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Perspectives

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FPC Escaped Abolishment, What Happened and Why?

by Sherri Johnson

Both last year and this year bills were introduced in the Florida Legislature that would have abolished the Florida Parole Commission (FPC) and distributed its work out to volunteer parole panels, the governor's office, the courts and other agencies. In both instances the bills (H.B. 1899 and H.B. 5017) failed to make it through the legislative process and become law, despite appearing to have wide support among lawmakers. Why? What happened? Can the Commission (or will it even need to) continue dodging legislative efforts to abolish it? This article addresses those questions and suggests some answers.

FPC—Caught in the Middle

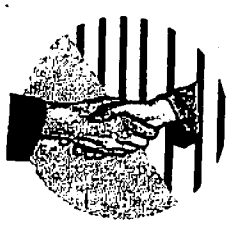
Its been said that once a state agency is created it is almost impossible to get rid of it. After a bureaucracy becomes entrenched, much of its work is focused on perpetuating itself. For its employees it's a matter of survival. For politicians, a redundant or obsolete agency can become a bargaining chip to be threatened or supported, whatever the case may be, to obtain other political goals. The FPC appears to have found itself in such a position recently.

It would be reasonable to think that a legislative push to abolish the Parole Commission would have something to do with parole. However, that isn't the case. The move by lawmakers to posture like they want to completely reorganize parole has to do with clemency, or more specifically, with restoration of civil rights to felons once they have completed their sentences.

A little known fact is that the Parole Commission actually devotes very little of its time to parole, only about 10 percent, according to the commission's latest Fiscal Year 2004-05 Annual Report. The bulk of the commission's work, approximately one-half (and over a third of its 148 employees), is devoted to conducting clemency investigations as part of the restoration of civil rights process. Florida is one of a few remaining states that do not automatically restore a person's civil rights, including the right to vote, once they have been convicted of a felony offense and served their sentence. Instead, in Florida, such persons must apply to the Board of Executive Clemency, consisting of the governor and Cabinet, for restoration of their civil rights. A process that could take many, many years. And the Parole Commission is the sticking point in the process. They do the investigations on clemency applications, which takes up to two years to do, according to commission data.

Restoration of civil rights has become a hot issue. Even before the 2000 presidential election, where it became apparent that felon voting disenfranchisement, especially among minorities—primarily blacks, was used to block votes, some legal scholars had already opined that felon voting disenfranchisement laws may be unconstitutional. Studies show that most such laws, including Florida's, were enacted after the war between the states as a means of depriving blacks of the right to

FAMILIES ADVOCATES PRISONERS



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vote. Yet, while most states that had such laws have abandoned them in favor of automatic restoration of rights, Florida and a handful of other states have not. Civil rights groups have been challenging Florida's disenfranchisement laws in court, with some success, and pushing lawmakers to go with automatic rights restoration, with less success.

In 2004 black lawmakers successfully had the courts hold that the Florida Department of Corrections must, by law, assist felons who have completed their sentences, with completing the clemency application paperwork to regain the right to vote. *Florida Caucus of Black State Legislators, Inc. v. Crosby*, 877 So.2d 861 (Fla. 1st DCA 2004). As a result, the Parole Commission was flooded with applications and a huge backlog was created.

In Dec. 2004 the clemency board, in an effort to reduce the impact of that court decision, amended clemency rules so that most nonviolent felons are eligible for restoration of civil rights without a hearing, if they remain arrest-free for five years and pay any victim restitution. And under the amendment, all felons are eligible for rights restoration without a hearing if they remain arrest-free for 15 years and pay any victim restitution, although if an objection is entered a hearing may still be necessary.

At that same time Gov. Bush proposed that the Legislature, during its 2005 regular Spring session, increase the Parole Commission's yearly budget, then $9.4 million, by $1.2 million to allow 40 more employees to be hired to work on the clemency application backlog. That started a move by some lawmakers to reorganize the whole process, starting by reorganizing the Parole Commission, a key cog in the restoration of rights process.

Shortly into the 2005 legislative session, the House budget committee voted not only to *not* give the Parole Commission extra funding but to not give it any funds at all to operate. Relying on recent audits of the commission that found it to be inefficient and poorly operated, some House representatives called for abolishment of the commission. In the Senate, however, the budget committee was proposing to give the commission its normal funding and about half of the increase asked for by Gov. Bush. When it was noted that laws would have to be changed to abolish the commission, House representatives introduced a bill, H.B. 1899, to do just that, which was then unanimously approved by the full House. When sent to the Senate, however, the bill wasn't approved. Instead, House and Senate budget writers struck a deal to keep the commission as it is for another year, with no increase in its budget, while the issue received further study. (Previously reported on in *FPLP*, Vol. 11, Iss. 2, pgs. 18-19, "Florida Parole Commission Escapes Abolishment, At Least For Another Year.")

Stacking the Deck

While giving the FPC its full budget, the General Appropriations Act of 2005-2006 also directed the Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) to study FPC operations before the 2006 session and report its findings to the Chairs of the House Appropriations Committee and Senate Ways and Means Committee on or before January 1, 2006.

OPPAGA didn't meet the Jan. 1 deadline, but it did complete a report on the FPC and released it on Feb. 24, just days before the 2006 regular session started on Mar. 6.

Unlike past OPPAGA studies of the FPC, which generally had been critical of the agency, this new study was favorable, finding that overall the commission is doing a good job and opining that abolishment of the FPC, as proposed in H.B. 1899, would result in higher costs to the State and taxpayers. While presenting itself as an unbiased analysis of the FPC, anything more than a cursory review of the OPPAGA report tends to support that it was politically influenced, designed to give legislative supporters of the FPC something to use to oppose any further efforts to abolish the commission. (That report, "Parole Commission Operations Consistent with Its Mission; Clemency Workload Needs to Be Addressed," OPPAGA Report No. 06-15, Feb. 2006, is reprinted in its entirety in this issue of *FPLP*, along with a detailed critique of the report prepared by FPLAO.)

Holding it Close to the Vest

Going into the 2006 session only one bill had been prefiled concerning the FPC, S.B. 1460, which was nothing but a "shell" bill stating that the Legislature "intends to revise laws concerning parole". Such bills are like a place-holder, there to be added to later, if felt necessary. S.B. 1460 was filed by Sen. Stephen Wise (R-Jacksonville), an acknowledge supporter of the commission.

Pre-session contact with Sen. Wise as to his position on the FPC resulted in him stating only that he thought the commission could be "streamlined". House representatives who had supported H.B. 1899 last year, and who had been very vocal then with criticism of the agency, were less forthcoming this year. Rep. Mitch Needelman's office claimed no new legislation would be introduced this year to abolish the FPC, while Rep. Joe Negron, the chair of the House budget committee, and Rep. Fred Brummer, who last year called the FPC a "nightmare" that needs to go away, had no pre-session comments about the FPC.

Meanwhile, Gov. Bush had again included in his requested state budget for the Legislature a provision giving the FPC $1.2 million more to hire additional staff to reduce the clemency investigation backlog. Bush has been a stanch opponent to automatic restoration of civil rights in Florida.

2006 Session

The first indication that the FPC abolishment issue was still on the table came Mar. 30 when different versions of a state appropriations bill cleared House and Senate committees. Like last year, the House bill provided no funding for the commission, while the Senate version proposed funding them.

FPC Chairwoman Monica David appeared before the House budget committee to try to change its mind by waving and citing to the OPPAGA report (No. 06-15), claiming it will cost more to get rid of the commission. The committee didn't buy it, and on Mar. 31 H.B. 5017 was filed.

That bill, introduced by the House Fiscal Council and Rep. Gus Barreiro (R-Miami), contained provisions deleting obsolete statutes related to the dissolved Florida Corrections Commission, removing the DOC's probation and restitution centers authority, reorganizing county-run bootcamps, revising the Prison Per-Diem Workgroup, *and* reintroduced the same provisions from last year's H.B. 1899 to abolish the FPC. On Apr. 6 H.B. 5017 was voted on and passed by the House 85 to 30, then sent to the Senate for approval.

In the Senate H.B. 5017 was filed on Apr. 19 to the Ways and Means Committee, then immediately withdrawn and sent to the floor, where an amendment was adopted, voted on and passed 39 to 0. That amendment, however, was nothing but a "shell", in effect deleting all the language in the House version of the bill, and placing the entire bill and all provisions in it up for negotiation.

The House refused to concur with such amendment and the bill was sent to a joint budget conference committee for negotiations.

The joint conference committee worked out the differences by agreeing to keep the FPC and removing some of the other provisions from the bill. Another amendment to the bill was then filed (Conference Committee Report), which *did not* contain any provisions concerning the Parole Commission abolishment, and which passed unanimously in both the House and Senate and was sent to the governor. Once again, the Legislature had failed to abolish the FPC.

What's the Real Deal?

It would seem that with a majority of House representatives determined to get rid of the FPC that they would have at least made some gain toward that goal after two years of introducing legislation. But, that's not the case. The FPC still exists, still has its full budget, and if one believes those lawmakers who supported that legislation, it is still a "nightmare", "incompetent and inefficient", "duplicative of other agencies", "obsolete", and "a dying agency in search of a mission, serving no

purpose other than the continuation of unjustifiable bureaucracy".

What's strange though is that those representatives who introduced the FPC abolishment legislation and who've done all the tough talking the past two years are Republicans. And it's their fellow Republicans in the Senate who have blocked the legislation. And both years it came down to striking a "deal" between the House and Senate that changes nothing. What kind of "deal" is that?

One might be tempted to think that the real deal isn't about abolishing the Parole Commission, but that it might be about protecting the Republican agenda of not allowing automatic restoration of civil rights. After all is said and done, Florida remains one of the few holdout states not to allow automatic restoration of rights.

And, no doubt, the FPC, with its existence having been threatened, is totally focused on getting its clemency backlog wrapped up as quickly and efficiently as possible. Which may have been the purpose in threatening them all along.

What is clear is that none of it has been about correcting any perceived defects in the parole process. That, if it happens, will apparently have to come from somewhere besides the Legislature. ■

FPC Rulemaking Under Fire

Until recently, the Florida Parole Commission (FPC) had not attempted to change or update any of its rules contained in Chapter 23 of the Florida Administrative Code (F.A.C.) since 1994. When Florida Prisoners' Legal Aid Organization began its Parole Project in 2003 to abolish, or at least significantly change, the FPC, a review of those rules showed them to be seriously out of date. Further investigation discovered that the FPC is required to every two years, by law, review and revise its administrative rules to ensure that they are correct and comply with statutory requirements, and file a certified report verifying such review with the Legislature. The FPC has never complied with that law. §120.74, Fla. Stat.

