So.2d 1151, 1152 (Fla. 1st DCA 1999) (where it was explained that a mandamus petition is the proper vehicle for review of prison disciplinary proceedings).

The circuit court denied Stokes relief because it opined that he failed to timely file a grievance with prison officials that raised the issue of whether a charge for self-mutilation could have been brought against Stokes without a prior determination his conduct (cutting his forearm) was not a suicide attempt. Also, the lower court *erroneously* ordered a lien to be placed on Stokes' prison account for filing fees. See: *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003).

On certiorari review in the appellate court, it was noted that Florida Administrative Code, rule 33-601.314, section 9-30, which proscribes the infraction of self-mutilation, defines such as including "self-disfigurement such as body piercing, scarring, and other non-life threatening acts." The rule also provides, "[d]etermination of whether an act constitutes self-mutilation as opposed to a suicide attempt *shall be made by health care staff*." (emphasis added)

The appellate court found that Stokes' timely grievances did, in fact, raise his issue properly through the administrative procedures. It was further opined that to the extent the circuit court found any failure on DOC's part to abide by its rule to be a de minimus violation erroneous. Such requirement that determination be made by "health care staff" is an essential one, and DOC, as a state agency, is bound by its own rules. See: *Marrero v. Department of Professional Regulation*, 622 So.2d 1109, 1112 (Fla. 1st DCA 1993).

Therefore, Stokes' petition was granted, the lower court's order of denial was quashed, and the case was remanded for further proceedings. Also, the order imposing the lien against Stokes' prison account was quashed, and the lower court was instructed to restore any funds taken due to that lien.

Lincoln v. State, 32 Fla.L.Weekly D252 (Fla. 5th DCA 1/19/07)

In Dana Lincoln's case, the appellate court clarified its order that found Lincoln's petition for belated appeal to be insufficient.

Upon granting Lincoln's motion for clarification of its order, the appellate court withdrew its original order and substituted a new order that clarified its decision.

The appellate court opined in its new order that although Lincoln's petition for belated appeal alleged that his trial counsel was requested and failed to file a notice of appeal on his behalf, it was not alleged *when* Lincoln made such a request. Thus, the appellate court was unable to make a determination whether the request was timely made to file the notice of appeal.

As such, Lincoln's petition was found to be facially insufficient.

Hartley v. State, 32 Fla.L.Weekly D256 (Fla. 2d DCA 1/19/07)

Stephen Hartley appealed the denial of his rule 3.850 *motion* because, as the lower court opined,

"it is not and cannot be ineffective assistance of counsel to fail to ask the question as to whether or not somebody plead guilty or no contest to prior offenses." The appellate court disagreed.

In pertinent part, Hartley's 3.850 motion alleged that his defense counsel was ineffective in failing to ask the trial court to instruct the jury that it could not consider the convictions he had previously plead guilty or no contest to (which were pending before the court at the same time he pled not guilty to the charge he took to jury trial) as substantive evidence of his guilt. Also, Hartley asserted that his counsel should have elicited testimony from him about his previous decisions to plead in the other charges so that the jury might have inferred that he had decided to proceed with a trial in the charge that was before it because he was not guilty of that particular offense.

The appellate court opined that such type of testimony and issue as Hartley had made is admissible for the very reason Hartley asserted. See: *Lawhorne v. State*, 500 So.2d 519, 523 (Fla. 1986). It was further noted that convictions have been reversed on direct appeals based on the erroneous exclusion of such testimony. See: *Scurry v. State*, 701 So.2d 587, 588 (Fla. 2d DCA 1997) and also *Bowles v. State*, 849 So.2d 465, 466 (Fla. 4th DCA 2003).

Furthermore, as to the lower court's opinion for its denial, the appellate court cited to *Ottesen v. State*, 862 So.2d 30, 31 (Fla. 2d DCA 203), where the defendant asserted the same issues as Hartley did in his post-conviction motion and it was held that the claims were properly raised in such a motion.

The appellate court opined that as a matter of law, the lower court erred when it ruled that Hartley's claims were not cognizable. Therefore, the lower court's denial order was reversed and Hartley's case was remanded for an evidentiary hearing on his claims.

