FLORIDA PRISON LEGAL

Perspectives

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FDOC PANICS OVER THREAT TO PRISON TELEPHONE MONOPOLY SCHEME

by Teresa Burns-Posey

Recently an Associated Press article that ran in many newspapers caused a panic among top prison officials in Florida. The article reported on how the families of many prisoners' in some states are getting around exorbitantly expensive collect-call telephone rates from their incarcerated loved ones and how prison officials are fighting back to force families to continue paying the high rates.

The AP article told the story of Gillian Bennett, the wife of a prisoner in New York. With the cost of accepting her husband's collect phone calls soaring and having become a financial burden, she had signed up with one of a growing number of small businesses around the country that help prisoners' families skirt the prison system's expensive rates. In Gillian Bennett's case, by signing up with the business she cut her monthly phone bill from $500 to $50, while accepting the same number of calls from her husband.

Breaking the Stranglehold

When New York prison officials and their phone company found out what she had done to lower her phone rates they claimed she had violated prison rules and blocked all further calls from her husband to her Albany, N.Y., home. Meanwhile, back at the prison, her husband was threatened with solitary confinement for his participation in trying to reduce the rates.

The Bennett's story is not that unique. With dawning awareness that an increasing number of families nationwide are turning to the businesses that offer cheaper collect-call rates to prisoner's families, prison authorities and the phone companies they contract prison phone services to as a monopoly are cracking down on those businesses and the families that turn to them for help.

As usual, when their logic is fuzzy on an issue, prison officials are turning to their catch-all "security threat" claim in support of their telephone monopoly scheme that gouges millions of dollars out of prisoners' families each year in many states. Prison officials defend the monopolies saying their more expensive phone systems should be the only choice because they are designed to record or allow calls to be monitored to prevent prisoners from committing more crimes, like making threats or drug deals over the phone. The implication is that families and businesses that skirt the prisons' phone monopoly, in any way, are defecting the prison phone system's security features. That simply is not true.

The problem for prison officials is a phone option available to every phone customer today, the ubiquitous call forwarding. With some variations, it

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ON THE INSIDE

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

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

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

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

works like this: A prisoner's family member establishes a phone number near the prison that the prisoner can call at the local area calling rate, which is usually much less expensive than a long distance call outside the local area. The family member then arranges with the phone company that services the area where that local number is established to have all calls to that local number (usually just the prisoner's) forwarded to the family member's home at a privately negotiated long distance rate well below the prison system's monopoly rate. The businesses that families are signing up with to get lower rates simply do all the work of setting up a system like that for the families and make a small percentage on the negotiated forwarded long distance portion of the calls made.

Contrary to prison officials' claims that such an alternative setup defeats their special security features, the local call that the prisoner makes to have *the call* forwarded long distance is still subject to all of the security features applicable to any call that is made from the prison – local or long distance – it's just that the local/forwarded call can be made at a much lower cost to families that pay for the calls. To try to block such setups, however, many prison systems have rules that prohibit call forwarding on calls made by prisoners.

So if security isn't the real problem with prison officials, what is it?

According to some estimates, nationwide the prison phone business is generating as much as $1 billion a year from prison systems and the phone companies that they award their monopoly phone contracts to. Ignoring the burden that extremely high phone rates place on families, who pay for the calls, many prison systems, just like Florida's, give the phone contract for the system to the to the company that guarantees to return the largest commission on calls made to the Department of Corrections – instead of basing the contract on a guarantee of the lowest rate for consumers, that is, prisoners' families. That, in turn, causes the telephone companies to charge the highest rate allowed by law so they can pay the prison system the largest commission to get the contract. (See: *FPLP*, Vol. 8, Iss. 5, "Let's Play Monopoly: Florida's Prison Phone System", for a detailed report on the prison phone business in Florida.)

FDOC Overreacts

Less than two weeks after the AP article appeared in mainstream newspapers, the Florida Department of Corrections panicked over the thought that families might learn how to reduce their phone rates. In April all copies of the magazine *Prison Legal News (PLN)*, Vol. 14, No.4, addressed to Florida prisoners were impounded and rejected by prison official because

the magazine carries advertisements for businesses that offer to help families reduce prison collect-call phone rates.

Those advertisements, the Department now claims, "encourages inmates to use phone companies other than those assigned to the institution by giving them lower rates and violates the [FDOC's] rules about using the institutional phone systems. [The ads also] violates the security of the institutional systems." That position is rather idiotic where the ads are clearly directed at families, not prisoners. Prisoners cannot set up a system to skirt the FDOC's chosen phone company. It is instructive, however, that the *PLN* censorship came only days after the AP article appeared considering the fact that *PLN* has been carrying the same ads for years and never been censored for them before. And there are other problems with the censorship.

The FDOC failed to notice *PLN* or subscribing prisoners what "rules" the ads allegedly violated, but it can only be the Department's rule prohibiting call forwarding, Rule 33-602.205(2)(a), Fla. Administrative Code, since that is the way the alternative setup avoids the high rates of making a direct long distance call. However, because of the unique wording of that rule there is a simple way families and businesses can comply with the rule and still set up a reduced rate call forwarding setup. The cited rule states:

"Inmates shall not make three-way calls nor make calls to numbers on the [prisoner's approved phone] *list which are then transferred to other phone numbers not on the list.*" See also: Rule 33-602.205(12)(b) 5., F.A.C.

So, if a prisoner places *both* the local area phone number that is used for reduced rates *and* the long distance number (that the local number is actually forwarded or transferred to) on his or her phone list, then no rule is violated and the prisoner can use the local/forwarded number and the family pays lower rates. The biggest savings would be on out-of-state calls or where the prisoner makes frequent in-state calls outside the local calling area.

For example, local area collect-call rates are capped in Florida by the Public Service Commission at $1.75 surcharge and $0.25 flat fee per call (unlimited minutes). There would be a charge per month to establish the local number (the same as for a basic service residential phone), usually around $25 or $30 a month. Then the per-minute rate for the forwarded long distance portion of the call, which usually can be negotiated to $0.10 per-minute or less since the family member can select which phone company carries that portion of the call.

Adding that up, say the prisoner makes 25 calls a month to stay in touch with his children in Virginia, that would be $1 per call out of the $25 for the basic local number service, plus $2 for the $1.75 local collect-call surcharge and $0.25 flat rate per call, plus $1.50 for each 15 minute call at $0.10 per-minute for the long distance portion of the call. That gives you a total of $112.50 for the 25 calls to anywhere in the U.S. Compared to the FDOC's monopoly rate system, which averages $20 per 15-minute call for out-of-state calls, or $500 for 25 calls, it's easy to see the savings to be had.

Of course, if all families set up, or signed up with one of the companies that will help them set up, such an alternative phone system, the FDOC's phone monopoly cash cow will dry up. Last year the FDOC received almost $19 million from MCI WorldCom as its 53 percent commission on phone calls made by Florida prisoners. This year it will make even more as there are about 2,000 more prisoners in the system.

It is expected the FDOC will fight tooth and nail for the millions it is gouging out of families, which may account for its overreaction to the ads in *PLN*. Those ads simply inform about the businesses that will help families set up a lower rate alternative phone system, unlike this article that explains how those businesses do it.

Alternate Solution

The local-number/call-forwarding setup is only one solution to obtaining lower phone rates for prisoners' families and is not practical for everyone. Many families cannot afford the basic expense of such a setup and it is those families that are most hurt by the FDOC's extreme high rate monopoly.

A better and more permanent solution is the one being proposed by Florida Prisoners' Legal Aid Organization's rate reduction campaign. The Families Against Inflated Rates, or FAIR, Campaign is working to have the families and friends of Florida prisoners contact their state legislators and other government official to call on them to eliminate the FDOC's high rate monopoly. The solution is legislation or administrative regulations requiring the FDOC to give the prison phone contract to the company that guarantees the lowest rates for families – instead of the highest commission to the FDOC.

In the past couple of months the FAIR Campaign has been distributing Action Packets to families that include complete information to participate in the letter writing and complaint-filing part of the campaign. The FPLAO website is set up to allow emails to be sent to legislators and the Florida Public Service Commission asking their help to stop the FDOC's gouging of families.

Such campaigns have been successful in other states, and this may be what the FDOC is really concerned about with its recent overreaction to the ads in *PLN*. It is certainly time for the FDOC to realize it must abandon its anti-family policies and that they will no longer be tolerated by prisoners' families.

Following is the contact information for the ads that were run in *PLN*:

Inmate Family Services
116 IH 35 S.
New Braunfels, TX 78130
1-866-446-6283 (Toll free)
www.inmatefamily services.com
"Cut the high costs of collect calls from prisons"

Tele-Net, Inc.
1-888-299-7800
www.prisoncalls.com
"Save up to 60% on collect prison calls"

Private Lines, Inc.
1-866-342-5754 (Toll free)
www.privatelinesinc.com
"Break the inmate telephone system stranglehold"

For more information about the FAIR Campaign, see the notice in this issue of FPLP.