For over a year FPLAO had surrogates (with no obvious connection to the organization) file public record requests to obtain further information about the FPC's out-of-date rules, procedure directives, and other documented policies. Inevitably, suspicions were aroused at the FPC that "someone", for some reason, was examining every aspect of the Commission's rules and policies. That prompted the FPC to move.

On May 9 and 10, 2005, for the first time in over 10 years, the FPC held a public workshop at its Tallahassee headquarters to discuss whether the agency needed to change any of its formal administrative rules. The only notice given of that public workshop was published in the Florida Administrative Weekly, Vol. 31, No. 17, pg. 1603 on Apr. 29, 2005.

On August 18, 2005, the FPC held another public meeting in Tallahassee at which the 3 commissioners, as required by Rule 23-15.011(3), F.A.C., voted on whether to engage in rulemaking procedures to adopt the proposed rule changes suggested as a result of the May 9-10 public workshop. The commissioners voted to initiate the proposed rulemaking. The only notice of the Aug. 18, 2005, public meeting at which the proposed rulemaking was voted on was published in the Florida Administrative Weekly, Vol. 31, No. 31, pg. 2763, on Aug. 5, 2005.

On January 13, 2006, the FPC proceeded to initiate the required §120.54, Fla. Stat., rulemaking process by publishing the required (first) Notice of Proposed Rule Development. That notice stated that the FPC proposed to make changes to its rules in §23-21, F.A.C., concerning "definitions," "requirements for Commission meetings", "consideration for grants of parole", and "parole violation proceedings". Notice of that rule development was only published in the Florida Administrative Weekly, Vol. 32, No. 2, pg. 77, on Jan. 13, 2006.

Approximately one month later, the FPC proceeded with the rulemaking by publishing a Notice of Proposed Rulemaking in the Florida Administrative Weekly, Vol. 32, No. 6, pgs. 563-591, on Feb. 10, 2006. That (second and) final notice (before the proposed rules could be filed for adoption with the Department of State) set out the full text of the numerous changes that the FPC intended to make to its rules governing parole. The purpose of the proposed rule changes, as stated in that notice: "[I]s to clarify Commission practices at meetings, the interviewing of parole-eligible inmates, factors considered at arriving at presumptive and effective parole release dates, and actions to be taken upon violation of parole."

Although such rule changes would directly and substantially affect parole-eligible prisoners, it was not until Feb. 23, 2006, almost two weeks after the final rulemaking notice had been published in the F.A.W., before such prisoners were even notified that rulemaking was occurring. That was the date the Department of Corrections, which had been contacted by the FPC on Feb. 21, posted the FPC's Notice of Proposed Rulemaking at all state prisons where parole-eligible prisoners could see it. That was the first and only notice that parole-eligible prisoners received informing them that the FPC was even considering or engaged in changing rules that would substantially affect them.

While the FPC was dutifully publishing notice of each stage of the rules' development in the Florida Administrative Weekly, apparently thinking it was giving notice to all substantially-affected persons of each stage of the process by doing so, notice was not being given to those who would be most affected by the proposed rules—parole-eligible prisoners. And that was a problem.

Florida prisoners, including parole-eligible prisoners, have not had access to the Florida Administrative Weekly, which is the official publication giving notice of all state agencies' public meetings and rulemaking activities, since 1996. That was the year the FDOC stopped subscribing to the F.A.W. for all prison law libraries. Realizing, however, that all persons substantially affected by an agency's rulemaking have a Due Process and statutory right to notice and an opportunity to participate in such rulemaking, since 1996 the FDOC posts notice of all its rulemaking activities in the prison law libraries and on bulletin boards at each institution where prisoners can view them.

The FPC, which has not engaged in any significant rulemaking since 1994 until this latest, was apparently unaware that prisoners no longer have access to the F.A.W.s. Florida Prisoners' Legal Aid Organization (FPLAO) staff, however, was aware of it—in fact, they counted on it.

On Feb. 27 FPLAO Director Bob Posey, a parole-eligible prisoner (and editor of this publication), wrote to the FPC objecting to the failure of the Commission to provide notice of each stage of its recent rulemaking activities to parole-eligible prisoners, and for only providing them late notice of the final stage of that process when the time had almost expired for prisoners to submit comments or objections to the intended rulemakings. Only 21 days is allowing once the Notice of Proposed Rulemaking is published to challenge or comment on or object to proposed rules. §§120.54(3), 120.56(2), Fla. Stat. Additionally, prisoners are generally limited to submitting written statements to rulemaking activities, §120.81(3), Fla. Stat., and may only challenge rules or rulemaking with a court-filed declaratory judgment action pursuant to §120.73 and Chapter 86, Fla. Stat. See, e.g., *Quigley v. Dept. of Corrections*, 745 So.2d 1029, 1031 (Fla. 1st DCA 1999).

The FPC responded to Posey's objection on Mar. 3, stating that the Commission does not have a rule requiring that notice be posted in institutions simultaneously with F.A.W. publication, however, in this situation the FPC will start the 21 day comment period from the day the (Proposed Rulemaking) notice was posted in the institutions. Only Posey was informed of that extension of time, and he did not feel that would resolve the problem. He also noted that the FPC's response did not address the failure to give parole-eligible prisoners notice of, or any opportunity to participate in, the earlier stages of the rulemaking.

Posey, therefore, on Mar. 3, filed a formal Petition to Initiate Rule Adoption (pursuant to §120.54(7), as authorized by §120.81(3)(a), Fla. Stat.) with the Commission. The petition requested that a rule be adopted, as required by §120.54(3)(a)3., mandating that parole-eligible prisoners be given proper notice of all stages of any rulemaking conducted by the FPC by posting such notices at all state and privately-operated prisons in the law libraries and on the bulletin boards, since prisoners do not have access to the F.A.W. The petition specifically requested that such proposed rule require that such notice be given not only of the actual Proposed Rule Development and Proposed Rulemaking notices, but also of any public workshops or meetings where proposed rules are discussed, developed, or voted on by the Commission.

On March 29, 2006, at a public meeting (that, ironically, parole-eligible prisoners were *not* provided notice of) the three-member Commission voted on and approved, in part, and denied, in part, Posey's petition. The Commission's order granted the request to adopt a rule requiring that notice of FPC rule workshops, rule development, rulemaking, and changes during rulemaking be posted at the institutions in accordance with §120.54(3)(a)3. But, the Commission denied the request that such rule also require posting of notices of Commission public meetings. The reason for that denial: "[T]he Commission holds regular agendaed meetings in accordance with Section 947.06, Florida Statutes, several times each month to discuss individual cases and business meetings several times each year to discuss Commission business. We find noticing of these routine meetings would be unduly burdensome and the general inmate population is not affected by the individual cases discussed in these meetings." Such reasoning may open a Pandora's box for the Commission.

The Commission really had no choice but to grant the request to adopt a rule requiring posting of actual rulemaking notices pursuant to §120.54(3)(a)3., Fla. Stat. The FPC can either provide notice in that manner and/or, according to that same statute, be required to mail such notices to each individual parole-eligible prisoner who requests same. See also, Rule 28-103.001, F.A.C., "Any person may file a written request with the agency to be given advance notice of agency proceedings to adopt, amend, or repeal a rule, as provided in Section 120.54(3)(a)3., F.S. The written request may specify that advance notice is requested of all agency rulemaking proceedings, or of only those agency rulemaking proceedings involving specific subjects."

The Commission's "reasons" for not including in such intended rule a requirement that notices of FPC public meetings also be posted at institutions is disingenuous, at best. The "reasons" do not address the fact that the Commission, by its own rule, must vote on whether to adopt specific rules at a public meeting. Such vote is therefore an essential part of the rulemaking procedure, and where such vote would concern rules that would substantially affect parole-eligible prisoners, they, arguably, would have a Due Process right to notice of and an opportunity to participate in such decision-making (at least by submission of written comments), just as they do in other stages of rulemaking.

However, the Commission avoided that aspect, and simply claimed that its public meetings (only) concern "individual cases" (ostensibly, parole hearings) that do not affect "the general inmate population" or are "Commission business" meetings. Neither of which must be noticed to parole-eligible prisoners, according to the FPC's order on Posey's petition.

What's interesting with that position is that the Commission does not even give notice to individual parole-eligible prisoners of when or where their "individual case" is going to be discussed or decided at a public meeting, even though such prisoners are substantially affected by the decisions made at such meetings. And all parole-eligible prisoners would, arguably, have a substantial interest in and be substantially affected by most, if not all, business, especially any parole-related business, conducted by the Parole Commission at any publicly-held "business" meeting. Yet, the Commission, in effect, said it will not give such prisoners notice of such meetings, in part, because it would be "unduly burdensome."

Bob Posey, unconcerned about FPC burdens, disagreed. One day after the FPC issued its order on his petition, he filed suit challenging the FPC's rulemaking to amend its rules in §23-21, F.A.C. Posey claims the proposed rules are invalid because the Commission failed to give parole-eligible prisoners prior notice of each stage of the rulemaking process. The suit alleges that the FPC's notice failure makes the entire rulemaking an invalid exercise of delegated legislative authority pursuant to §120.52(8)(a), Fla. Stat., and as such, the court is asked to declare the rulemaking null and void.

The suit also particularly asks the court to declare that the FPC must give parole-eligible prisoners notice of all public workshops, public meetings and public hearings at which any rule or rulemaking that would substantially affect parole-eligible prisoners is discussed or voted on. Posey asserts a right to such notice as encompassed in Article I, §9, Florida Constitution (Due Process Clause), and Article I, §24(b), Florida Constitution, and §286.011, Fla. Stat. (constitutional and statutory Sunshine provisions). *Posey v. Florida Parole Commission*, Case No. 2006-CA-840 (Second Jud. Cir. Ct. filed 3/30/06).

If the above suit is successful, Posey has stated that he will likely seek to have the court invalidate all FPC public meetings or hearings at which his particular case was discussed or voted on, none of which he has received date and time notice of from the FPC. And he will seek invalidation of all business actions taken at all FPC public business meetings that concerned parole, parole eligibility or parole operations, which substantially affects, or affected him, and which were held without providing him notice or an opportunity to participate in same.

On May 5, 2006, the FPC published in the F.A.W., and posted in prison law libraries, a Notice of Proposed Rule Development initiating the rulemaking process to adopt a rule at §23-15.012, F.A.C., concerning posting of rulemaking notices in the prisons as Posey, in part, had requested in his rule adoption petition.

FPLP will provide updates of the rulemaking and lawsuit discussed in this article in future issues. ■

—Parole Commission— Exploiting Problems With Rules, Rulemaking and Parole Hearings

by Sherri Johnson

The Florida Parole Commission (FPC) is facing some potentially serious challenges in relation to its rules, rulemaking, and parole hearings that are intended to result in changes at the agency.