Anderson v. Florida Parole Commission, 32 Fla.L.Weekly D133 (Fla. 1st DCA 12/28/06)

Robert Anderson had filed a petition for writ of mandamus in the circuit court that challenged the presumptive parole release date set by the Parole Commission. Although his petition was denied, which the appellate court affirmed and denied his petition for writ of certiorari, the circuit court ordered a lien to be placed on his prison account.

On that issue, the appellate court reversed the circuit court's order imposing the lien pursuant to *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003). Under *Schmidt*, the circuit court in Anderson's case erred when it ordered him to pay filing fees and imposed a lien on his prison account. See: *Cason v. Crosby*, 892 So.2d 536, 537-38 (Fla. 1st DCA 2005).

Accordingly, it was concluded that Anderson's petition to review the lower court's denial of his mandamus petition was denied, but was granted as to the challenge to the lien order, that order was quashed.

McKire v. McDonough, 32 Fla.L.Weekly D293 (Fla. 1st DCA 1/24/07)

Gerald M. McKire had filed a mandamus petition in the circuit court that challenged gain-time forfeitures resulting from several prison disciplinary proceedings. The petition was denied as untimely, and McKire appealed.

After McKire filed his notice of appeal of the order denying his mandamus petition, and in response to an order the appellate court issued that required McKire to file a certified copy of the circuit court's order of insolvency for appellate purposes (or pay to the clerk of the appellate court the filing fee), the clerk of the circuit court prepared a certificate stating that McKire was indigent and had incurred circuit court costs and fees.

On the same day the clerk's certificate was issued, the circuit court ratified and adopted it as an order of the court. That order, entered post-judgment and while the appeal of the denial of the mandamus petition was pending, ordered the Florida Department of Corrections to place a lien on McKire's trust account for court costs and fees incurred in the mandamus proceeding in circuit court. It appeared to the appellate court, from the initial brief, that review was sought on the lien order too.

However, McKire never filed a separate notice of appeal (or any paper that could be construed as a notice of appeal) to invoke the appellate court's jurisdiction as to the lien order, and he made no attempt to amend his earlier notice of appeal. As a result, the appellate court's jurisdiction over the circuit court's post-judgment lien order was not timely invoked, which left the appellate court without authority to review it.

The mandamus petition denial order was affirmed.

Stevens v. State, 32 Fla.L.Weekly D320 (Fla. 2d DCA 1/26/07)

Marquell L. Stevens appealed a circuit court's order that dismissed his *sworn* rule 3.850 motion because the *memorandum of law* filed with the motion *was unsworn*. The circuit court relied upon *Oramas v. State*, 615 So.2d 853 (Fla. 2d DCA 1993).

On appeal, it was noted rule 3.850 requires that motions filed pursuant to that rule be under oath. The purpose of the oath is to prevent false factual allegations by subjecting the movant to prosecution for perjury if the factual allegations in the motion are proven false. See: *Scott v. State*, 464 So.2d 1171 (Fla. 1985).

In relying on *Oramas*, the circuit court had concluded that it could not consider Stevens' memorandum because it lacked an oath. Because it did not consider the memorandum, it was further

concluded that Stevens' motion was facially insufficient.

In *Oramas*, it was opined that a dismissal for facial insufficiency where the lower court refused to consider the movant's unsworn memorandum was proper. However, it was pointed out that in the *Oramas* case, the factual allegations supporting the motion *were contained only in the memorandum of law*. In contrast, Stevens' properly sworn motion, not the memorandum, contained all the factual allegations Stevens relied on in support of his claims.

As a result of its findings, the appellate court concluded that it was *not* necessary for Stevens' memorandum to be under oath because the memorandum did not contain any additional factual allegations that were not already in his sworn motion. Instead, the memorandum set forth the legal arguments based on the facts contained in the sworn motion.

Accordingly, it was opined that the lower court erred when it refused to consider Stevens' memorandum and dismissing the motion. Thus, the lower court's dismissal was reversed and the case was remanded for further proceedings.

Orange v. State, 32 Fla.L.Weekly D351 (Fla. 3d DCA 1/31/07)

Rudolph Orange sought a recall of a mandate and rehearing of the appellate court's order affirming the lower court's denial of his rule 3.850 motion as being untimely because he was incarcerated in another state during and over the two-year time limitation.