[Sources: AP article, 3/31/03; FDOC records; *Prison Legal News*, Apr. 03] ■

DNA Dragnet to Expand

by Oscar Hanson

The Justice Department is seeking legislation to require arrestees and juvenile offenders to submit DNA samples to be placed into the FBI's DNA database. Currently, only DNA from adults convicted of crimes can be collected and placed in the national database, which is used to compare biological evidence from unsolved crimes.

Administrators from the Justice Department say that adding profiles from thousands of adult arrestees and juvenile offenders would greatly expand the DNA system's worth by increasing the number of potential matches. As of January 2003, there were about 1.3 million DNA samples on file, according to FBI officials.

While law enforcement officials claim that DNA is to the 21st century what fingerprinting was to the 20th, critics say adding arrestee and juvenile offender profiles to the database threatens privacy by expanding the pool of samples beyond adult criminals. Although only digital DNA profiles would be linked to the FBI database, the blood or saliva samples from which the DNA was drawn would be kept by state labs.

DNA analysis is not the 21st century equivalent of routine fingerprinting. Unlike an ink copy made of a suspect's prints, DNA tests require a person to surrender a sample of blood or saliva from his or her body. While the tests are intended to provide identification without revealing much about a subject's genetic makeup, even the limited sample tested could provide sensitive information on a person's medical history.

Further, states and the federal government are not just keeping DNA results, but also the actual samples for future testing based on scientific advances. Possibilities include creating a genetic blueprint of a subject's physical characteristics, vulnerability to diseases, even genes linked to criminal behavior. Government possession of this information risks violating innocent individuals' medical and privacy rights.

"It's only a matter of time before the government gets its hands on those DNA samples and starts playing around with our genetic code," says Barry Steinhardt, privacy specialist for the American Civil Liberties Union's national office in New York City. "They say they don't want to do that, but not to long ago they were saying they'd only take DNA profiles from rapists and murderers, and now they want juveniles....we're not just on a slippery slope, we're halfway down it."

For those unfamiliar with DNA, a little history follows. DNA is a cellular acid contained in blood and other body fluids and tissues. Law enforcement considers DNA an ideal tool for crime solving. Because it contains an individual's unique genetic code, a DNA sample taken from blood, semen or even traces of saliva in a bite mark can be used to match a perpetrator to a crime.

In 1989, states began collecting DNA from convicted criminals and adding the profiles to a computer database that could match them to DNA from unsolved crimes. In 1992, the FBI created a system that linked the state databases via a bureau computer in Morgantown, West Virginia.

The Justice Department says it is not urging states to expand DNA tests to include everyone arrested for a crime because that's an issue for states to decide. Yet by including in its national database all DNA results that states submit, including those from individuals unjustly arrested (and even wrongfully convicted), the department is condoning testing of the innocent.

Broad-based DNA testing increases the chances of catching criminals – and of freeing those who are unfairly accused. But the pursuit of those benefits doesn't override the privacy rights guaranteed by our constitution of law-abiding citizens.

[Sources: *USA TODAY*, 4-16-03, 4-22-03] ■

Effective Exhaustion of Administrative Remedies

by David M. Reutter

Although most prisoners legitimately feel the FDOC's grievance process is broken, it remains the only avenue for prisoners' complaints to be heard by administrators. Moreover, it is a prerequisite to filing any civil judicial remedy a prisoner may file. This includes a lawsuit seeking only monetary damages, even if such damages are not available through the grievance process. See: Booth v. Churner, 121 S.Ct. 1819 (2001).

Prisoner under-use of FDOC's grievance system is the largest contributor to that system being broken. Many factors contribute to this under-use: ignorance of procedure, lack of knowledge of what to write, and fear of retaliation. This article attempts to address the first two factors by highlighting the basics of the grievance process. The last factor, retaliation, while a legitimate fear, can be reduced by larger participation of prisoners in the process, for if only a select few are grieving an issue, it is easy for guards and administrators to focus on those few. However, if grievances en mass are filed, administrators must then focus on the merits of the complaints. In recent years, brought on by budget constraints, retaliatory transfers have decreased, as current FDOC policy discourages transfers, which are costly.

Time Limits

A first consideration is when to file your grievance. Simply, as soon as possible after the incident or action at issue occurs. FDOC policy states that time frames for determining grievance timeliness "begin[s] the day following the date of the incident or response to the grievance at the previous level." Procedure Directive 103.001 (3).

An Informal Grievance must "be received within a reasonable time of when the incident or action being grieved occurred." Chapter 33-103.111(1)(a), F.A.C. The vague term "reasonable time" is determined on a case-by-case basis, which requires officials to look at the availability of witnesses and relevant documentary evidence. If you are filing beyond 15 days of an incident or action, you should state at the beginning of your grievance why the delay is reasonable.

Direct and Formal Grievances filed at the institution and Direct Grievances and Appeals filed with the Secretary of FDOC must be received within 15 days of the incident or action, or the date of response at the previous level. Chapter 33-103.111(1)(b), (c), (d), F.A.C. A grievance is considered filed or received on the date you give it to prison officials or place it in the mailbox, for the "mailbox rule" has been held to apply to FDOC's Inmate Grievance Procedure. See: Pedroza v. Tadlock, 705 SO.2d 1005 (Fla. 4th DCA 1998). If the 15 th day falls on a weekend or holiday, the due date shall be on the next regular work day. Chapter 33-103.011(5), F.A.C.

If for any reason you cannot meet these time limits, you may request an extension of time. Chapter 33-103.111(2), F.A.C. However, you must demonstrate it was not feasible (reasonably possible) to file the grievance and that you made a good faith effort to file in a timely manner. Such a situation may exist if you were inhibited from using the law library to access rules or applicable case law.

Responses to your grievances are due as follows: (1) Informal Grievance within 10 work days of receipt by official; (2) Formal and Direct Grievances, filed at the institution, within 20 days of receipt by officials; and (3) Direct Grievances and Appeals to the Secretary within 30 days of receipt. Emergency Grievances on any level require a response within 15 days, unless an emergency is found not to exist, which requires a response within 72 hours. Procedure Directive 103 (19)(b) 1.

If you have not received a response and did not agree to an extension of the above time limits, you may move on to the next level of the grievance process once the time for officials to respond has expired. However, you must clearly state the date you filed your previous grievance, who it was sent to, and that you have not received a timely response. If a response is not timely provided from the Secretary level, you may proceed to file any judicial remedy that may be available. Chapter 33-103.011(4), F.A.C.

The Proper Remedy

Before filing any grievance you must first determine what type of grievance to file. Most complaints start with an Informal Grievance on a regular Inmate Request Form (DC6-236). On the top line of the Request Form you simply write "Informal Grievance." If the Informal Grievance is denied, you would then proceed by filing a Formal Grievance to the Warden, and if that is denied, then an Appeal to the Secretary, for both of which you use what is commonly referred to as a Formal Grievance Form (DC1-303) or "303" Form. In certain situations you can skip filing an Informal Grievance and file a Direct Grievance on a 303 Form if it is a case of: (a) an emergency, which is defined as something that would cause serious or irreparable harm to you or subject you to a substantial risk of personal injury; (b) is a reprisal (retaliation) situation; (c) a grievance of a sensitive nature; (d) alleging violation of the Americans with Disabilities Act; (e) a medical

grievance; (f) involves incentive gaintime; (g) challenges close management placement; (h) involves admissible reading material; and/or involves disciplinary action not including corrective consultations. These issues are sent directly to the Warden, except for grievance appeals concerning admissible reading materials which are sent to the Secretary. Also, Emergency Grievances, Grievances of Reprisal, and Grievances of a Sensitive Nature may be filed directly to the Secretary. When filing a Direct Grievance of any type it is advisable to write what type grievance it is on the top line of the form. See: Procedure Directive 103.001(19). In practice, be aware, these type grievances are normally denied if filed directly to the Secretary with instructions to refile at the institution.

Preparing and Writing the Grievance

As with any formal written document, you should prepare a draft of your complaint before putting it to the final form. If you are filing an Informal Grievance, check the "Other" box on the form and write in the staff member's name who is responsible for the particular area of your complaint. At times this may mean sending it to the person that caused the problem. While that may seem problematic, it allows the staff member responsible to respond in writing, which will be useful in any higher level grievance or appeal or judicial action that you may file. However, you are not required to send your complaint to anyone you are alleging reprisal against or who physically abused you. Chapter 33-103.015(6). On the first line of the Request Form write "Informal Grievance." Unlike Informal Grievances, on Formal Grievance Forms you can just check one of the provided boxes to indicate who your complaint is going to.

The first "rule" of grievance writing is not to ask questions, seek information, guidance, or assistance because grievances of that nature "shall be treated as inmate requests and the inmate will be advised that he cannot appeal the response." Chapter 33-103.005(2)(b) 1., F.A.C.