On Aug. 1, 2005, a lawsuit was filed against FPC Chairwoman Monica David by Erica Flowers (of Orlando) alleging that the FPC's' rules at Chapter 23, Florida Administrative Code (FAC), had not been updated in over ten years and for that time provided, in part, false and misleading information to the public on how and where to attend FPC public meetings, or obtain public records from the agency, and about how the agency is organized. That suit also alleges that Monica David is legally responsible and accountable for not updating the rules during her tenure as chairwoman, and, in fact, that David intentionally did not update the rules to mislead and obstruct the public's access to FPC public meetings (such as parole hearings) and public records. If the court finds in Flower's favor in that case, it could result in criminal charges against David, since intentional obstruction of access to public meetings or records is a criminal offense.

That case was previously reported in *FPLP*, Vol. 11, Iss. 5 and 6, Pgs. 12-13, and is still pending in the Second Judicial Circuit Court. *Flowers v. David*, Case No. 2005-CA-2194.

Monica David responded to that suit, not by addressing the allegations, but by claiming that it is really a rule challenge, seeking to compel the FPC to update its rules, and therefore should have been brought administratively, not in a court action since administrative remedies had not been exhausted. Flowers replied that her suit is not a rule challenge, that it seeks a declaration that David violated the state's Sunshine laws, and in any event, even if it was a rule challenge, Florida law provides that administrative remedies do not have to be exhausted before challenging an agency's proposed rules. The parties are now waiting for a decision by the court on Flower's claims.

In an apparent attempt to lessen any impact of that suit, on Aug. 13, 2006, the FPC at a public meeting voted to update its rules. A formal Notice of Proposed Rule Development was published Jan. 13, followed by a

published Notice of Proposed Rulemaking on Feb. 10. They noticed the FPC's intent to amend its rules to, in part, update the rules concerning FPC public meetings, public records, and how the agency is organized and operates.

Before those proposed rules could be filed for adoption, Florida Prisoners' Legal Aid Organization, Inc. (FPLAO) challenged them as an invalid exercise of delegated legislative authority in the Division of Administrative Hearings. That challenge stopped the rules' adoption while that action was pending. *FPLAO v. FPC*, DOAH Case No. 06-0748RP (filed 3/1/06).

After fast and furious litigation, the FPC convinced the DOAH administrative judge to dismiss FPLAO's rule challenge (dismissal became effective Apr. 17), but to no avail. On Mar. 30 Bob Posey had filed a challenge against the same proposed rules in the circuit court, again tying them up. (See article in this issue "FPC Rulemaking Under Fire.")

While that was happening, other actions were filed against the commission challenging the parole granting and revocation processes.

In Feb. '06, Deborah Cantrell, a freelance writer, also from Orlando, filed suit against the FPC claiming that the commission is, and has been, violating Florida's constitutional and statutory Sunshine laws by not noticing nor allowing the public access to attend a crucial stage of the parole determination process termed "parole interviews." The FPC makes parole granting decisions in a two-stage process. First, parole-eligible prisoners are interviewed by Department of Corrections' personnel and a parole examiner, who also analyze facts and records and formulate and make recommendations to the three-member parole commission as to what action should be taken to grant or deny parole. Such parole interview meetings are not open to the public. The commission, which never sees nor talks to parole-eligible prisoners, later in a public meeting approves or denies, with modifications, the recommendations formulated at the closed door parole interview meetings.

Cantrell's suit claims that where FDOC representatives and parole hearing examiners meet, discuss, and formulate recommendations for the parole commission on what parole actions should be taken, even where such recommendations are not binding on the commission, that parole interview meetings are part of the parole decision making process, and therefore must be open to the public. The suit notes that § 947.06, fourth sentence, also mandates that: "All matters relating to the granting, denying, or revoking of parole shall be decided in a meeting at which the public shall have a right to be present." Florida case law supports Cantrell's claims.

The FPC responded to Cantrell's lawsuit claiming that parole interview meetings involve only parole hearing examiners and prisoners, are for fact-finding purposes only, and that the resultant recommendations are not "decisions" because they are not binding on the commission. The response continues to claim that Sunshine Laws and § 947.06, Florida Statutes, only applies to meetings of two or more parole commissioners, and does not apply to parole interview meetings.

Cantrell's reply to that response points out that FPC rules and procedure directives provide that FDOC representatives and hearing examiners act as a de facto "committee" in the parole interview process, and that § 947.172(2) deems parole interview recommendations to be "decisions" to be based upon "competent evidence." Further, the reply points out, that under Florida law, government boards or commissions cannot evade compliance with open public meeting laws by appointing staff or a committee to conduct meetings in secret and make recommendations as to what action the board or commission should formally take later in a public meeting. Under Florida law, the public has a right to attend *all* stages of decision making by a commission, even when it involves appointed staff or committee meetings, if they make recommendations.

Cantrell's suit asks the court to declare that the FPC has violated Sunshine Laws by not publicly noticing and opening parole interview meetings to the public and press and seeks an injunction ordering the FPC to make parole interview meetings accessible to the public—with written minutes being taken of the meetings. A decision is expected by the court in the next few months. *Cantrell v. FPC*, Case No. 2006-CA-0429 (Second Judicial Circuit Court). (For more details on this case, see *FPLP* Vol. 12, Iss. 1, pgs. 16-18.)

As the commission was reeling, trying to adopt rules and respond to the various petitions and complaints as above, it was hit with another lawsuit. During March '06, Erica Flowers filed a second suit against the commission. That suit alleges that the FPC is, and has been, violating the state's open public meeting Sunshine Laws by not noticing nor allowing the public to attend final parole revocation hearings. (See the above-referenced issue of *FPLP* for more details on this case.)

The FPC responded to that suit (similar to how it had to Cantrell's suit) claiming that final revocation hearings, usually conducted by a single hearing officer, are not subject to open public meeting laws because the hearings are not conducted by two or more actual commissioners and the recommendations to revoke parole or not resulting from such hearings are not binding on the "final" decisions made by the commission at a later public meeting.

Flowers has replied that Florida law holds that even a single commissioner or appointed staff member-conducted hearing is subject to open public meeting laws, if it involves decision making. And since 2003, Florida (and one federal) courts have consistently held that the findings of fact and recommendations not to revoke, based on competent, substantial evidence, made by FPC-appointed

revocation hearing officers at final revocation hearings, *are* binding on the commission's later "final" decisions at a public meeting. Thus, Flowers replied, final parole revocation hearing officers are involved in the revocation decision making process. She asks the court to declare that and issue an injunction ordering the FPC to notice and open such hearings to the public. A decision is also expected in this case in the next few months. *Flowers v. FPC*, Case No. 2006-CA-1064 (Second Judicial Circuit Court.)

Neither Flowers nor Cantrell are asking the court to declare that past parole determination or revocation hearings/decisions are invalid, if the court finds in their favor. Although the law holds that such is the case where Sunshine Law violations are found. If, as expected, the court does declare that open public meeting laws were violated, parole-eligible prisoners will be able to follow up these cases with their own actions seeking to invalidate parole or revocation decisions made in their individual situations. And the commission would, where possible, have to hold entirely new hearings, on top of having to open up parole interviews and final revocation hearings to the public. The result would likely be a collapse of the current parole system in such a circumstance. And out of the rubble, hopefully, arise a new system shorn of the secrecy and disadvantages to parole-eligible prisoners, and parolees facing revocation, that exists under the current system.

[**Note:** Erica Flowers and Deborah Cantrell are members of FPLAO and both are volunteers involved in the organization's Parole Project.] ■

Head of FDLE Forced to Resign

The head of the Florida Department of Law Enforcement, Guy Tunnell, was forced to resign April 20, 2006, after a series of questionable incidents.

In early April, it was reported that Guy Tunnell complained in e-mails to Gov. Jeb Bush's office about how the new prison chief, James McDonough, had described the actions of Tunnell's son, a former prison employee. Brad Tunnell resigned from the FDOC in March after McDonough demoted him for fighting at a prison softball tournament in Jacksonville last year. This at a time that the FDLE had been, for over a year, conducting an investigation into wrong doing within the FDOC.

In one email to Bush's office, Guy Tunnell hinted that he might disclose an alleged threat that former FDOC secretary James Crosby made to his son in order to halt the FDLE investigation a few months ago. The implication was that the FDLE investigation of the FDOC might be compromised, if the new secretary, McDonough, didn't back off releasing information about Tunnell's son's wrong doing.

Guy Tunnell was also criticized over his handling of an FDLE investigation into the death of 14-year-old Martin Lee Anderson at a Bay County boot camp in January. Tunnell, who was the sheriff of Bay County before being picked by Bush to head the FDLE in 2003, and who started the Bay Co. boot camp, reportedly was sending emails to the current Bay Co. sheriff, Frank McKeithen, venting about everything from a search for scapegoats in Anderson's death to the lack of state money for boot camps. The FDLE was removed from the boot camp investigation because of Tunnell's emails.

Then when two state legislators asked to see the videotape of Anderson being beaten by guards at the boot camp, Tunnell refused, saying, it "ain't gonna happen." Once the FDLE was removed from the case, the videotape was released and aired nationwide.

The final straw for Tunnell came from remarks he made at a state agency head meeting about a protest rally concerning Anderson's death. Reports say Tunnell compared the Rev. Jesse Jackson to outlaw Jesse James and U.S. Senator Barack Obama, D-IL, to Osama bin Laden. Jackson and the Rev. Al Sharpton attended to protest at the Capitol. Tunnell later claimed his comments were a joke, but it didn't save his job. ■

FDOC Secretary Orders Random Drug Testing of Employees—Re-establishment of K-9 Interdiction Program

You would think that in an agency like the Department of Corrections that has custody of more than 86,000 prisoners, most of whom have drug abuse histories, and over 25,000 employees, any of whom could potentially make above-blackmarket money to smuggle drugs into the prisons, that employees would be subject to random drug testing. After all, many employers in less tempting jobs randomly test their employees, just to be on the safe side. However, until recently, FDOC employees didn't have to worry about being randomly tested for illegal drug use.

On May 8, 2006, FDOC Secretary James McDonough, who took over the helm of department in February when James Crosby resigned after a barrage of scandals involving misconduct by high-ranking employees and prison guards, sent out a memo to all FDOC staff informing them they will be subject to random drug tests.

McDonough, the former head of drug control policy for Gov. Jeb Bush, said he doesn't think there is a widespread drug problem among FDOC employees and figures only a few will test positive, but said it's all part of

his effort to boost confidence in the agency. McDonough emphasized, however, that the random testing policy won't be punitive for those who test positive. They will undergo treatment, and be moved out of duty that could be dangerous. But, after an employee goes through treatment and returns to work, if he were to test positive again, he'd likely be fired, said McDonough.