On May 18, 1993, Orange was arrested in Florida for a Miami crime. He subsequently entered into a substantial assistance plea agreement (agreement) with the State. In that agreement, provided that Orange complied with States contentions, Orange would receive a lesser sentence. It was also stipulated that if Orange failed to return for sentencing, the court would enter an adjudication of guilt and sentence him to the maximum allowed, which was thirty years prison with a minimum-mandatory of fifteen years.

Meanwhile, Orange was already on probation in Georgia, which learned of the new offense he committed in Florida, thus violating his Georgia probation. Subsequently, Orange voluntarily returned to Georgia to resolve those charges, where he was sentenced to nine years incarceration. As a result, Orange failed to appear for his Florida sentencing, violating the terms of his agreement. Although counsel for Orange explained to the court that Orange was incarcerated in Georgia, the judge imposed sentencing on Orange for thirty-years prison.

In September 2002, Orange completed his Georgia time and was transferred to Florida Prison, where he began his thirty-year term. In May 2003, Orange filed a rule 3.850 motion where he sought to have his plea set aside as involuntary. The lower court denied the motion as being untimely. Orange appealed and the appellate court affirmed the denial.

On motion to recall mandate and for rehearing in the appellate court, Orange contended that his 3.850 motion was not untimely according to *Demps v. State*, 696 So.2d 1296 (Fla. 3d DCA 1997). He further alleged that the lower court erred in sentencing him *in absentia* and that because he was incarcerated in Georgia, his absence at the sentencing hearing in Florida was involuntary.

In *Demps*, the appellate court noted it had held that the time limit (two-years) for filing a 3.850 motion is tolled when a defendant is incarcerated in another state, not having access to Florida materials. Accordingly, it was found that Orange's motion was not untimely because it was filed within two years of his returning to Florida. It was further decided that Orange's absence from the sentencing hearing was involuntary, thus not triggering the "failure to appear" provision of the agreement.

The appellate court also further opined that the lower court erred in the application of the plea agreement in Orange's case. It cited to *Valladares v. State*, 754 So.2d 190 (Fla. 3d DCA 2000) and *Johnson v. State*, 501 So.2d 158 (Fla. 3d DCA 1987) (which opined that "where timely appearance for sentencing is made a condition of a plea agreement, non-willful failure to appear will not vitiate the agreement and permit the court to impose a greater sentence." *Id.* at 160). Therefore, it was found that Orange's failure to appear for sentencing was not willful and thus did not vitiate the plea agreement. However, it was noted that had Orange been incarcerated for a new crime committed after entering into the agreement, then it would not have been found that his absence was non-willful.

As a result, Orange's case was reversed and remanded with directions for the lower court to sentence Orange in accordance with the previously entered plea agreement without considering the portion of the agreement regarding Orange's failure to timely appear for sentencing.

Ruth v. State, 32 Fla.L.Weekly D422 (Fla. 1st DCA 2/8/07)

Hardy L. Ruth appealed a lower court's order that summarily denied his rule 3.850 motion where he had claimed ineffective assistance of counsel for failing to seek sentencing under the Youthful Offender Act.

Ruth was eighteen years old when he committed the offenses he was charged with. He asserted in his motion that his counsel should have advised the trial court of the option to sentence him as a youthful offender pursuant to section 958.04, Florida Statutes (2003), which

authorizes the imposition of a sentence exceeding no more than 6 years' imprisonment for those individuals committing crimes prior to their 21st birthday and who meet the enumerated criteria.

The trial court denied Ruth's claim based on section 958.04's specific wording which states that an individual may not be sentenced as a youthful offender if the individual was convicted of a *life felony*. In its order denying relief, the trial court opined that although Ruth was convicted of a first degree felony (armed robbery), which would allow for a youthful offender sentence, the first degree felony was reclassified to a *life felony* pursuant to section 775.087(1), Florida Statutes (2003).

Section 775.087(1) mandates reclassification "whenever a person is charged with a felony, *except a felony in which the use of a weapon or firearm is an essential element*,..." Thus, the appellate court opined. that the trial court's order of denial was in error for several reasons.

It appeared that the lower court was confused about which subsection of the 10/20/Life Statue applied to Ruth. A plain reading of section 775.087(1) requires reclassification only where the use of a weapon or firearm *was not an essential element of the crime*. Ruth was convicted of armed robbery, in which a weapon or firearm is an essential element. As such, section 775.087(1)'s reclassification requirement would not apply, and the appellate court noted that the trial court was in error to conclude otherwise.