Your grievance should state the date of the incident, the names of any prisoners or staff that witnessed or were involved in the incident or action, and a short narration of the incident. If you cannot identify wrongdoers, identify their position the best you can. The courts have held you need not identify wrongdoers in your grievance if you cannot readily ascertain their identity, for you can name the Warden as a defendant if it comes to a case in court to identify the wrongdoers, and then amend your complaint to include those wrongdoers after they are identified. See: Brown v. Sikes, 212 F.3d 1205 (11th Cir. 2000).

Include all relevant facts in the grievance. Relevant facts include, for instance, that *you have* incurred pain, injury, or require medical treatment. Describe in detail how you are or have been affected by the incident or action. For example, that you have back pain that is not being properly treated. It causes you to have pain run down your leg when you walk, you are unable to sleep at night because of the pain, or you cannot sit upright. Including such facts not only provides the reviewing official with facts to justify taking action on your behalf, but if your situation rises to the level of a constitutional violation to where you have to seek relief in court, you will be able to show knowledge of your condition by the grievance reviewer(s) and demonstrate deliberate indifference to your situation if they deny you relief. If your situation continues or worsens, file additional grievances describing how your condition continues to affect you or how it is getting worse.

Limit each grievance to a single issue or violation. Procedure Directive 103.001(15)(a) 5. The *only* exception to that policy is when you are appealing a disciplinary report (DR) that resulted in more than one rule or Due Process violation during the processing of or hearing on the DR. In such cases, list the DR Log Number (its on the DR form) and list each violation in separate numbered paragraphs. You should cite all authorities when alleging the violation of any case law, rule, policy, or procedure.

A useful method in filing and exhausting the grievance process is to be progressive. This method involves stating the facts and requested relief in the initial grievance. Upon denial, rather than rewriting the entire grievance again on the next level form, simply attach a copy of the denied grievance that sets out your complaint in full and write on the new form "Attached and incorporated is my Informal Grievance (or Formal Grievance, etc.). I maintain the same grievance and request the same relief." You can add, if necessary, why the lower level denial was improper or cite authorities that show you are entitled to the requested relief. Do not, however, include new issues that were not included in the initial grievance or your grievance may be denied for attempting to raise new issues. If new issues have arose, file a new and separate grievance on just those issues.

Filing Your Grievance

If your complaint written out is longer than the space provided on the form, you can add continuation pages. The FDOC would like you to provide three copies of each page of the continuation pages for their convenience. If you do send three handwritten copies of each continuation page, you are suppose to get one of

the copies back with the response to your grievance. However, sometimes you will not get a copy back at all. FDOC policy does state you may submit only one copy of continuation pages, but if you do you will not get that copy back. Procedure Directive 103.001(15)(a) 7., (16)(a) 4. and (17)(a) 5. The same applies to any documents or exhibits that you attach to the grievance. The law library will not make photocopies of your continuation pages, but should make copies of exhibits to attach to a grievance. Chapter 33-602.405, F.A.C. In the case of appeals of impoundment or rejection of admissible reading materials, you are only required to attach one of the two notices of impoundment/rejection forms that you receive from the mailroom.

Important: You are also required to attach a complete copy of any grievance and response on a lower level when proceeding to a higher level. For example, when filing a Formal Grievance at the institution level you must attach a copy of the Informal Grievance that you filed to it, and when filing an Appeal to the Secretary you must attach a copy of both the Informal and Formal institutional level grievances to the Appeal. Only one copy of the lower level grievance(s) need to be attached, and they should be returned with the response.

Informal, Formal, and Direct Grievances filed at the institutional level are normally placed in the routine mailbox, though some institutions have a box just for grievances. Appeals to the Secretary may be handled in the same manner. Postage for grievances or appeals to the Secretary will be provided by the institution, although you may, if you wish, place it in a sealed envelope and send it directly to the Secretary yourself. It is usually unnecessary to do that since the institution will eventually learn of your complaint anyway.

Finally, your grievance should be signed and include your DC# next to your signature, failure to do so may result in delay of response to verify it is your grievance. Chapter 33-103.005(2)(b) 2. No matter what prison your grievance occurred at, your grievance is to be filed with the prison you are currently at. Officials at your present prison are responsible for handling complaints that arose at a prison you were previously assigned to. If that is the case, clearly state in your grievance that the grievance concerns an incident or action at your previous prison. Chapter 33-103.015(4), F.A.C.

Closing Thoughts

The Inmate Grievance Procedure is found in Chapter 33-103 of the Florida Administrative Code (F.A.C.) and further defined in Procedure Directive 103.001. Those rules and procedure directives are available from the prison law library. If you are in confinement the Chapter 33 rules may be available from the housing officer, but you may have to request a loan copy of the Procedure Directive from the law library. Facilities without law libraries shall have access to the rules and procedures from the classification office or security shift supervisor's office. Chapter 33-103.004(4), F.A.C.

Forms DC6 and DC1-303 are to be available upon request from the prison library, classification department and staff, and the housing officer of any housing unit. Chapter 33-103.015(2), F.A.C.

This article is not all inclusive in detailing the grievance procedure or in ways to prepare a grievance. It is meant to encourage prisoners to put their complaints to paper. We are 75,000 strong. If we utilize the grievance procedure en mass, it will be cheaper for prisons to address the root problem rather than continue to address grievances on the same issue. It will also take pressure off those steady grievance warriors.

The next time you have a complaint, react to it with more than an expulsion of ineffective, and boring, hot air. Utilize the grievance procedure, which only costs you a little time. We all have plenty of that on our hands. See you at the mailbox. ■

Supreme Court Revisits Miranda

This fall the U.S. Supreme Court will decide the extent of its 1966 ruling in Miranda v. Arizona, one of the pillars of the liberal era of Chief Judge Earl Warren. The current conservative bench has often critized the Miranda decision.

The Miranda warning requires suspects to be told that they have a right to remain silent and that anything they say can (and will) be used against them in a court of law.

In 2000, the Justices ruled that the 1966 decision rested on constitutional principles and that Congress could not pass a law allowing confessions to be admitted at trial when defendants had not been read their Miranda rights. The 7-2 ruling focused largely on limiting Congress' ability to meddle with court rulings.

The question in a Colorado case is whether physical evidence derived from such statements, such as guns or drugs, can be used in court. Past rulings of the Court suggest that the Justices could be more closely divided in this case. The U.S. Solicitor General will argue that Miranda bars only the admission of confessions not physical evidence obtained as at issue in the Colorado case.

The ruling will have a broad impact on police tactics as police sometimes deliberately do not give the Miranda warning to try to get details about evidence. ■

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Loren Rhoton is a member in good standing with the Florida Bar and a Member of the Florida Bar Appellate Practice Section. Mr. Rhoton Practices almost exclusively in the post conviction/appellate area of the law, both at the State and federal level. He has assisted hundreds of incarcerated persons with their cases and has numerous written appellate opinions.

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Oftentimes when a criminal defendant on a probationary portion of a split sentence (for purposes of this article a split sentence is a prison sentence followed by a term of probation) admits to a violation of probation and agrees to a new prison sentence, the advice given by counsel is incomplete as it pertains to previously earned gaintime. Many trial lawyers are not familiar with DOC's treatment of previously earned gaintime and thus misadvise their clients as to how the previously earned gaintime will affect the new sentence.. I have represented numerous inmates who were informed by their attorneys that they would receive credit for all previously earned gaintime against their new sentence. Unfortunately, trial attorneys are often unfamiliar with Florida Statute §944.28(1) which provides DOC with the authority to forfeit previously earned gaintime upon a violation of a probationary portion of a split sentence.

Florida Statutes §948.281(1) provides that if probation is revoked for a defendant who already served a term of incarceration under a split sentence, DOC "...may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to... his or her release under such clemency, conditional release, **probation, community control**, provisional release, control release, or parole." §948.281(1) effectively allows DOC to forfeit the previously earned gaintime and forces the defendant to serve the forfeited time before the newly negotiated sentence can begin. In other words, if a defendant enters an admission to a violation of probation pursuant to a plea deal for a specific prison sentence, DOC will make the person serve the remainder (forfeited gaintime) of the original prison sentence before the new sentence can commence. Therefore, §948.281(1) allows DOC to thwart the intention of the negotiated plea by adding more time onto the negotiated sentence.

If a defendant is not properly advised as to the effect of §948.281(1) on a plea to a violation of a probationary portion of a split sentence and his previously earned gaintime is forfeited, then the plea is rendered involuntary and is subject to being withdrawn. A plea of guilty is constitutionally valid only to the extent that it is voluntary and intelligent. Brady v. United States, 397 U.S. 742 (1970). Three requirements are essential for a valid guilty plea: (1) the plea must be voluntary; (2) the defendant must understand the nature of the charge and the consequences of his plea; and, (3) there must be a factual basis for the plea. Williams v. State, 316 So.2d 267 (Fla. 1975). If a defendant does not understand that additional time (the forfeited gaintime) will be added back onto the newly imposed sentence (thereby increasing the negotiated sentence) then said defendant clearly does not have a clear understanding as to the consequences of his plea. Such a plea would, thus, be rendered involuntary if in fact DOC forfeited the previously earned gaintime and forced the defendant to serve a longer sentence than was actually negotiated.