The testing, which will cost about $200,000 a year, will screen for marijuana, cocaine, opiates, amphetamine, methamphetamine, and other drugs.

The biggest union representing prison guards, the Florida Police Benevolent Association, supports the new testing policy. Previously, the FPBA has vociferously been against random testing of its members, but has shifted position now in the face of the numerous scandals that have roiled the FDOC for the past year. Among those scandals was one involving several prison guards allegedly involved in a steroids trafficking and distribution ring. So far, at least nine people have been charged in connection with that investigation.

Matters weren't helped when a prison guard, who worked at Lawtey Correctional Institution, Marcus Henry, allegedly attacked a pharmacist in Starke, Florida, in February. Allegedly, when Henry jumped over a counter in a Winn Dixie pharmacy and was caught trying to steal pills, he attacked the pharmacist with a knife and cut his throat. Police, who later arrested Henry, say he admitted being willing to do whatever it took to get his hands on drugs, like Oxycontin, or the money to buy them with.

The FDOC also has announced that it will bring back drug-sniffing dogs and handlers to conduct random searches at Florida's prisons beginning July 1. The K-9 drug interdiction program was abolished three years ago under former FDOC Secretary James Crosby.

Prison officials now claim the K-9 program's demise came after one of the dogs alerted on a car in the Union County High School parking lot indicating the presence of marijuana. The FDOC's K-9 unit was at the school as part of an agreement with other law enforcement agencies with interdiction programs. The problem started when it was discovered who had driven the car to the school, it was the son of Allen Clarke, one of Crosby's closest friends in the FDOC and a regional director in the department.

Local police decided not to file charges against Clarke's son because only a small amount of marijuana was found inside the car. Within days, however, the head of that K-9 unit, Major Kevin Dean, who retired from the department three years ago as a lieutenant, got a heated call from Clarke and then was told a few weeks later that the K-9 program was being disbanded. Dean was subsequently transferred to a prison twice as far from his home and assigned to the night shift. He retired a few months later after doing 20 years in the prison system.

Secretary McDonough has now rehired Dean and promoted him, placing him in charge of re-establishing the K-9 program.

"What we plan is to have two K-9 units in each of the four (FDOC) regions around the state because these dogs are competitive and work better in pairs," Dean said. "Also, it's a lot easier when you are going through large areas, like dormitories, because these dogs can only work so long in a day and then they get tired of it and want to do something else."

On May 10 a K-9 team worked inside some South Florida prisons, and the dogs alerted on the bunk areas of four prisoners. Three of the prisoners agreed to be tested for drug use and tested positive and were placed into confinement. The fourth prisoner refused to give a urine sample and was confined and disciplined for refusing.

"The goal is to deter inmates from using drugs," Dean said. "Not knowing when or where the dogs will be and then having discipline for testing positive or not being willing to be tested should help that."

Prisoners won't be the only ones to have cause for concern. When the K-9 program operated before, prisoners' visitors were a favorite target of the interdiction teams. On weekends, when visitors are allowed to visit prisoners, the K-9 units would troll visitor parking lots with the dogs. If a visitor's car was alerted on, the teams, often backed up by local police, would try to intimidate the car's owner into allowing the car to be searched. If anything was found in the car, or if the owner refused to allow a search, future visiting privileges were often terminated.

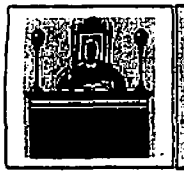
[Sources: *St. Petersburg Times; Gainesville Sun*, 5/10/06] ■

FPLAO Sponsors Meeting to Review Issues Affecting Prisoners' Families

On June 25, 2006, Florida Prisoners' Legal Aid Organization sponsored a meeting between a group of prisoners' family members and staff from the Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) to discuss issues and problem areas in FDOC operations that negatively affect families.

The meeting, which was well-attended, was held at the Orlando, downtown Orange County Public Library, from 1:30 pm till 4:30 pm., and was to educate the OPPAGA employees on problems faced by prisoners' families. The topics discussed included, but were not limited to: family visitation problems; FDOC viewing families as a source of revenue (prices in inmate canteens, service fees on money sent to inmates, phone rates, inmate medical co-payments); FDOC mail restrictions and limitations; and lack of an established, noticed complaint procedure for families and others who must deal with the prison system.

OPPAGA will be preparing a report to the Legislature on its findings from this review. *FPLP* will advise when that report is available.



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

US SUPREME COURT

Day v. McDonough, 19 Fla.L.Weekly Fed. S153 (S.Ct. 4/25/06)

Patrick Day's case presented the Supreme Court with the question of whether a federal court lacks authority, on its own initiative, to dismiss a habeas corpus petition as untimely, once the State has answered the petition without contesting its timeliness.

It was held that although district courts are under no obligation, they are permitted to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition. It was further stressed that a district court is not required to double-check the State's math. Also, "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants," *Pliler v. Ford*, 542 U.S. 225, 231 (2004), by the same token, they surely have no obligation to assist attorneys representing the State.

It was concluded however, if a judge has detected a clear computation error, there are no Rules, Statutes, or constitutional provisions that commands that judge to suppress that knowledge.

FLORIDA SUPREME COURT

State v. Dickey, 31 Fla.L.Weekly S234 (Fla. 4/20/06)

Herbert Dickey's case presented a question to the Florida Supreme Court of whether allegations of affirmative misadvice by trial counsel on the sentence-enhancing consequences of a defendant's plea for future criminal behavior in an otherwise facially sufficient motion are cognizable as an ineffective assistance of counsel claim.

The question was answered in the negative, and the court held that wrong advice about the consequences for a future crime that has not yet been committed cannot constitute ineffective assistance of counsel.

The First District's decision in Dickey's case, 30 Fla.L.Weekly D443 (Fla. 1st DCA 2/15/05)(where it was decided that such claim *would* constitute an ineffective assistance of counsel claim), was therefore quashed.

DISTRICT COURTS OF APPEAL

Tolbert v. State, 31 Fla.L.Weekly D432 (Fla. 5th DCA 2/10/06)

Kenneth Tolbert presented an issue that involved the conjunction "and/or" being used between the defendants' names within a jury's instructions.

It was noted that numerous courts have consistently agreed that the use of "and/or" between the names of co-defendants in jury instructions is fundamental error. That general rule is premised on the rationale that use of such verbiage misleads the jury into believing that the conviction of defendant may be based solely on the conduct of a co-defendant. Thus, the purpose for such rule is to prevent one individual from being improperly convicted for the criminal conduct of another.

In Tolbert's case however, Tolbert was convicted, where his co-defendant was acquitted of all charges. Therefore, the appellate court opined that if the purpose for the rule [explained above] is not served in a particular case, the rule may be inapplicable. In other words, it was noted that most of the appellate court's prior decisions concerning this issue has not mentioned the fact that the co-defendants were also convicted. It was reasoned that perhaps such absence of factual information in those prior cases could be attributed to the procedural course followed by co-defendants in their own filings of appeals. Nevertheless, it was discerned that each case involved *convictions* of the co-defendants that did file appeals regarding the relevant issue, which likewise were reversed based on the same instructional error.

The appellate court in Tolbert's case found that it had never been presented with a case where the rule was applied despite acquittal of the co-defendant. As a result, it was concluded that because Tolbert's co-defendant was acquitted, the fundamental instructional error rule would not apply to his case. The jury could not have been misled into believing that Tolbert was responsible for the conduct of a co-defendant that was found not guilty of any wrong doing.

Accordingly, Tolbert's convictions were affirmed.

Spera v. State, 31 Fla.L.Weekly D575 (Fla. 4th DCA 2/22/06)

Theodore Spera presented a summary denial of his Rule 3.850 motion to the Fourth District Court of Appeal that has caused that

appellate court to take a second look at their decision in *Frazier v. State*, 912 So.2d 54 (Fla. 4th DCA 2005).

In *Frazier*, the Fourth District concluded that *Nelson v. State*, 875 So.2d 579 (Fla. 2004), required the trial court to, *sua sponte*, grant leave to the defendant to re-file the motion if it does not contain all of the necessary allegations.

In Spera's case, Spera asserted in his Rule 3.850 motion that his trial counsel failed to call witnesses in his defense or to present a case-in-chief. Spera failed to identify any of the witnesses in his defense or to confirm that the witnesses were available to testify at the time of trial. Additionally, Spera failed to describe what defense his trial counsel should have put forth. Further, Spera had argued that his counsel failed to adequately discuss the case with him prior to trial. In the latter claim, Spera gave no explanation as to how that prejudiced his case. Therefore, the trial court had denied Spera's Rule 3.850 motion as substantively insufficient, in a detailed order which did not provide leave to amend, contrary to the Fourth District's *Frazier* decision.

In re-evaluating its decision in *Frazier*, the Fourth District noted that a review of *Nelson* reflected that the Florida Supreme Court was recognizing that when the movant has failed to allege whether the missing witnesses were available to testify at trial, a period of time to allow for an amendment should be granted. However, it found that the *Nelson* opinion does not read as extending such relief from an essentially technical omission to the point where a movant who *wholly* fails to present sufficient facts as to *any* aspect of a claim of prejudice should, automatically, be granted leave to amend the motion.

Therefore, after further consideration of the *Frazier* decision, the Fourth District found that it misinterpreted *Nelson* as encompassing the extended application they mandated in *Frazier*. But see, *Keevis v. State*, 908 So.2d 552 (Fla. 2d DCA 2005)(broadly applying *Nelson* to encompass any omission in pleading). As a result, the Fourth District concluded that if the Florida Supreme Court intended to announce a requirement that when any post-conviction motion fails to meet *any* pleading requirement for post-conviction relief, an order denying relief must deny relief with leave to amend, it would certainly have stated such a requirement more explicitly.

The Fourth District affirmed the trial court's denial of Spera's motion and receded from *Frazier* to the extent that it recognized a *per se* requirement that trial courts must deny relief with leave to amend whenever the pleading is deficient by omission and the omitted claims go beyond a simple technical failure. It was further recognized that its opinion was in conflict with the Second District's decision in *Keevis*.

Miller v. State, 31 Fla.L.Weekly D682 (Fla. 5th DCA 3/3/06)

Richard Lynn Stearns Miller presented an issue of whether it was a conflict of interest to have an attorney represent him during his trial whom he had filed a federal civil action against.

Miller had filed numerous motions to discharge a variety of defense counsels that the trial court appointed to represent him. Apparently fed up with Miller's continued complaints and arguments regarding counsels appointed, the trial court denied discharge of the final counsel it had appointed. In doing so, the trial court had held a *Nelson* hearing and it was determined that that counsel was in fact an effective counsel for Miller.