Furthermore, Ruth was sentenced to 20 years' imprisonment with a 10 year minimum mandatory. A life felony carries a minimum sentence of 30 years' imprisonment. Thus, Ruth was not sentenced to a life felony. Consequently, Ruth's *sentence* was enhanced pursuant to section 775.087(2)(a), which required a ten year minimum mandatory for the conviction of armed robbery due to his use of a firearm.

However, the ten year minimum requirement of the 10/20/Life statute was noted to be in conflict with the maximum allowable sentence, 6 years, authorized by the Youthful Offender Act. This has been addressed in *State v. Drury*, 829 So.2d 287 (Fla. 1st DCA 1994), where it was opined that a trial court may sentence a defendant to a youthful offender sentence *in lieu of* the 10/20/Life statute's minimum mandatory requirements. As a result, the appellate court in Ruth's case opined that the trial court incorrectly ruled that the original sentencing court lacked discretion to sentence Ruth as a youthful offender.

Therefore, Ruth's case was remanded to the trial court for further proceedings on the merits of his rule 3.850 motion.

[Note: The appellate court in Ruth's case noted that if Ruth is entitled to the requested relief, he will be merely entitled to a resentencing where the trial court has been fully informed of its discretion to sentence Ruth as a youthful offender; Ruth is not necessarily entitled to resentencing as a youthful offender. See: *Holmes v. State*, 638 So.2d 986, 987 (Fla. 1st DCA 1994).]

Reese v. McDonough, 32 Fla.L.Weekly D423 (Fla. 1st DCA 2/8/07)

James Reese appealed an order dismissing his mandamus petition to comply with the circuit court's case management order directing him to file appropriate indigency documentation, as required by section 57.085(2), Florida Statues (2003). In particular, Reese had failed to file a copy of his inmate bank account statement for the six months preceding the filing of his petition.

The appellate court however, reversed the lower court's order of dismissal and remanded the case to allow Reese one opportunity to correct the deficiencies in his indigency submissions.

[Note: Whether the claim falls under a collateral criminal proceeding or not, the appropriate indigency documentation and affidavits—including an inmate bank account statement for the preceding 6 months before the filing of a petition for writ of mandamus–must be filed for the purpose of case management procedures, according to the DCA.]

Hurley v. McDonough, 32 Fla.L.Weekly D446 (Fla. 1st DCA 2/12/07)

Michael Hurley appealed an order that denied his mandamus petition that, in part, sought relief from the circuit court's order imposing a lien on his inmate trust account for filing fees.

It was conceded by all parties in the case that Hurley's petition was a collateral criminal action, therefore, the appellate court reversed the lower court's order denying Hurley's relief from seeking removal of the lien.

Hurley's case was remanded with directions that the circuit court dissolve the lien and direct the reimbursement of any funds withdrawn pursuant to the mandamus petition filing fees.

[Note: Also see other similar cases recently decided regarding exemption of the indigency lien provision issue: *Austin v. McDonough*, 32 Fla.L.Weekly D1 (Fla. 1st DCA 12/19/06); *Bowleg v. Fla. Dept. of Corrections*, 32 Fla.L.Weekly D131 (Fla. 1st DCA 12/28/06); *Scott v. McDonough*, 32 Fla.L.Weekly D132 (Fla. 1st DCA 12/28/06); *Marquez v. McDonough*, 32 Fla.L.Weekly D192 (Fla. 1st DCA 1/5/07); Vega v. *McDonough*, 32 Fla.L.Weekly D195 (Fla. 1st DCA 1/9/07);*Hickey v. McDonough*, 32 Fla.L.Weekly D195 (Fla. 1st DCA 1/9/07); *Lowery v. McDonough*, 32 Fla.L.Weekly D330 (Fla. 1st DCA 1/26/07); *Banks v. McDonough*, 32 Fla.L.Weekly D339 (Fla. 1st DCA 1/31/07); and *Jones v. Harris*, 32 Fla.L.Weekly D339 (Fla. 1st DCA 1/31/07).] ■

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Florida Prison Legal Perspectives

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Former Prison Chief Sentenced to Prison