Florida case law specifically provides relief for the above situation. In McCallister v. State, the defendant entered into a plea agreement to receive ten years credit for time served on a seventeen year sentence following the revocation of probation and was sentenced in accordance with the agreement. DOC revoked the gain time portion of the original ten years in accordance with Florida Statutes §948.28(1). The defendant in McCallister claimed in a 3.850 Motion that he entered into the plea agreement with the understanding that he would receive credit for the full

ten years. McCallister asked that the trial court either: (1) resentence him in a manner that would enforce his plea agreement; or, (2) allow him to withdraw his plea. The McCallister Court stated:

> "While the trial court cannot compel the DOC to follow the plea agreement, since it would usurp the DOC's authority to forfeit gain time, the trial court can still effectuate the plea agreement by either resentencing the appellant in a manner that will effectuate the plea agreement given the DOC's forfeiture, or by allowing the appellant to withdraw from his plea.." Id.

Therefore, if a defendant were to be resentenced, he should be resentenced so that he would have to serve the amount of time he actually plead to, instead of said amount of time plus the forfeited gaintime. The McCallister Court further explained that "effectuating the plea agreement is proper even though the appellant had no legal entitlement to such gaintime since the DOC could declare it forfeited, because the court and the parties contemplated that the appellant would be credited with such gaintime." Id.

McCallister, a First District Court of Appeal case, is in accord with the other district courts of appeal in Florida. See, Foldi v. State, 695 So.2d 886 (Fla. 2nd DCA 1997); Williams v. Department of Corrections, 734 So.2d 1132 (Fla. 3rd DCA 1999): and, Dellahoy v. State, 816 So.2d 1253 (Fla. 5th DCA 2002). Therefore, should DOC forfeit gaintime from a previously served sentence upon the violation of probation, there is a remedy if there was a negotiated plea agreement which did not take the effect of Florida Statutes §948.28(1) into account. The sentence should be restructured to reflect the intent of the parties or the plea should be allowed to be withdrawn. ■

FDOC Targets Pen-Pal Ads

On Apr. 4, 2003, the Florida Department of Corrections (FDOC) posted a final rulemaking notice that the Department intends to adopt rules prohibiting prisoners, or anyone acting on a prisoner's behalf, from posting personal ads seeking pen-pals on web sites or in any other type of printed media. Additionally, if adopted, the proposed rule amendments would create a blanket prohibition on prisoners "receiving correspondence or materials from persons or groups marketing advertising services, or from subscribing to advertising services," and prisoners would be prohibited from entering any type contest or sweepstake through the mail.

The FDOC is claiming that prisoners must be prevented from using personal ads to locate pen-pals because some prisoners try to con pen-pals out of money.

Randall Berg, an attorney with the Florida Justice Institute in Miami, said that his office will file a protest with the FDOC over the pen-pal ad ban on grounds that it would violate prisoners' First Amendment rights. Currently, the only remaining meaningful review of prisoners' rights falls under the First Amendment umbrella. All other constitutional angles have been extremely narrowed by both the judiciary and Legislature.

Two other states, Arizona and California, have attempted similar bans on prisoner pen-pal ads. Upon being challenged, however, both attempts by those states were ruled to be unconstitutional and struck down by the courts.

Following FDOC's publication of the rulemaking notice, a public hearing on the proposal was demanded by several prisoner advocate groups and scheduled for mid-May by the FDOC.

What happens with the rule proposal remains to be seen. With the way FDOC is going this may be the year that the Department finds itself embroiled in several legal actions over its attempts to restrict and violate prisoners' and their correspondents' First Amendment rights and the Fourteenth Amendment Due Process rights that must be afforded.

[Sources: *Tampa Tribune*, 3/14/03; FDOC Rulemaking Notice, 4/4/03. concerning Rule 33-210.101 "Routine Mail."] ■

Streamlining COAs

by Richard Geffken

Federal Civil Procedure is so complicated it can be incomprehensible even to those completing law school and passing a bar exam. For a change, the U. S. Supreme Court recently decided to streamline the federal civil appeal process by making Certificates of Appealability (COAs) more obtainable. In an 8-1 decision (Thomas dissenting) the high Court ruled that the Fifth Circuit erred in requiring habeas petitioner Thomas Joe Miller-EL to make a substantial factual demonstration of trial evidence in order to obtain a COA to appeal denial of his habeas petition. The case, decided Feb. 25, 2003, is *Miller-EL v. Cockrell*, 16 FLW Fed. S77; S Ct. Case No. 01-7662.

Federal rules require that if a U.S. District Court decides against an indigent litigant, he or she must first apply for a COA from the same court, or the decision cannot be appealed. The practice is highly discriminatory. The State is specifically excluded from the need to do this, and litigants who can pay the appellate filing fee need not worry about COA rejection for being frivolous under sec. 1915.

Nor is the basic concept fair. To issue a COA the District Court is essentially required to admit that its own decision is incorrect. It is patently illogical to require the District Court to confess in advance that its judgment is shakey and that reasonable jurists could disagree with it.

Consequently, District Courts have been issuing few COAs and that decision is not itself appealable. Many prisoner litigants reaching that point in an already complicated legal process simply give up, often making a mistake.

While it is true that in the semantics of Federal Civil Procedure lingo a District Court's denial of a COA is not appealable, by turning to the Federal Rules of Appellate Procedure, and then 28 U.S.C. s.s. 636 and 2253, it will be discovered that if a District Court denies a COA, one can still be sought by application directly to the Appeal Court.

What *Miller-EL* streamlined was the criteria for granting a COA. Under 28 U.S.C. 2253, the Court said, a COA decision is merely a "threshold inquiry" into constitutional defects. Further, the Court noted, "the COA inquiry asks only if the District Court's decision was debatable."

Thus, it appears that following *Miller-EL*, if cases can be cited supporting a litigant's argument that it is reasonable to assume that jurists of reason already disagree with the District Court's determination and that a COA should issue from the Appeal Court.

One more sentence could have extended *Miller-EL* to COA determinations by the District Courts. It makes no sense for a lower court to impose a stricter standard. It creates a flow of useless paperwork from litigants to the appeal court, but that is where the Supreme Court left the issue hanging. At least the Miller-EL "debatable" standard is to be applied to COA determinations by the appeal courts, and that should help overcome the almost insurmountable obstacle that COA's had become for prisoner habeas litigants in recent years. ■

from the editor

It is obvious to those who follow FDOC rulemaking actions that certain elements within the Department have embarked on a mission to further restrict Florida prisoners' communication and interaction with, and receipt of information from, the outside world. This is not entirely surprising. For prisoners, information and a strong outside support system equals a relative amount of power. That, in turn, creates fear and anger among those in the prison bureaucracy who are insecure with themselves or who self-righteously believe that all prisoners and anyone who would associate with them have no real rights that must be respected.

In recent months there has been a flurry of rulemaking proposals from the Department. In December, frustrated with FPLAO rulemaking challenges, the Department ignored mandatory rulemaking requirements, and bulldozed ahead to adopt and implement new rule restrictions on the amount and content of written materials that free world citizens may send to prisoners through the mail. That has resulted in a furiously antagonistic legal battle between FPLAO and the FDOC before the Division of Administrative Hearings that is still ongoing.

Apparently oblivious to fundamental rights, in February the Department introduced two more infirm rulemaking proposals. The first proposal would prohibit prisoners from placing any advertisements, specifically advertising in any medium for pen-pals, and prohibit them from receiving any mail related to advertising. The proposed rule would also prohibit prisoners from entering any contest through the mail, which would include writing, poetry or art contests.

The Department followed that rule proposal with one that would prohibit prisoners from engaging in any business or profession that might generate revenue or profit for a prisoner. Specifically prohibited, unless approved by the Warden, would be engaging in the business or profession of writing for publication. Additionally, prisoners engaged in a business or profession would be required to turn total operational authority of same over to someone on the outside to whom prisoners would be prohibited from sending mail to or receiving mail from concerning direction of the business. Further, under the rule proposal, any prisoner who even "attempts" to engage in a revenue-generating business or profession "through the mail, telephone, or any other avenue of communication...shall be subject to disciplinary action."

On a slightly different tack, but perhaps related, recently *FPLP* staff have been receiving an increased number of letters from prisoners saying they didn't receive an issue, although upon checking the staff finds the issues were mailed. We can only conclude that some institutional mailrooms are "losing" the issues, although they deny same when contacted. In January, two institutions returned all copies of *FPLP* to our office claiming they were undeliverable because they lacked the prisoners' DC Numbers on the mailing labels. Actually, every copy returned had the prisoner's DC number clearly printed on the label. A call to the DOC central office convinced them to allow the copies to be mailed to the Warden of each institution to ensure they were distributed to the proper prisoners.