On appeal, after noting the numerous actions filed by Miller and counsels that Miller had gone through, the appellate court determined that discharging the last appointed counsel would not have been appropriate. It was opined that if there was any conflict between the attorney and Miller, it was conflict that was created entirely by Miller himself.

Apparently it was found that the "lawsuit" against the appointed counsel was no more than a claim of ineffective assistance of counsel dressed up in civil law clothing, and the trial court appropriately found that the counsel was effective.

Furthermore, the appellate court opined: "The filing of the complaint in federal court created no more of a conflict than the unsuccessful assertion by Mr. Miller [during trial proceedings] of ineffective assistance of counsel. A criminal defendant is entitled absolutely to representation by 'reasonable effective counsel.' This does not mean perfect counsel. More importantly from the perspective of this case, it does not mean that the defendant [Miller] gets to shop for counsel by using the commencement of a civil lawsuit as a shopping basket."

Accordingly, the trial court's action of continuing the trial with the appointed counsel in question was affirmed.

Robinson v. State, 31 Fla.L.Weekly D686 (Fla. 5th DCA 3/3/06)

Robert A. Robinson had sought to invoke the Fifth District Court of Appeal's jurisdiction by virtue of the all writs provision found in Article V, Section 3(b)(7), of the Florida Constitution, by filing a "Writ of Habeas Corpus Under Jurisdictional Defect Act." (The appellate court noted under note 1 of this case that Article V, Section 3(b), of the Florida Constitution, related solely to the jurisdiction of the Florida Supreme Court. Thus, presumably, Robinson's intent was to invoke the Fifth District's all writs jurisdiction pursuant to Article V, Section 4(b)(3).)

Nevertheless, the appellate court's review of the case revealed that Robinson's petition was merely an attempt to "bypass the trial court and raise post-conviction claims

directly in the appellate court." See: *Maddox v. State*, 813 So.2d 138 (Fla. 5th DCA 2002) (dismissing petition to invoke all writs jurisdiction where grounds raised should have been brought on direct appeal or in a prior motion for post-conviction relief). It was found that as in *Maddox*, it was the same in Robinson's allegations on his petition.

The appellate court further noted that the two-year limitation period for filing a Rule 3.850 motion in Robinson's case had expired, and it opined as such, that it appeared Robinson was utilizing the all writs argument in an attempt to circumvent the rule's limitation period. Therefore, Robinson's petition was dismissed.

Richardson v. Florida Parole Commission, 31 Fla.L.Weekly D865 (Fla. 1st DCA 3/23/06)

James Eugene Richardson sought review of a lower court's denial in his challenge against the Florida Parole Commission, which had revoked his conditional release.

The lower court had denied Richardson any relief despite the hearing examiner's findings that Richardson was not guilty of the alleged conditional release violations. Therefore, the appellate court opined that the lower court had departed from essential requirements of law where it was apparent from the record that the Commission had acted impermissibly in disregarding the examiner's findings.

The lower court failed to follow correct law where it limited its' consideration to the sufficiency of the evidence to support the Commission's action, rather than inquiring as to whether the hearing examiner's contrary findings were supported by *competent, substantial evidence.*

Richardson's petition was granted, the lower court's denial order was quashed, and the cause was remanded with instructions.

[Note: See also, *Tedder v. FPC*, 842 So.2d 1022 (Fla. 1st DCA 2003); *Mabrey v. FPC*, 858 So.2d 1176, 1183 (Fla. 2d DCA 2003); *Merritt v. Crosby*, 893 So.2d 598 (Fla. 1st DCA 2005); and *Collins v. Hendrickson*, 371 F.Supp.2d 1326 (M.D. Fla. 2005)—editor].

Marganet v. State, 31 Fla.L.Weekly D950 (Fla. 5th DCA 3/31/06)

Hugo A. Marganet's case involved a search and seizure issue where Marganet's girlfriend, Wilma Luz Pinero (Pinero), gave consent to authorities to search items belonging to Marganet.

In relevant part, Pinero had led authorities to a hotel room she was sharing with Marganet, consenting to search of the room. Pinero pointed out luggage items that belonged to her and then pointed out and consented search of luggage belonging to Marganet.

Inside Marganet's suitcase, which authorities had opened, Pinero pointed to a shaving kit which she informed the authorities she believed Marganet kept drugs in. Consequently, drugs, cocaine and heroin, were found in the shaving kit that Pinero had given consent to be searched. Marganet was then arrested and charged with possession of heroin with intent to sell or deliver and possession of cocaine.

At trial, Marganet sought to suppress the contraband found, arguing that there had been no valid consent given to search his belongings. The motion was denied with the trial court opining that Pinero had apparent authority to consent to the search of the items.

The leading case bearing on the issue of third-party consent to search is *United States v. Matlock*, 415 U.S. 164 (1974), which involved the issue of "actual authority" to consent to a search, and it was held that "permission to search [can be] obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."

On appeal, it was found that it was undisputed Pinero had actual authority to consent to a search of the hotel *room* because she and Marganet had shared use and joint access to or control over the shared area. However, it was opined that this was not dispositive of Pinero's right to consent to a search of Marganet's suitcase and shaving kit, which she plainly told the authorities belonged to Marganet and was not hers. See: *United States v. Ruiz*, 428 F.3d 877 (9th Cir. 2005) (authority to consent to a search of property does not necessarily translate into authority to search specific containers).

Absent evidence that Pinero had mutual use of Marganet's suitcase and shaving kit, or even a right to access to those items, it was opined that the trial court erred in finding that Pinero had the right to consent to a search of Marganet's property.

The trial court's denial of Marganet's motion to suppress the evidence found was reversed and the case was remanded.

Stevens v. State, 31 Fla.L.Weekly D1039 (Fla. 3d DCA 4/12/06)

Joseph Stevens' case presented a question of whether a trial court erred in limiting *voir dire* on the defense of necessity.

Stevens had been charged with carrying a concealed firearm and unlawful possession of a firearm by a convicted felon. Stevens' defense was that his life had been threatened and he armed himself for self defense.

Pre-trial, the lower court granted State's motion *in limine* to prevent defense from discussing the defense of necessity during *voir dire*, although, the defense of necessity instructions was given to the jury at the conclusion of Stevens' trial.

On appeal, it was opined that the lower court abused its discretion in depriving Stevens of the

opportunity to discuss, or question the jury about, the defense of necessity during *voir dire*. See: *Lavado v. State*, 492 So.2d 1322 (Fla. 1986); *Ingrassia v. State*, 902 So.2d 357 (Fla. 4th DCA 2005) (the court may not preclude a party from inquiry into bias bearing on a matter that is at the heart of the defendant's case).

Accordingly, the judgment and sentence imposed on Stevens were reversed and his case remanded for a new trial.

Petty v. State, 31 Fla.L.Weekly D1075 (Fla. 1st DCA 4/13/06)

David Petty had filed a Rule 3.800(a) motion in the lower court, which denied the motion and further included language barring Petty from future *pro se* filings.

On appeal, the appellate court affirmed the denial of the motion, however, it was opined that the lower court erred to sanction Petty without providing him notice and an opportunity to respond. In the context of *pro se* criminal defendants, the Florida Supreme Court has held that before the lower court can sanction a defendant by imposing a bar to future *pro se* filings, a defendant must be given notice and the opportunity to respond. See: *State v. Spencer*, 751 So.2d 47, 48-49 (Fla. 1999).

Accordingly, that part of the lower court's denial order was reversed and the cause was remanded for further consideration consistent with the opinion given.

Gillam v. McDonough, 31 Fla.L.Weekly D1079 (Fla. 1st DCA 4/18/06)

Michael Gillam appealed a lower court's denial of his motion to remove a lien imposed upon his prison account for court costs relating to a writ of mandamus petition.

On appeal, it was found that the lower court had incorrectly concluded that Gillam's petition did not constitute a collateral criminal proceeding. Therefore, the appellate court reversed the lower court's denial and remanded with directions for the removal of the lien or direct reimbursement of any funds that have been withdrawn.

Leveille v. State, 31 Fla.L.Weekly D1103 (Fla. 4th DCA 4/19/06)

Robert Leveille appealed his convictions of two counts of child abuse and three counts of committing unnatural and lascivious acts. He argued that the lower court had erred in assessing 120 sexual contact points on his criminal punishment scoresheet, because he was acquitted of the greater charge involving sexual contact.

Leveille was originally charged with multiple counts of child abuse and lewd or lascivious battery for contact with a thirteen-year-old girl. He was found guilty, however, of the lesser included offense of committing an unnatural and lascivious act with another person, a misdemeanor, pursuant to Section 800.02, Florida Statutes.

"Unnatural" means not in accordance with nature or with normal feelings or behavior. "Lascivious" means lustful, normally tending to excite a desire for sexual satisfaction.

Florida Rule of Criminal Procedure 3.704(d)(9) states, in pertinent part: "victim injury must not be scored for an offense for which the offender has not been *convicted*." Emphasis added. Despite that prohibition, the lower court determined that the crime *charged* included a definition of sexual activity which included penetration or contact. See: Section 800.04(1)(a), Fla. Statutes. The appellate court opined that, nevertheless, the crime of which Leveille was *convicted* did not *require* sexual contact, and the jury was never asked to determine factually whether sexual contact occurred. Thus, the jury's verdict did not constitute a factual determination necessary to support the imposition of additional points for the crimes of which Leveille was convicted. See: *Blakely v. Washington*,, 542 U.S. 296 (2004); also, *Behl v. State*, 898 So.2d 217 (Fla. 2d DCA 2005).

Leveille's convictions were affirmed, but for the findings in the case his sentence was reversed and remanded for imposition of a sentence on a corrected scoresheet eliminating the 120 points assessed for sexual contact. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

The right to a trial before one's peers includes the right to be tried by a jury free from bias or outside influence. Trial courts routinely warn jurors not to discuss cases with others, read newspaper articles about cases, or otherwise act in a manner which would expose the jurors to prejudicial outside information about cases. Typically such admonitions from the courts serve to ensure that juries are free from improper outside influence. Sometimes, though, a juror will take it upon himself to learn more about a case. A juror may try to talk to a witness outside of the courtroom during a break or watch a news story about the defendant. Such actions are prohibited and threaten the integrity of a trial. If juror misconduct becomes known to defense counsel, the trial court should be alerted and the alleged misconduct should be investigated before a case progresses any further. The failure of defense counsel to properly address juror misconduct can amount to ineffective assistance of counsel which renders a judgment and sentence invalid.

Misconduct of a juror in a criminal trial entitles a defendant to a new trial where prejudice can be established. F.R.Cr.P. 3.600(b)(4). In a criminal case, any private communication, contact or tampering with a juror about a matter pending before the jury is presumptively prejudicial. Remmer v. United States, 347 U.S. 227 (1954). The presumption is not conclusive but the burden rests heavily on the state to establish that any improper contact with a juror was harmless to the defendant. Id. If the misconduct is such that it would probably influence the jury, the onus is not on the accused to show that he was prejudiced for the law presumes he was. Russ v. State, 95 So. 2d 594 (Fla. 1957).