JACKSONVILLE—The former secretary of the Florida Department of Corrections (FDOC), James Crosby, was sentenced to eight years in federal prison, to be followed by three years probation, on April 24, 2007, for his role in taking $130,000 in kickbacks from a prison contractor. The following day Crosby's longtime friend and crony, Allen Clark, whom Crosby had promoted to regional director of the state's prison system, and who was involved with Crosby in the kickback scheme, was sentenced to two years and seven months in federal prison. U.S. prosecutors asked for a more lenient sentence for Clark than what Crosby received. Acting U.S. Attorney Jim Klindt revealed for the first time publicly that the lesser sentence was appropriate for Clark because he worked undercover to help federal agents build the case against his lifelong friend and mentor, James Crosby.

Both Crosby and Clark pleaded guilty last July to a single charge of accepting kickbacks from the owner of Gainesville-based American Institutional Services, a company that was set up specifically to sell snacks and drinks to prisoners' visitors on weekends, for which they were charged exorbitant prices. Prosecutors said Clark would accept the kickbacks and deliver part of the payments to Crosby. The kickbacks were totaling as much as $12,000 a month. The private contractor raked in millions in profit by gouging prison visitors at the majority of Florida's more than 130 correctional facilities.

At his sentencing, Crosby, a 31-year veteran of the FDOC, apologized, "I am truly sorry for what I did," Crosby told U.S. District Judge Virginia Hernandez Covington. "I failed a lot of people. I failed the people who worked for me." Crosby also apologized to his predecessor at the FDOC, Secretary Jim McDonough, who was the prosecution's only witness at the sentencing. McDonough testified and called Crosby "a cancer" on the FDOC. "Corruption had taken roots, vile things were done" while Crosby was head of the prison system, McDonough said. Crosby did not offer any apology to the victims of his criminal actions—the families and friends of prisoners who were bilked to cover the kickbacks that he and Clark took.

Judge Hernandez Covington said that she was disappointed that Crosby had not paid any of the $130,000 that he agreed to pay in his plea agreement. Crosby's attorney, however, said Crosby has no money to pay because after he was charged the state cut off his retirement funds which would have totaled more than $1 million. The judge had no sympathy. "The public's trust was violated. As head of the department, you have to suffer the consequences," she said, "Government officials are held to a higher standard."

Crosby was given until May 24 to report to a federal prison to begin serving his sentence.

After Crosby's sentencing, McDonough said, " I think justice was done." Asked whether he accepted Crosby's apology, McDonough said he would think about it while Crosby does his time.

Wanda Valdes, whose ex-husband Frank Valdes was murdered in 1999 in a beating by a gang of prison guards at Florida State Prison where Crosby was then a warden, was pleased with his sentence. Several guards were acquitted in two trials, but earlier this year Valdes' family settled a lawsuit for $737,500 against Crosby and the prison guards. "Thank God the system is finally working," she said.

After Crosby was sentenced, his ex-wife, Leslie Crosby, confronted Secretary McDonough and in a choked voice asked him, "How can you live with yourself?" Apparently she needed someone else to blame for Crosby destroying her life as well as his own.

Leslie Crosby divorced Crosby three days after he pleaded guilty last year and he handed over $200,000 of his retirement money to her. A short while later she used that money to buy a home in Starke, where Crosby moved in with her. The state of Florida recently filed suit against both Leslie and James Crosby, alleging that the divorce was a scheme to try to shield the forfeited retirement money from being taken back by the state.

Crosby could be back in court again, if he is needed to testify against others in future proceedings. Prosecutor Klindt said Crosby is cooperating with a continuing investigation into the kickback scandal and that depending on Crosby's cooperation the government could ask for a reduction in his sentence. That investigation no doubt involves Edward Dugger, the owner of American Institutional Services, who was paying the kickbacks to Crosby and Clark. It may also involve other powerful figures. Reportedly money from the AIS prison visiting park canteen gouging scheme was also going to fund the campaign of at least one state senator, who also just happened to be a longtime friend of Crosby's. (Reported on in more detail in *FPLP*, Volume 12, Issues 3 and 4.)

Klindt also said, "We're pleased with the judge's sentence. We think eight years sends the right message to public officials who turn to corruption because of greed. And we think this sends the right message to the people of the state of Florida and it sends the right message to the Department of Corrections that things have indeed changed and that if you cross that line, you'll be brought to justice." ■