Most recently the Department stepped into a potentially serious quagmire by rejecting an issue of *Prison Legal News* because it contained advertisements for companies that help prisoners' families get around phone rate gouging by prison systems.

The above noted actions cannot be ignored. Historically, the FDOC, like many prison bureauracracies, tends to constantly nibble with like actions to gradually erode fundamental constitutional rights and the power bases of prisoners and their supporters. It just so happens that now the focus is on eroding the most fundamental rights, upon which most other rights depend, and that is those rights protected by the First Amendment. It can only happen, however, if we let it.

Recently FPLAO has been receiving more donations from its members. Much thanks goes out to those prisoners, their family members, loved ones, and advocates who have contributed to help make the organization stronger. The budget is always very tight, so the extra donations are always very helpful. In fact, the organization needs all the extra donations it can get right now.

FPLAO has outgrown the limited office space its had since the beginning. It's time to expand so space is available for more volunteer members to actively participate in projects and operations. Instead of renting additional office space, which can be expensive, the FPLAO Board of Directors have decided the best option would be to purchase a mobile (construction site type) office. Such an office in used but good condition, can be purchased for approximately $6,000.

We have an offer of rent-free property to set such an office up on, located only two blocks from where the main office is now located on East Colonial Drive, right outside of Orlando. To get the office (actually the unit staff wants has 3 rooms or offices in it and a restroom) FPLAO members and supporters are being called on to make donations specifically for this purpose. Any amount donation will help. Simple indicate on your check or money order, or in a note accompanying same, the donation is for new office space. In future issues of *FPLP* will be noted how this fundraiser is going and the amount collect towards the $6,000 goal. If you haven't made a donation recently, please do so now so FPLAO's productivity and effectiveness can be increased with adequate space to work in for staff and volunteers.

- Bob Posey ■

NOTABLE CASES

by Oscar Hanson

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

UNITED STATES SUPREME COURT

Ewing v. California, 16 Fla. L. Weekly Fed. S124 (U.S. S.Ct. 3/5/03)

The United States Supreme Court has held that California's three strikes law is constitutional. Under California's three strikes law, a defendant who is convicted of a felony and has previously been convicted of two or more serious or violent felonies must receive and indeterminate life sentence. Such a defendant becomes eligible for parole on a date calculated by reference to a minimum term, which, in this case, is 25 years.

While on parole for a previous offense, petitioner Gary Ewing was convicted of felony grand theft for stealing three golf clubs, worth $399 a piece. As required by the three strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. In sentencing Ewing to 25 years to life, the court refused to exercise its discretion to reduce the conviction to a misdemeanor – under a state law that permits certain offenses, known as "wobblers," to be classified as either misdemeanors of felonies – or to dismiss the allegations of some or all of his prior relevant convictions. The State Court of Appeal affirmed his conviction. The State Supreme Court denied review.

On certiorari the U.S. Supreme Court held that Ewing's sentence was not grossly disproportionate and therefore does not violate the Eight Amendment's prohibition on cruel and unusual punishments.

Lockyer v. Andrade, 16 Fla. L. Weekly Fed. S135 (U.S. S.Ct. 3/5/03)

In a second case involving the constitutionality of California's three strikes law, the United States Supreme Court not only rejected an Eight Amendment challenge as discussed in Ewing v. California, but also rejected a challenge premised on an unreasonable application of clearly established federal law.

California prisoner Leandro Andrade's argument to the Supreme Court was that his two consecutive terms of 25 years to life for stealing approximately $150 in videotapes is grossly disproportionate in violation of the Eight Amendment. Andrade similarly maintained that the state court decision affirming his sentence is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."

Andrade relied upon a series of precedents from the U.S. Supreme Court, i.e., *Rummel v. Estelle*, 445 U.S. 263 (1980); *Solem v. Helm*, 463 U.S. 277 (1983); and *Harmelin v. Michigan*, 501 U.S. 957 (1991), that he claimed clearly established a principle that his sentence is so grossly disproportionate that it violates the Eight Amendment.

The Supreme Court stated that section 2254(d)(1)'s "clearly established" phrase "refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision." In other words, "clearly established Federal law" under section 2254 (d)(1) is the governing legal principle or principles set forth by the Supreme court at the time the state court renders its decision. See: *Williams v. Taylor*, 529 U.S. 362 (2000).

The Supreme Court admitted that their precedents in this area have not been a model of clarity, nor has the Court established a clear or consistent path for courts to follow.

In sum, the Court held that the gross disproportionality principle reserves a constitutional violation for only the extraordinary case. In applying this principle for 2254(d)(1) purposes, the Court held it was not an unreasonable application of their clearly established law for the California Court of Appeal to affirm Andrade's sentence.

[Editor's Note: Each of the two cases above was rendered by a 5-4 split of the Court].

Connecticut Department of Public Safety v. Doe, 16 Fla. L. Weekly Fed. S140 (U.S. S.Ct. 3/5/03)

In a case involving sex offender registration, the U.S. Supreme Court held Connecticut's statute requiring persons convicted of sexual offenses to register with Department of Public Safety upon their release into the community and requiring DPS to post a sex offender registry containing registrants' names, addresses, photographs, and descriptions, does not deprive

registered sex offenders of a "liberty interest" and does not violate Due Process Clause because officials do not afford registrants a predeprivation hearing to determine whether they are likely to be "currently dangerous." Further, the Court held that Due Process does not require an opportunity to prove a fact that is not material to state's statutory scheme.

Smith v. Doe, 16 Fla. L. Weekly Fed. S142 (U.S. S.Ct. 3/5/03)

In a second case regarding sex offender registration, the U.S. Supreme Court held that Alaska's Sex Offender Registration Act, which requires any sex offender or child kidnapper incarcerated in state to register with Department within 30 days before his release providing vital information such as future address and other specified information, is not punitive. Accordingly, retroactive application does not violate ex post facto clause.

U.S. COURT OF APPEALS

Smith v. Siegelman, 16 Fla. L. Weekly Fed. C365 (11th Cir. 2/28/03)

The sole issue in this interlocutory appeal is whether nine public servants, who are being sued for money damages in their individual capacitites under 42 U.S.C. section 1983, are entitled to qualified immunity with respect to the claim that they violated plaintiff's Fourteenth Amendment rights by designating him a child abuser without first affording him a due process hearing. The defendants raised their qualified immunity defense in a joint motion to dismiss the plaintiff's complaint. The district court denied their motion; however, the circuit court reversed.

Smith claims that the defendants violated his Fourteenth Amendment right to due process when the public servants, who worked at the Department of Human Resources (DHR), placed his name and the DHR report on DHR's Central Registry without providing him the opportunity to present testimony and examine witnesses. Because Smith could not provide sufficient facts that six of the nine defendants participated in, or even where aware of, child abuse investigation of plaintiff or placing his name on sexual abuse registry, there is no constitutional violation, and without a constitutional violation, there can be no violation of a clearly established right to justify the denial of qualified immunity.

Further, assuming that the remaining three defendants played a significant role in decision to deny Smith the sort of due process hearing plaintiff sought, these defendants, the court held, are entitled to qualified immunity on due process claim where the plaintiff has not sufficiently alleged depriviation of protected liberty interest in not being designated as a child sexual abuse. In other words, plaintiff had not established a liberty interest sufficient to implicate Fourteenth Amendment safeguards where plaintiff had not alleged that, due to the information on the registry, he has suffered loss of employment, diminution of salary, or anything else that would qualify as some more tangible interest. Even if Smith's employment and custody rights in the future could be affected adversely due to information on registry, reputational damage alone is insufficient to constitution protected liberty interest. Plaintiff must show that defendant's conduct deprived him of previously recognized property or liberty interest in addition to damaging plaintiff's reputation.

FLORIDA SUPREME COURT

State v. Abreu, 28 Fla. L. Weekly S16 (Fla. 1/9/03)

Section 90.803 (22), Florida Statutes (1999) has been declared unconstitutional by the Florida Supreme Court to the extent that it allows the prosecutor to use at trial a witness's testimony from a previous judicial proceeding without a showing by the prosecutor that the witness is unavailable.

This section was held unconstitutional on the ground that it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Ashley v. State, 28 Fla. L. Weekly S18 (Fla. 1/9/03)

The Florida Supreme Court, in a revised opinion, has held that a trial court cannot bring a defendant back to court, vacate a sentence imposed, and resentence him to what amounts to a more onerous sentence without violating double jeopardy. In sum, once a "legal" sentence is imposed, jeopardy attaches and the defendant cannot be resentenced to a greater term of imprisonment.

[Editor's Note: An additional caveat to the above decision needs to be explored. The Supreme Court indicated that once a sentence has been imposed "and the person begins to serve the sentence," that sentence may not be increased without running afoul of double jeopardy principles. The term, "and the person begins to serve the sentence," is problematic. There are conflicting opinions of when that event takes place.]