In Marshall v. State, 664 So.2d 302 (Fla. 3d DCA 1995), the defendant was convicted of attempted second degree murder. One week after the defendant was convicted, he filed a motion for new trial and a motion for juror interview, alleging juror misconduct. Id. at 303. In support of his motions the defendant submitted an affidavit of Cindy Munson, a trial witness for the defense. Id. In her affidavit and subsequent sworn testimony Ms. Munson alleged that she visited the defendant at the county jail before and during the trial. While on the witness stand at trial Ms. Munson vaguely recognized one of the jurors, Johanna Giorgio. Id. After the jury deliberations had begun, Ms. Munson remembered that Ms. Giorgio was the volunteer at the county jail who escorted Ms. Munson to the visitation booth for Ms. Munson's visits with the defendant. Id.

After the jurors were seated in Mr. Marshall's case the court instructed the jurors to have no discussions with any of the attorneys, the witnesses, or the defendant. Id. After giving the jury preliminary instructions, the trial court recessed until two days later. Id. In the interim, Ms. Munson visited the defendant at the county jail. Juror Giorgio, in her capacity as a volunteer at the jail, escorted Ms. Munson to the visitation booth to see the defendant. Id. The trial reconvened the next day with Juror Giorgio in the jury box. Later that same day Ms. Munson took the witness stand. During the trial Giorgio never disclosed her jail contact with Munson or the defendant. Afterwards, the jury was sent to deliberate and the defense began to identify Giorgio's status. Id. at 304. After the verdict was rendered the defendant filed his motions for

new trial alleging juror misconduct. Id. Said motions were denied. Id.

On appeal the Third District Court of Appeal reversed the trial court's denial of a new trial and held that "juror Giorgio's failure to disclose her contact with defendant and his witness constituted prejudicial juror misconduct which deprived defendant of his Sixth Amendment right to a fair trial." Id. at 304. Juror Giorgio was clearly instructed by the trial judge to have no contact with the defendant or any of the witnesses. Ms. Giorgio thus had a duty to disclose her contacts with the defendant and Ms. Munson to the trial court. The Marshall Court held that Ms. Giorgio's breach of that duty of disclosure prejudiced the defendant's fair trial rights and entitled him to a new trial. Id. at 304.

As noted above, defense counsel has a duty to alert the trial court to any alleged improper actions of jurors. The failure of trial counsel to alert a trial court to apparent juror misconduct falls well below an objective standard of professional reasonableness, as is required by Strickland v. Washington, 466 U.S. 668 (1984). There simply is no excuse for an attorney's failure to further investigate such a matter after the discovery of any type of juror misconduct. Furthermore, there is no excuse for an attorney's failure to alert the trial court to improper juror actions. The prejudice to a criminal defendant is apparent and is, in fact, presumed in such a situation. Remmer v. United States, 347 U.S. 227 (1954). As a result, any time defense counsel becomes aware of facts which indicate the possibility of juror misconduct, it is defense counsel's duty to raise the issue with the trial court. Any failure to do so results in a weighty deprivation of a defendant's constitutional right to a fair trial before a jury of his peers.

Loren Rhoton is a member in good standing with the Florida Bar and a member of the Florida Bar Appellate Practice Section. Mr. Rhoton practices almost exclusively in the postconviction/appellate area of the law, both at the State and Federal Level. He has assisted hundreds of incarcerated persons with their cases and has numerous written appellate opinions. ■

oppaga
OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY

February 2006 Report No. 06-15

Parole Commission Operations Consistent with Its Mission; Clemency Workload Needs to Be Addressed

at a glance

The Parole Commission has been successful in identifying low-risk offenders for release via parole. Regionalizing the commission's parole determination functions would distribute this workload across the state but would likely increase overall state costs. Transferring the commission's revocation authority to the court system and victims' services programs to other state agencies is feasible but would also likely result in higher overall state costs.

The commission also staffs the Florida Board of Executive Clemency, whose backlog continues to grow. The commission has proposed funding additional clemency staff to address the backlog. As alternatives, the Legislature could consider outsourcing this work to a private entity, or the Board of Executive Clemency could streamline its investigation process to reduce workload without additional resources.

Scope

As directed by the Legislature, OPPAGA reviewed the Florida Parole Commission's major functions. Specifically, this report

- analyzes the commission's effectiveness in determining which offenders should be released on parole;
- examines the fiscal, legal, and administrative ramifications of transferring commission functions to other entities; and
- evaluates options for reducing the backlog in processing executive clemency applications.

Background

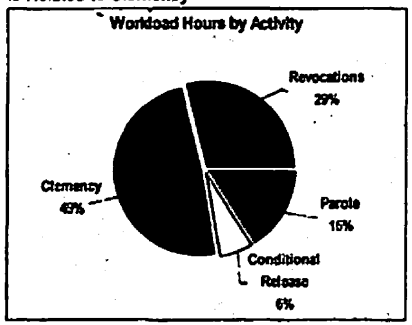
The Florida Parole Commission plays two primary roles in the criminal justice system. First, the commission seeks to protect public safety by determining the suitability of releasing certain offenders from incarceration and by setting the terms and conditions of supervision for post prison releasees. Second, the commission acts as an investigative body that supports the Board of Executive Clemency in considering petitions for clemency by offenders. Exhibit 1 shows the specific functions performed by the commission.

Exhibit 1
The Parole Commission Performs a Number of Criminal Justice Functions

Commission Duties	Fiscal Year 2004-05 Performance
Parole Determination. Conduct administrative, quasi-judicial hearings to determine whether to release offenders on parole and conditional medical release.	341 parole hearings 43 offenders paroled
Offender Revocation. Revoke the supervision of offenders who violate their supervision conditions or commit new crimes.	2,687 revocation hearings
Warrants. Issue warrants for the arrest of violators.	3,597 warrants
Supervision Term and Condition Setting. Set terms and conditions of supervision for parole, conditional release, addiction recovery supervision, and conditional medical release such as mandatory drug treatment, anger management counseling, and/or restrictions on where the offender may reside.	6,366 offenders
Victim Assistance. Notify, and solicit input from, victims of inmates that are eligible for parole prior to sentence completion, in accordance with victim assistance requirements.	2,913 victims assisted
Clemency. Perform administrative and investigative activities for the Clemency Board.	43,332 investigations

In Fiscal Year 2005-06, the Legislature appropriated $9.34 million in general revenue and authorized 148 full-time equivalent positions to the commission. As illustrated in Exhibit 2, parole occupies an increasingly minor part of the staff's time, while clemency investigations and offender revocations now dominate staff time.

Exhibit 2
Almost Half of the Commission's Workload Is Related to Clemency



Source: Parole Commission data.

Findings

We reviewed the commission's parole determination, revocations, supervision term setting, victim services, and clemency responsibilities. We concluded that the commission has done a reasonably good job identifying inmates who are good risks for parole release. While there are some advantages to moving its revocations, supervision term setting, and victim services duties to other agencies, we concluded that no significant cost savings or quality improvement would result. The clemency application backlog has increased since our last report, and there are a number of options to address this backlog.

Parole determination

One of the basic functions of the commission is determining what inmates should be paroled from prison. Prior to 1983, when determinant sentencing led to the abolishment of parole, parole was the primary method of prison release. Currently, only those inmates whose offenses occurred before the change to sentencing guidelines and capital felony cases up until 1995—5,178 inmates as of September 2005—are eligible for parole.

The parole determination process comprises three primary phases.

1. At a public hearing, the commission sets a parole-eligible offender's presumptive parole release date, or the date at which he or she may first be considered for parole, following a review of the inmate's prior criminal history and community supervision record, severity of the offense, and the presence of aggravating or mitigating circumstances. The commission also considers victim input when setting a presumptive release date.
2. Subsequent reviews of the presumptive parole release date are held every two to five years in hearings open to the public. At these hearings, commissioners review the inmate's institutional adjustment, noting prison progress reports, program participation, disciplinary actions, psychological evaluations, educational and vocational training, and other factors. Commissioners then vote to reduce, extend, or order no change to the presumptive parole release date.
3. Finally, as the presumptive parole release date approaches, the commission conducts a final review of the inmate and the threat he/she poses. At this time, the commission solicits input from the sentencing judge, state attorney, law enforcement, the inmate's family and victims; conducts a complete review of the inmate's file; and interviews the inmate and scrutinizes his or her proposed release plan. The commissioners then vote at a public hearing whether to grant parole.

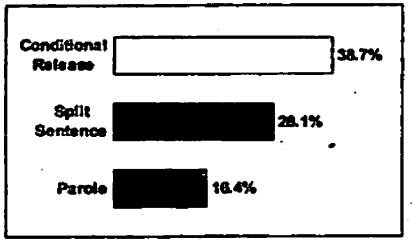
OPPAGA examined two questions related to parole determination.

- Is the commission successful in identifying good risks for parole release?
- Would shifting parole determination from the current centralized system to a regional system result in cost savings?

Paroled offenders have lower recidivism rate than comparable non-discretionary releasees

One measure of the commission's effectiveness is how well it is able to identify offenders who pose the least threat to public safety. By this metric, the commission has been successful. An analysis of recidivism data for inmates released from prison in Fiscal Year 1998-99 and Fiscal Year 1999-00 showed that paroled inmates fared far better than inmates with similar criminal histories but who were released mandatorily at the end of sentence. As shown in Exhibit 3, within 36 months of release, only 16% of paroled offenders had been charged with a new offense, while 39% of conditional releasees and 28% of offenders with split sentences had reoffended. [1]

Exhibit 3
Paroled Offenders Have Lower Recidivism Rates Than Other Released Inmates



Source: OPPAGA analysis of Department of Corrections data.

Because these groups differed on demographic variables, OPPAGA conducted a multivariate regression analysis that controlled for offenders' race, gender, age, and criminal history. This analysis indicated that demographic differences between the groups did not explain the gap in recidivism rates and that a parolee was half as likely to reoffend than a conditional releasee of the same race, age, gender, and criminal record. This analysis suggests that the more subjective factors considered by the commission—factors such as an inmate's mental health status, in-prison disciplinary record, employment prospects, and family support—may play an important role in determining recidivism, and that the commission is successful in determining which inmates are likely to reoffend.

[1] A split sentence is a sentencing option in which an offender receives a prison term followed by a mandatory term of community supervision.