Gethers v. State, 28 Fla. L. Weekly S44 (Fla. 1/16/03)

The Florida Supreme Court accepted conflict jurisdiction and held that absent the execution of an arrest warrant, a defendant who is in jail in a specific county pursuant to arrest on one or more charges need not be given credit for time served in that county on charges in another county when the sentence county has only lodged a detainer against the defendant. The filing of a detainer or hold does not have the same effect as executing or transmitting an arrest warrant. A detainer is merely a request to hold the defendant for the second county or to notify the second

county when the defendant's release is imminent so the second county can act.

Butler v. State, 28 Fla. L. Weekly S90 (Fla. 1/30/03)

The Florida Supreme Court answered a question certified by the Fifth DCA and held that a trial court may sentence a defendant to a prison term in excess of the statutory maximum for an offense committed after October 1, 1998, where the lowest permissible sentence under the Criminal Punishment Code exceeds the statutory maximum. The court held there is no conflict between section 921.002(1)(g), Florida Statutes (Supp. 1998), which does not authorize the trial court to impose a sentence in excess of the statutory maximum, and section 921.0024(2), Florida Statutes (Supp. 1998), which directs that where the lowest permissible sentence under the Code excess the statutory maximum, the sentence required by the Code must be imposed. The lowest permissible sentence under the Code becomes the maximum sentence allowable.

Goad v. FDOC, 28 Fla. L. Weekly S176 (Fla. 2/27/03)

Florida prisoner Ollie Goad initiated a civil action against the DOC in 1995, for injuries he sustained when he was attacked by another inmate. In response to this claim, the DOC filed a motion for summary judgment and a counter-claim under sections 960.293 and 960.297, Fla. Stat. (Supp. 1994) to recover the costs of Goad's incarceration.

Section 960.293 provides that a defendant who is incarcerated for an offense that is neither a capital offense nor a life felony offense is liable to the state in the amount of $50 per day for the costs of incarceration. By the terms of section 960.297, the state may recover these costs for the portion of the offender's remaining sentence after July 1, 1994, the effect date of the law.

The question presented in this case is whether 960.297 could be applied retroactively because the statute was not in effect at the time Goad committed the criminal offenses resulting in his incarceration.

On appeal the First DCA concluded that sections 960.293 and 960.297 afford civil remedies that are not the equivalent of criminal punishment, and therefore do not violate the ex post facto clauses of the state and federal constitutions. Conflict was certified with the Second and Fourth DCA's.

The Florida Supreme court resolved the conflict siding with the First DCA and held the Civil Restitution Lien and Crime Victims' Remedy Act did not violate the ex post facto clause nor did it violate substantive due process under either the state or federal constitutions.

DISTRICT COURT OF APPEAL

Rial v. State, 28 Fla. L. Weekly D7 (Fla. 3d DCA 12/18/02)

Christina Rial appealed the circuit court's order of revocation of probation and community control and sentence. Rial entered into a plea agreement where she pled guilty to the charges against her in exchange for two years community control followed by 10 years probation, with a special condition that she complete the Start program and then enter the Passageways program.

Rial completed the Start program then entered the Passageways program. Shortly thereafter, she asked to leave the program. (Both Start and Passageways programs are non-secure mental health facilities.) Rial's probation officer advised her she was in violation of her community control, and a revocation and a revocation hearing soon followed. Rial was found in violation of her conditions of community control and sentenced to 30 years in prison.

On appeal, the DCA held that the trial court erred in finding that Rial violated probation and community control by absconding from the Passageways program where the condition did not require Rial to complete the program, but only that she enter it. The DCA reversed the order of revocation since the condition that Rial enter a program was without a requirement of completion or a fixed time limit.

Amos v. State, 28 Fla. L. Weekly D49 (Fla. 4th DCA 12/18/02)

Florida prisoner Tyra Amos appealed the denial of her Rule 3.800 motion that alleged her sentence was illegal because the jury did not make specific findings that (1) she discharged a weapon, and (2) such discharge caused great bodily harm, which findings are necessary to trigger an enhancement under section 775.087(2)(a) 3. Amos was charged with aggravated battery with a firearm.

The DCA held that where the jury did not find great bodily harm, enhancement of sentence beyond statutory maximum for aggravated battery based on the discharge of firearm causing great bodily harm violated U.S. Supreme Court's holding in *Apprendi v. New Jersey*. The DCA reversed for resentencing in light of *Apprendi*.

Plute v. State, 28 Fla. L. Weekly D308 (Fla. 2d DCA 1/24/03)

The Second DCA held when a defendant has been granted relief from initial sentence imposed under unconstitutional 1995 guidelines, that upon resentencing the trial court could impose a habitual offender sentence notwithstanding the fact a guideline sentence was originally imposed.

NOTABLE CASES continued...

NOTABLE CASES continued . . .

Fuston v. State, 28 Fla. L. Weekly D572 (Fla. 2d DCA 2/28/03)

Florida prisoner Charles Fuston appealed the denial of his Rule 3.800(a) motion to correct an illegal sentence. The State conceded error that the minimum mandatory terms imposed at a second sentencing hearing were illegal, and the DCA reversed. Yet, there is more to this case that needs to be discussed.

While Fuston's case was pending on appeal, the Department of Corrections (DOC) sent a letter to the trial court claiming that the trial court had failed to impose minimum mandatory terms and that it was required to do so. The DOC took the position that the trial court had no discretion but to impose ten-year minimum mandatory terms for the first two of Fuston's offenses and a five-year minimum mandatory term for the third offense. This position contradicts the Supreme Court's decisions in *Burdick v. State*, 594 So.2d 267 (Fla. 1992) and *State v. Eason*, 592 So.2d 676 (Fla. 1992).

The DCA recognized that the DOC regularly sends letters to the trial courts. The DOC, however, has no power to reverse a sentence, or to disobey a sentence, when it is not ambiguous. The DOC has no authority to impose a more onerous sentence upon a prisoner than the sentence actually imposed by the trial court, said DCA Chief Judge Chris Altenbernd. If the State believes a sentence is erroneous, it is obligated to preserve this issue and appeal it to an appropriate appellate court. Otherwise, the sentence imposed by the court stands, and the Department must comply with that sentence.

Oliver v. State, 28 Fla. L. Weekly D585 (Fla. 5th DCA 2/28/03)

Florida prisoner Tony Oliver appealed his judgment and sentence arguing that he should be re-sentenced on the robbery charge because the habitual violent offender statute is unconstitutional. The DCA rejected this issue because the unconstitutionality of the habitual violent offender statute was cured retroactively. However, the DCA did certify the question of whether the curative statute passed in 2002 should be applied retroactively.

[Editor's Note: It is noted here that Chapter 99-188, Laws of Florida, was declared unconstitutional in violation of the single subject requirement of Art. 111, section 6 of the Florida Constitution by the Second DCA in *Taylor v. State*, 818 So.2d 544 (Fla. 2d DCA 2002). Subsequently, the Legislature passed Chapter 02-210, Laws of Florida, in an attempt to cure the defect, and to circumvent the *Taylor* decision. Recently, the Second DCA declared that legislative action unconstitutional in *Green v. State*, 28 Fla. L. Weekly D343 (Fla. 2d DCA 1/31/03)

Akins v. State, 28 Fla. L. Weekly D594 (Fla. 5th DCA 2/28/03)

Florida prisoner Anthony Akins appealed his conviction for armed robbery with a firearm or deadly weapon. Akins argued that his conviction should be reversed because the state failed to present any evidence that the item he carried "was designed or may readily be converted to expel a projectile by the action of an explosive." Akins further argued that because there was no evidence to establish that he possessed a firearm, he could not be convicted as charges. The DCA did not agree.

The DCA found that the direct evidence and the circumstantial evidence in the case supported the conviction. The DCA noted that it is not fatal to the prosecution if the state does not introduce the weapon into evidence. Eyewitness testimony that the defendant possessed a firearm is sufficient evidence to support a finding that the defendant was in possession of a firearm. Further, the DCA held a conviction does not require a showing that the firearm is loaded or operational.

Johnson v. State, 28 Fla. L. Weekly D116 (Fla. 4th DCA 12/26/02)

The Fourth District Court of Appeal has analyzed the question of whether fundamental error can also be harmless error. The DCA reasoned that an error which is so significant as to be fundamental under Maddox v. State, 760 So.2d 89 (Fla. 2000) cannot also be harmless.

[Editor's Note: This writer has not found a Florida Supreme Court case that has found an error to be fundamental, but harmless. The DCA referenced a sister district's decision that concluded that the Florida Supreme Court found fundamental error to be subject to harmless error review. In *Reed v. State*, 783, So.2d 1192 (Fla. 1st DCA 2001), the First DCA cited *State v. Clark*, 614 So.2d 453 (Fla. 1992) for the proposition that the high court considered the error at issue to be both fundamental and harmless. However, just as the Fourth DCA recognized, footnote 1 in *Clark* suggests that the court considered the error to be a "constitutional" error rather than a fundamental one. The assumption that fundamental errors can be harmless may have arisen from the fact that constitutional errors, which are not necessarily fundamental errors, can be harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).]

Hastings v. Krischer, 28 Fla. L. Weekly D156 (Fla. 4th DCA 1/2/03)

A petition for writ of mandamus seeking to compel state attorney and circuit court to "obey the law" citing failure to comply with procedural requirements of habitual offender statute is not available to remedy alleged errors in criminal case where avenues of direct appeal and post conviction relief provide adequate remedy. ■

NEWS BRIEFS

NATIONAL – A new study released by Amnesty International USA shows that while blacks and whites are murdered in roughly equal numbers in the U.S., those who murder white people are six times as likely to be executed. The statistical analysis found that of 845 people executed since states resumed capital punishment in 1977, 80% were put to death for killing whites, compared to only 13% who were executed for killing blacks. Similarly, several state-level studies done in the past year have like results. In Illinois, juries have been three times as likely to sentence someone to death if the victim is white rather than black. In Maryland, a study showed that the death penalty is four times as likely to be imposed when the victim is white rather than black. Other studies in New Jersey, North Carolina, Pennsylvania, Texas, and Virginia have also shown that the race of the victim is a factor in whether the death penalty is imposed.
[Source: *USA TODAY*, 4/29/03]

NATIONAL – On Jan. 25, at a conference for prison medical officials in San Antonia, TX, the Centers for Disease Control and Prevention (CDC) released a study that had been commissioned by Congress that shows prisons have become a primary incubator for some of the nation's worst diseases. The report, Morbidity and Mortality Weekly Report, shows that in 1996 at least 1.3 million prisoners were released from jail or prison who were infected with the deadly disease Hepatitis C. That number accounted for 29% of all cases estimated nationwide. Additionally, in 1996 released prisoners accounted for 35% of the 34,000 Americans with tuberculosis. The CDC called on all states to test their prisoner populations completely.
[Source: *New York Times*, 1/28/03]

NATIONAL – According to reports, a new virulent antibiotic-resistant form of staph infection appears to be rapidly spreading through jails and prisons. In Los Angeles County more than 1,000 jail prisoners have contracted the painful, aggressive, and highly contagious skin infection named methicillin-resistant staphylococcus aureus, or MRSA. In 2002, 57 L.A. jail prisoners had to have surgery to remove MRSA diseased tissue. The infection can spread into bones and blood vessels. Other states have also reported cases of the disease among their prisoners last year. Over 200 prisoners in Texas, 90 in Georgia, 60 in Mississippi, 20 in Pennsylvania, and 9 in Tennessee tested positive for the infection.
[*New York Times*, 2/4/03]

NATIONAL – In a bitterly split 5 – 4 decision the U.S. Supreme Court ruled on Apr. 29 that legal immigrants who face deportation for past criminal convictions can be jailed and denied bail while awaiting the deportation decision by the Immigration and Naturalization Service (INS). The ruling by the S.Ct. applies to foreigners who are "permanent residents" often known as green-card holders, and who have been convicted of a crime that can result in deportation. Under a 1996 law, when green-card holders are released from prison they can be taken into custody by the INS while officials decide whether to deport them. The high Court's ruling upheld that law and establishes that such immigrants can be detained without a hearing to determine whether they are dangerous or a flight risk. Four of the Court's justices joined in a caustic dissent to the majority ruling in the case *Demore v. Kim*.
[Source: AP, 4/30/03]

AL – A medical consulting firm hired to review and report on the quality of medical care provided to prisoners at the Limestone Correctional Facility, found "dangerous and extremely poor quality health care" being provided. Medical services at the facility are contracted out to NaphCare, a Birmingham-based private company. NaphCare disputed the findings of the consulting firm, which also documented that the death rate from AIDS at Limestone is more than twice the national average in prisons.
[Source: *USA TODAY*, 2/14/03]

AZ – The U.S. District Court in Phoenix struck down an Arizona law that made it a crime for prisoners to make even indirect use of materials generated off Internet websites. The law had prohibited mail correspondence with websites. The Court was not persuaded that the law was constitutional by the AZ DOC's argument that even indirect contact with the Internet by prisoners could result in fraud of the public, prisoners contacting minors, or making escape plans.
[Source: *New York Times*, 12/17/02]

CA – The U.S. District Court for Northern California has issued a permanent injunction against the CA DOC's enforcement of a policy that prohibited prisoners from receiving mail that contained material generated from Internet websites. The Court found that the policy, as applied, could not pass any prong of a four-prong test established by the Supreme Court to determine the reasonableness of prison regulations that restrict First Amendment rights.

[Source: *Clement v. Calif. Dept. of Corrections*, 220 F. Supp.2d 1098 (ND CA 2002]

CA – In January California prison officials held a public hearing on a proposal that would allow the prison system to take 55 % of all state prisoners' income, whether such income is earned in prison or sent to prisoners by their families. The CA DOC already takes 22% of prisoners' income. The money, claims DOC officials, would go to victim compensation funds. Since 1992 $59 million has been taken from prisoners for such funds. Only one-third of prisoners' income comes from prison jobs that pay 15 cents an hour, the rest comes from their families or friends.
[Source: L.A. *Times*, 1/15/03]

CA – Two Pelican Bay State Prison guards were sentenced to federal prison on Feb. 6 for conspiracy to violate prisoners' civil rights. Former guard Edward Powers was sentenced to 7 years in prison, followed by 3 yrs. unsupervised release, and fined $25,000. Jose Ramon Garcia received 6 years and 4 months in prison to be followed by 3 yrs. unsupervised release. Both guards were convicted of having prisoners attack child molesters, sex offenders, and other prisoners who had problems with the guards between 1992 and 1996. One former prisoner testified that Powers had offered to give him a half-ounce of heroin and half-ounce of crystal meth to stab another prisoner and even furnished a knife for the job. Pelican Bay has a history of corrupt prison guards abusing and even killing prisoners for sport.
[Source: L.A. *Times*, 2/7/03]

CT – In Feb. the Peanut Butter Bandit was sentenced to 14 more years in prison following a guilty plea for escaping from Connecticut's highest security prison in 1987. Fredrick Merrill, 56, got his nutty nickname for an escape attempt in 1968 when his mother brought him a gun, money, and a handcuff key in a jar of peanut butter. It's not known whether the PB was Jiffy, or smooth and creamy or crunchy style.
[Source: *USA TODAY*, 2/8/03]

FL – On Jan.25 Rudolph Holton was released from prison after spending 16 years on Florida's death row when it was finally determined through DNA testing that the evidence against him didn't hold up. Holton was the 103rd person who has been exonerated and freed from the nation's death rows since 1973. He was the 25th Florida death row prisoner to have been exonerated during the same period. Holton's release was the result of his legal representatives from the tax-payer-funded Capital Collateral Regional Counsel, who represent indigent death-sentenced defendants in Florida. With Holton's release assured, Fla. Gov. Jeb Bush, as part of his state budget proposal this year, called on the legislature to eliminate the Capital Collateral Regional Counsel offices and attorneys. Bush claimed this would save the state $3.8 million a year.
[Source: Lakeland *The Ledger*, 2/8/03]

FL – During April argument was heard before the 11th Circuit Court of Appeals in the case Johnson v. Bush which is challenging the validity of a Florida law that permanently prohibits citizens with a felony conviction from voting even after they have served their sentence. The lawsuit, brought by the Brennan Center for Justice at New York University School of Law, asserts that Florida's felon disenfranchisement law violates the U.S. Constitution and the Voting Rights Act. An amicus brief has been filed in the case by 14 people, including numerous former U.S. attorneys, who argue the law is unconstitutional and racially discriminatory. Originally enacted in 1868 and re-enacted in 1968, the amici brief argues that the disenfranchisement law was adopted to provide a means of excluding blacks from the voting booth. One proponent of the law in 1868 noted that the purpose of adopting it was to keep Florida from becoming "niggerized." Today, almost one in five black males in Florida are denied the right to vote because of felony convictions and the disenfranchisement law.
[Source: *St. Petersburg Times*, 4/6/03]

FL – According to a report released by the Florida Department of Law Enforcement in April, last year was the 11th straight year that crime has dropped in the state. There was a 1.2 percent drop in crime last year from the year before. The report shows that Florida has the lowest crime rate since 1972. Crime rates are calculated on the number of crimes committed per 100,000 people.
[Source: Fort Myers, *The News Press*, 4/17/03]

FL – A bill that will allow an increase in basic phone rates passed in both the Florida House and Senate and Gov. Jeb Bush stated he would sign it into law following the regular 2003 Legislative session. Leading telecommunication firms hired at least 150 lobbyists to push for passage of the law and contributed more than $5 million to political campaigns and parties before the session started. Under the new law, monthly basic phone rates for Floridians could jump statewide from between $3 to $7.50 during the next four years and then increase as much as 20 percent per year after that.
[Source: AP, 4/27/03]