Shifting from a centralized parole board to regional parole boards may distribute workload, but has a number of disadvantages

In 2005, the Florida Legislature considered a bill to create four regional, all-volunteer parole boards. The bill proposed that these boards, appointed by the Governor, be responsible for conducting parole determination hearings only; parole revocation authority was to be granted to the judicial system. The bill also proposed that the Office of the Attorney General provide all administrative support for the regional parole boards.

There would be a number of advantages and disadvantages of this option. If the regions were appropriately sized to ensure roughly equal workloads and commissioner duties were restricted to parole determinations, each volunteer commissioner would have only one-quarter the parole workload of current commissioners, which would be reasonable for a volunteer board. In addition, parole determination functions would not likely require a reengineering if moved from the central office to a regional model. Currently, most of the work associated with determining and reviewing the inmate's presumptive parole release date is performed at the regional level by parole examiners.

Eliminating the current three paid commissioners' salaries would save the state $340,947 in salaries and benefits; of this amount, $213,092 represents the portion of the commissioners' time spent on activities that would be performed by volunteer commissioners under this proposal.

However, these costs savings might be offset by higher administrative costs. It is likely that no administrative support positions could be cut by moving these functions to the regions, and some additional positions might need to be created. Currently, each commissioner has two staff assisting with his or her caseload. If each volunteer commissioner were assigned one administrative support position, 12 total positions would be required, assuming four regional boards with three commissioners each. This would result in a net increase of six administrative support positions statewide. Salaries and benefits of these six positions, estimated at $206,382, would mostly offset the $213,092 saved as a result of cutting the three paid commissioner positions.

In addition, switching from a centralized to a regional system could result in inconsistent parole determination and lead to divergent outcomes throughout the state. Local boards might be less likely to authorize release, due to community pressure to deny parole, which could lead to higher state incarceration costs. While fewer releases could result in less crime, it appears that the commission's screening process has been relatively successful at screening out offenders who are most likely to reoffend, as previously discussed.

Texas is the only state that has adopted a semi-regionalized system. In that state, seven governor-appointed board members and 11 commissioners appointed by the board, divided into three-member panels operating out of six regional offices, make release and revocation decisions. However, the Texas system of regional parole panels is unlike the Florida proposals in four ways. First, Texas parole panels may make parole determination decisions without holding a hearing; due to the panels' workloads—hundreds of cases per week per panel—most decisions are made simply by reviewing the inmate's file. Second, unlike the proposed Florida regional boards, all panel members are paid; each of the 11 commissioners are paid approximately $75,000 a year, and each of the seven board members

are paid approximately $86,000 a year. Third, all administrative support is housed within the parole board, rather than at another agency, as envisioned in the Florida proposal. Finally, Texas uses parole risk assessment instruments and parole guidelines which officials believe helps to ensure accountability and uniformity in decision making. The 2005 proposal to create regional Florida parole boards did not have such a provision.

Revocations and post-prison supervision term and condition setting

The Parole Commission sets the terms and conditions of parole, conditional medical release, conditional release, and addiction recovery release. These terms and conditions are set at the time of release, and typically include refraining from contact with criminal associates, submitting to urinalysis, and paying the cost of supervision and rehabilitation. Additional conditions are automatically imposed on sex offenders. Commissioners have the discretion to impose any additional conditions they deem appropriate, however, including mandatory therapy programs, prohibitions against traveling to particular counties or states, or driving or employment restrictions.

The commission also makes final determinations regarding alleged violations of parole, conditional release, addiction recovery release, control release, and conditional medical release. Upon a finding of fact that an offender has indeed violated the terms and conditions of his or her release, the commissioners may vote to revoke supervision and return the offender to prison, continue supervision, terminate supervision, or amend the terms of supervision. The vote occurs at a publicly noticed administrative hearing in which the offender does not have an automatic right to counsel.

OPPAGA examined the fiscal and legal implications of transferring these functions from the commission to the judicial system, as proposed in legislation introduced in 2005.

Transferring revocation and term and condition setting authority to the courts would significantly increase costs

Transferring revocations and term and condition setting from the commission to the judicial system would increase the costs of these activities by an estimated $2.42 million to $3.53 million annually. The lower estimate represents the costs to the court system if the process remains an administrative hearing and reflects the net cost increase associated with the increase in judges' workloads, as well as the court reporting costs associated with a judicial proceeding. According to the Office of State Courts Administrator, at a minimum, the Florida courts would require an additional 64 FTEs (9 judges and 55 support staff) and an additional $4.77 million in annual appropriations in order to absorb the additional caseload.[2] Since the commission currently allocates 49.3 FTEs to revocations and term and condition setting at an annual cost of $2.35 million, this estimate represents a net increased annual cost of $2.42 million. If this authority were transferred to the judicial system and appropriations were not increased, the Office of State Courts Administrator believes that delays in the adjudication of cases in the civil and family divisions would increase.

The upper estimate includes the costs associated with shifting from a non-adversarial proceeding—as is currently the practice at the commission—to an adversarial proceeding, with the state represented by an assistant state attorney and the defendant represented by counsel. Currently, probation revocation proceedings—the only revocations now handled by the court system—are adversarial

[2] This projection does not include an estimated $721,178 in nonrecurring transition costs or the additional costs that would arise from appeals of these revocation decisions.

proceedings, and it appears likely that transferring additional revocation authority to the courts could lead to the introduction of appointed counsel for indigent defendants and the need for counsel to represent the state's interests.[3] The Office of State Courts Administrator and the Florida Prosecuting Attorneys Association concur with this conclusion. The Florida Public Defender Association opined that counsel will be required in only those cases in which the offender is alleged to have committed a new crime; the association believes that hearings regarding technical violations are not sufficiently akin to a sentencing to trigger the requirement of counsel.

According to estimates provided by the Florida Public Defender Association and the Florida Prosecuting Attorneys Association, the yearly cost of providing counsel for these cases would be approximately $1.11 million. Combined with the aforementioned court workload costs, the total estimated costs associated with converting parole revocations from an administrative proceeding to an adversarial proceeding in the judicial system would be $3.53 million.

[3] Two Florida Supreme Court cases support this conclusion. In 1985, the Florida Supreme Court extended the right to counsel to all alleged probation violations, reasoning that a uniform rule in all probation revocation hearings was more easily understood and easier to administer than a rule requiring attorneys in some cases but not others (State of Florida v. Hicks, 487 So.2d 22, 1985). A 1987 Florida Supreme Court ruling delineated three major differences between probation and parole that supported the requirement of counsel for the defendant in all probation revocation hearings but not in all parole revocation hearings (Floyd v. Parole and Probation Commission, 509 So.2d 919, 1987). Two of these three points of difference—that probation revocation hearings are conducted in the judicial system, while parole revocation hearings are administrative in nature, and that probation revocation hearings are conducted by lawyers (judges), while parole revocation hearings are not—would be eliminated by a switch to judicial revocation hearings for parole and other types of release currently adjudicated by the commission. The third point of differentiation, that parole revocation does not lead to a sentencing hearing, could still hold; s. 947.141(4), *F.S.*, authorizes the commission to revoke supervision and return the releasee to prison, "reinstate the original order granting the release, or enter such other order as it considers proper." It is unclear whether the procedure outlined in this statute, which was enacted after the 1987 decision, would be construed as sufficiently similar to a sentencing hearing.

Victims' services

The Parole Commission's Victims' Services Office provides a variety of services to victims of offenders being considered for parole, clemency, or conditional medical release, including:

- notification of upcoming hearings via mail;
- one-on-one counseling about the process and the victims' legal rights;
- provision of documentation available to the commissioners regarding their offender's case, including the offender's proposed release plan, upon request;
- assistance with providing input to the commission;
- assistance at the hearing, including maintaining a separate waiting area for victims, accompanying victims to the hearing and providing emotional support, and reading statements from victims upon request; and
- notification of the commission's decision if victims are not in attendance.

In addition, the office gathers information about the nature of the crime to assist the commission in determining whether aggravating factors (e.g., torture, excessive brutality) were present; in setting the presumptive parole release date, the commission may use this information to increase the date at which the inmate is first eligible for parole.

The office has four full-time staff and a budget of $204,812. Roughly one-quarter of the office's budget—$48,422—is not funded by the state, but is supported by federal Victims of Crime Act grants.

OPPAGA examined the effect on the cost and quality of services of transferring Victims' Services from the Parole Commission to either the Department of Corrections or the Office of the Attorney General.

Transferring Victims' Services to another entity is unlikely to result in significant cost savings and may result in lower quality services

If the Parole Commission were abolished, the Department of Corrections' Victim Assistance Office would be best poised to perform these functions. This office, currently staffed with seven FTEs, performs the same type of victim notification and counseling services for victims of offenders nearing their mandatory release date; victims of offenders eligible for discretionary release (parole) are, as noted above, assisted by the commission.

However, the department does not perform other functions currently provided by the commission staff, such as accompanying victims to hearings, assisting with victim impact statements, or gathering information about the nature of the crime, since the end-of-sentence releases administered by the department are non-discretionary in nature and therefore there is no release decision for which victim input must be obtained. Also, because the department does not have experience providing these services and its personnel do not deal with the intricacies of the parole process—such as the scoring system used to calculate the inmate's presumptive parole release date—the department's current staff would be less proficient in assisting victims of parole-eligible inmates. According to the director of the department's Victim Assistance Office, in the event the department were to assume the commission's Victims' Services duties, he would request that all of the commission's staff be transferred in order to manage the increased workload and provide expertise on parole-specific issues. There would therefore be no cost savings in terms of personnel.

Another option would be to transfer these functions to the Office of the Attorney General, which also has a Victims' Services Office. The current focus off this office is administering federal Victims' of Crime Act grants and the state's Crime Victims' Compensation Program. Unlike Corrections and the Parole Commission, the Attorney General provides few direct victim assistance services. It has one staff member dedicated to direct services who works with victims of capital cases and their families if and when an inmate on death row appeals his or her sentence to the district court or the Florida Supreme Court. The local state attorney's office provides these services during the initial trial.

Clemency

Originally designed to address miscarriages of justice, clemency has evolved to take on several forms. These include full pardons, which unconditionally release an individual from punishment and forgive guilt for any Florida convictions; commutations of sentence, which adjust an offender's sentence to one less severe (including changing a death row inmate's sentence to life in prison); restoration of firearms authority for ex-felons; and restoration of civil rights--the right to vote, hold public office, serve on a jury, and obtain state-issued occupational licenses—for ex-felons.

The Florida Clemency Board, composed of the Florida Cabinet, makes all final decisions regarding the granting of clemency.[4] It is assisted by the Parole Commission's Office of Executive Clemency and Office of Clemency Administration. These offices assist the board with the two main processes for clemency—clemency with a formal hearing and restoration of civil rights without a hearing.