IL – Illinois Gov. Rod Blagojevich stated in April that he will not lift a three-year moratorium on state executions even if the Legislature passes bills intended to correct the system. He said the changes still would not ensure that an innocent person won't be executed. Former

Gov. George Ryan halted executions in that state after several death-sentenced prisoners were found to have been wrongly convicted. At the end of his term as governor in Jan., Ryan commuted the sentenced of all 167 death-row prisoners; most now face life without parole.
[Source: *USA TODAY*, 4/25/03]

IL – The Illinois Supreme Court ruled in Feb. that sex offenders as young as 12 years old can be labeled "sexual predators" and be required to register as same the rest of their lives under IL law. Three of the five justices on the Court, however, called on the Legislative to rewrite the law saying it is inconsistent with reason, logic and common sense.
[Source: Washington *Post*, 2/23/03]

MD - There are currently over 28,000 prisoners incarcerated in the Maryland prison system and the system requires a $1 billion yearly budget. In Jan. Gov. Robert Ehlich appointed Mary Ann Saar, a former probation officer, as head of the prison system in that state.
[Source: Washington *Post*, 1/23/03]

PA – The Pennsylvania state prison system population recently topped 40,000 for the first time. The state's 26 prisons are now operating at 115% of capacity. The PA DOC Secretary, Jeff Beard, said his department would be asking the Legislature to reduce sentences for drug and alcohol offenders this year.
[Source: Philadelphia *Inquirer*, 1/27/03]

VA – Virginia has started collecting the DNA of all persons who are charged with a violent felony in the state. If the person is acquitted at trial or the charge is later dropped, the DNA data will be expunged from the state's database. Currently, Virginia has over 200,000 DNA samples on file.
[Source: AP, 1/1/03] ■

FAMILIES AGAINST INFLATED RATES (FAIR) CAMPAIGN

Are you tired of the high cost of the collect-call phone rates being charged the families and friends of Florida state prisoners? FPLAO intends to do something about those exorbitant rates, but your help is needed. If you have access to the Internet, log on to ww.fplao.org to participate in the FAIR Campaign online. You can also write and receive a FAIR Campaign Action Packet to participate in the effort to achieve lower rates. Together, we can make a difference. Write for your Action Packet today and visit www.fplao.org to get involved.

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Chuluota, FL 32766

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Prisoner Art Exhibit

For the first time in the state of Florida there will be an Art Exhibit exclusively for prisoners. The show will be from December 12, 2003 until March 7, 2004 in the historic Gov. John Martin house located at 1001 DeSoto Park Dr., Tallahassee FL.

We are asking for photos of work or slides, so we can select the best representative work to show. We need these mailed to us by July 30, 2003. They have restrictions: no nudity, no violent themes, and no religious iconography. We expect to have paintings, drawings, wood sculpture, collages, pen and ink sketches. Of course no sales are allowed. You can send photos, slides, or the pieces themselves, to us at:

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If you want to send the pieces themselves, you must send a description and media, name and institution along with a SASE FIRST so we can do a notarized receipt form to send to you. We want everybody secure in the knowledge their work will be safe in our care. **YOU WILL HAVE TO HAVE A PLACE FOR US TO SEND THE WORK AFTER THE SHOW OUTSIDE THE PRISONS. THE DOC WILL NOT ALLOW US TO SEND THE PIECES BACK IN...**unless they are simple pen and ink drawings or water colors that meet the size restrictions for mailing.

Families can call me at (352) 466-3706 or FAX (352) 4660705 or email Kathleen @ KATHLEEN_PAPILLON@hotmail.com

Three professional Florida artists will judge the show and give ribbons for top three in each media and a best in show! Good Luck and please spread this information around

FPC Chairman Resigns as FDLE Launches Criminal Investigation

by Bob Posey

On May 12, 2003, mainstream media sources briefly reported the resignation of Florida Parole Commission (FPC) Chairman Jimmie L. Henry. According to those sources, Henry's resignation, effective on May 9, only three days before the Florida Department of Law Enforcement confirmed it had initiated an investigation involving the Commission and Henry based on information relayed to law enforcement officials by the state Auditor General's Office.

Media inquiries to the Governor's Office were stymied by Bush press secretary Alia Faraj saying only that the governor had accepted Henry's resignation, and that she had no further information about the decision. FDLE spokesman Al Dennis would only comment that the FDLE is investigating a "matter" concerning the Commission and Henry. Dennis declined to be more specific. The sparse media reports concluded for the public that it "wasn't clear" that Henry's resignation was related to the FDLE's criminal investigation.

Henry began his career in state government in 1979. He started out with the Florida Commission on Human Relations and moved on to work with the state Comptroller as a financial investigator dealing with cases involving theft and abuse of state funds. In 1987 Henry was promoted to the position of Senior Cabinet level matters related to executive clemency, he later became Chief Cabinet Aide. In 1997 he was appointed to the Florida Parole Commission and in 1998 became the Chairman of the Commission. In that position Henry had statutory authority and full responsibility over administrative functions, including finances, of the Commission.

Although attempts were made to cover it up, Henry took over the top position in the Commission following a string of scandals that exhibited an ingrained core of corruption within the agency. For the past two decades, ever since guideline sentencing policies replaced indeterminate parole-eligible sentencing for most crimes in 1983, the FPC has struggled to maintain its existence. Faced with a diminishing parole-eligible prisoner population of approximately 5,600 people, and with Commission activities increasingly being duplicative of functions also being performed by the Department of Corrections, the Commission, according to its many critics, has become a waste of taxpayers' money as an agency that has outlived its purpose and usefulness.

Henry was appointed to the Commission at a time when it had become obvious the agency was long overdue a complete reorganization, if not outright elimination. In 1996 and 1997 the Commission was forced to fight tooth-and-nail to counter bad publicity generated by revelations of political favoritism in parole decisions, the mistaken release of prisoners, sexual harassment charges against a parole commissioner, and Commission employees being paid large salaries for work never done. Legislative attempts to abolish the anachronistic agency were unsuccessful, with one former legislator, Rep. Robert Sindler, commenting in 1996 that, "They have a lot of political connections and they call them in. They are a master at surviving." With investigations being conducted by the state Comptroller's Office into mismanagement and misappropriation of taxpayer money by the Commission, Henry being appointed an FPC Commissioner at that time from his top position at the Comptroller's Office was either an ideal choice or an odd decision in light of developing events.

While the mainstream media appears to have been stonewalled or silenced about what exactly the FDLE, Florida's version of state police, may be investigation concerning Henry and the Commission, some facts have been discovered by staff of Florida Prisoners' Legal Aid Organization (FPLAO). FPLAO has been con ducting its own investigation of FPC activities for the past two years as part of a project launched May 1st to increase the number of parole releases and decrease the number of parole revocations for technical violation in Florida, while focusing public attention on FPC activities.

An examination of FPC records after Henry took over as Chairman reveals that little changed under his watch, and some things may have got worse. A review of FPC financial records between Jan. 1998 and May 1999 revealed purchase requests had not been properly completed, purchase order dates not preceding the dates goods or services were received, transaction records not being kept as required by state law, and amounts being paid for goods or services in amounts greater than agreed upon.

Further investigation of records up to 2002 found Commission employees receiving pay raises with no justification of the raises being documented as required by state rules, and some employees who left the Commission were overpaid for unused leave time. As time went on the problems got worse. FPC records showed that some employees were being paid travel expenses for travel between their homes and office, others received travel expenses for travel between home and other locations. Instances were found where employees were using state - owned cell phones to make personal calls and not reimbursing the cost of the calls. Evidence was found where state - purchased property was being declared "surplus" and disposed of by a single FPC employee, contrary to state law, and Commission property not being properly accounted for or insured for loss, damage, or theft.

Perhaps the most damaging discovery was the fact that in June 2000, the last month of the fiscal year, instead of reporting and turning back over to the state treasury unspent money from the FPC's budget, Henry approved "merit awards" of between $200 to $1,000 for 144 of the Commission's 159 employees. Six months later he approved 15 more "merit awards" totaling $15,223 to the remaining 15 employees who didn't get an award in June of that year. The total amount of the "awards," which are only suppose to be given for outstanding performance and achievements above and beyond normal job expectations, was more that $105,000. Again contrary to state rules and laws those awards were not reported to the state Department of Management Services, which reports such awards to the Legislature each year. Nor was a $8,364 alleged cost saving suggestion award given to one employee in Dec. 2000 reported to DMS. A later calculation of that aware, after it was brought to the attention of the Auditor General's Office, showed that the suggestion was worth a maximum award of $446.

Additional problems concerning Henry and Commission employees have been brought to the Auditor General's attention now that cannot be discussed at this time considering the pending investigation by the FDLE. As the FPLAO Parole Project continues, further information concerning the FPC will be disclosed. Henry's resignation and the FDLE investigation promises to be just the first ripple in a wave of change bearing down on the Commission.

[Sources: Auditor General Reports # 13539 and 02-095; FPC records; AP article, 5/12/03]■

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