Clemency with a formal hearing. All ex-felons seeking a pardon or commutation of sentence, and some ex-felons seeking restoration of civil rights, must use the formal hearing process. In these cases, the applicant completes a short application which prompts the initiation of a full investigation as mandated by the Board of Executive Clemency. The application information is verified by field investigators at the Office of Clemency Administration. The commission staff then forwards its recommendation and investigative report to the Clemency Board, which makes its decision following a formal hearing.

[4] The Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture and Consumer Services compose the Florida Cabinet.

Restoration of civil rights without a hearing. In accordance with changes to the Rules of Executive Clemency adopted in December 2004, most nonviolent offenders are eligible for restoration of civil rights without a hearing, provided that they have remained arrest-free for at least five years and do not owe victim restitution. All offenders are eligible for restoration of civil rights without a hearing if they have remained arrest-free for 15 years and do not owe victim restitution, although in rare cases board members may object and initiate a formal hearing process.

While formal applications to request the restoration of civil rights is the most labor intensive, 90% of applications are "automatic"; that is, sent directly from the Department of Corrections to the commission electronically when offenders complete their prison or supervision terms. This electronic process was established in response to a 2004 ruling of the First District Court of Appeal which found that the Department of Corrections failed to assist offenders with the paperwork to regain their voting rights.[5]

OPPAGA examined three questions related to the commission's clemency activities.

- How efficiently is the commission processing clemency cases?
- What policy options would improve the processing of clemency cases and eliminate the backlog?
- Would transferring clemency functions to the Executive Office of the Governor result in cost savings?

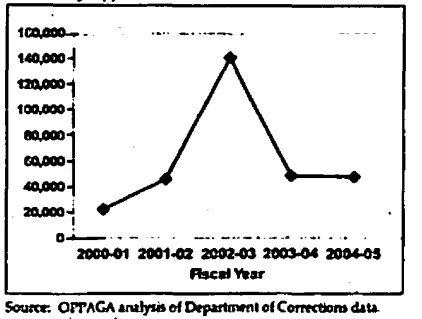
A large increase in applications without a corresponding increase in personnel has led to a backlog of cases and lengthy application processing times

At the time of OPPAGA's 2001 Justification Review, restoration of civil rights cases without a hearing took an average of 6.1 months, and full investigations took an average of 16 months. The backlog—defined as the number of clemency applications that had been received by the Office of Executive Clemency but not yet investigated by the Office of Clemency Administration—stood at 7,199 cases.[6]

However, the backlog and the average length of time required to process a case have increased significantly. According to a commission analysis, the backlog rose to 13,329 cases as of February 2006 and clemency applications requiring a full investigation took an average of 22 months to be processed.

There are two main reasons for this increase in the backlog. First, the number of applications for clemency increased dramatically. As shown in Exhibit 4, clemency applications increased from 22,534 in Fiscal Year 2000-01 to over 40,000 a year thereafter.

Exhibit 4
Clemency Applications Increased



Source: OPPAGA analysis of Department of Corrections data.

The Fiscal Year 2002-03 peak was due to the substantial increase in restoration of civil rights applications following the aforementioned judicial decision requiring the Department of Corrections to automatically forward the names of eligible ex-offenders for restoration of civil rights consideration. The commission also attributes some of this increase to the

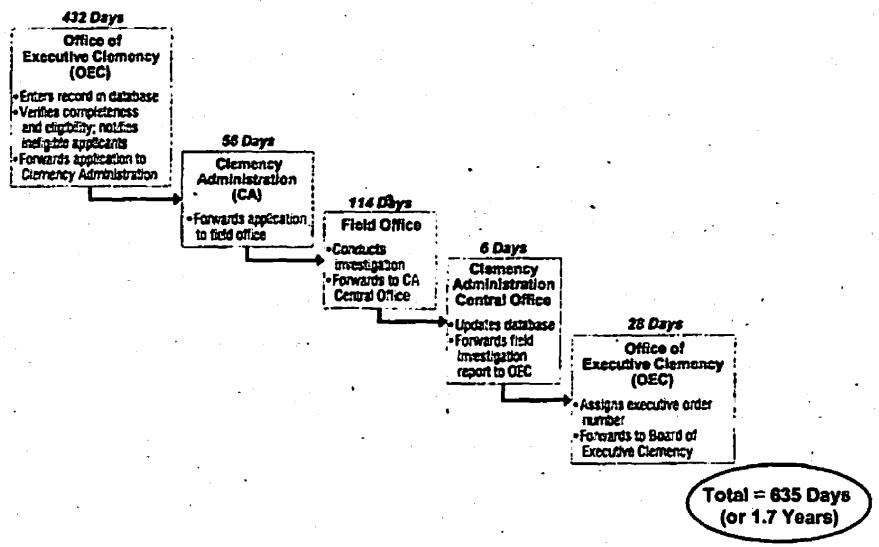
[5] Florida Caucus of Black State Legislators, Inc. v. Crosby, 877 So.2d 861 (Fla. 1st DCA 2004).

[6] *Justification Review: Budget Reductions, Process Improvements Possible in Parole Commission Operations*, Report No. 01-55, November 2001. Note: The backlog figure cited in this report (6,437 cases) has been updated to reflect a revised backlog definition.

simplification of the process over the past five years as well as high-profile clemency campaigns conducted by the American Civil Liberties Union and other groups focused on felon enfranchisement; many of these groups held workshops around the state to assist ex-offenders with completing clemency applications.

Second, due to staffing levels, many cases wait over a year to be processed. Clemency cases spent, on average, over a year (432 days) in the Office of Executive Clemency in the initial stages of application processing, before being referred to the Office of Clemency Administration for assignment to a field investigator. As shown in Exhibit 4, each case then spent an average of 56 additional days in the Office of Clemency Administration before being assigned to a field office. Efforts to reduce pre-investigation backlogs, however, would likely increase backlogs in the field offices, where examiners conduct full investigations. Cases that do not require field office investigations take far less time to process. For example, electronic restoration of civil rights applications that come directly from the department and bypass the full investigation process take roughly six months to complete.

Exhibit 4
Clemency Cases Take Over 600 Days to Be Processed by the Parole Commission



Note: Data reflects Fiscal Year 2002-03 applications.
Source: Florida Parole Commission.

Streamlining clemency investigations would reduce the backlog and clemency costs

We assessed two options for reducing the clemency backlog: increasing clemency staffing and streamlining the clemency investigation process. While additional staff or outsourcing would reduce the backlog, changes in clemency investigation requirements could allow the commission to redirect staffing to address the backlog.

Increase staffing. For Fiscal Year 2006-07, the Parole Commission is requesting an additional 20 full-time staff and 20 part-time OPS staff, at a cost of $1.45 million, to eliminate the clemency backlog. As an alternative, the state could add temporary OPS staff and/or outsource the workload. Hiring temporary OPS staff would be less costly than full-time staff. If OPS staff were hired instead of full-time staff, the cost savings associated with eliminating benefits of the full-time staff would be $168,331.

Outsourcing was addressed in our 2001 Justification Review, which concluded that private sector cost estimates for investigation work were comparable to the commission's costs.[7] The advantages of outsourcing include not adding additional state staff and the opportunity for the state to test the quality and timeliness of privatizing this function. The disadvantages of outsourcing include the private sector's lack of access to criminal records and data systems and lack of familiarity with the clemency rules and process.

Streamline clemency investigation. Another option for reducing the backlog is to streamline the clemency investigation requirements by modifying the time consuming investigation requirements of the Clemency Board. This could be done in two ways.

[7] *Justification Review: Budget Reductions, Process Improvements Possible in Parole Commission Operations*, Report No. 01-55, November 2001.

- **Change restoration of civil rights policy to automatically restore civil rights of offenders upon release from prison or supervision.** The Clemency Board could adopt a policy to automatically approve all applications for restoration of ex-felons' civil rights upon release from prison. This would free up clemency resources to perform other clemency activities and reduce the backlog. In Fiscal Year 2004-05, the commission had 51 FTE dedicated to clemency activities. If the Clemency Board permitted ex-felons to automatically receive their civil rights back upon completion of sentence, the restoration of civil rights workload would be eliminated, allowing the state to save approximately 24 FTE and $1.08 million. Such a policy change would not be inconsistent with national trends—in most states, ex-felons automatically receive their voting rights back upon completion of their prison or supervision sentences.[8] Opponents of this option point out that clemency is not a right and that the Clemency Board should retain the authority to exercise discretion in clemency cases.
- **Reduce the investigative work for the Restoration of civil rights cases.** Reducing the clemency investigation work performed by parole examiners would free up resources to reduce the clemency backlog. In Fiscal Year 2004-05, the commission completed 2,944 full restoration of civil rights investigations; on average, these investigations required 15.28 hours of staff time to verify the applicant's military history, mental condition, employment, and other items that appear only tangentially related to one's suitability to regain civil rights. Reducing requirements for these cases could save resources. For example, if the Board of Executive Clemency were to limit the investigation to

[8] Two states other than Florida (Kentucky and Virginia) require ex-felons to petition to have their voting rights restored. Nine others require certain categories of offenders to petition or require a waiting period to receive their rights back.

fewer elements--such as a criminal history check and verification of restitution and court fee payments, detainers, and child support—the state could cut approximately 19 FTE parole examiner positions for a savings of $914,490. Alternatively, these positions could be used to reduce the backlog.

Transferring clemency functions to the Executive Office of the Governor would likely increase program costs

Transferring the 51 clemency staff directly involved in clemency activities from the commission to the Governor's Office would lead to additional annual costs of approximately $794,000. This includes an increase in personnel costs of $417,000 and an increase in overhead costs of up to $377,000.

Personnel costs would likely increase because most positions at the Governor's Office have higher salaries than comparable positions at the commission. Also, Governor's Office positions are select exempt service, with all health insurance premiums fully paid by the state, while most commission positions are career service positions, with employees paying a portion of the premiums. According to Governor's Office officials, transferring Tallahassee-based commission employees to offices at the Capitol would increase the overhead costs of the Governor's Office by $377,000. It is unclear to what extent these increased facility costs could be offset by savings resulting from renting or reallocating the commission's current workspaces.

Agency Response

In accordance with the provisions of s. 11.51(6), *Florida Statutes*, a draft of our report was submitted to the chairman of the Florida Parole Commission for review and response.

The chairman's written response is reproduced in its entirety in Appendix A.

OPPAGA supports the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources. This project was conducted in accordance with applicable evaluation standards. Copies of this report in print or alternate accessible format may be obtained by telephone (850/488-0021 or 800/531-2477), by FAX (850/487-3804), in person, or by mail (OPPAGA Report Production, Claude Pepper Building, Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475). Cover photo by Mark Foley.

Florida Monitor: www.oppaga.state.fl.us

Project supervised by Marti Harkness (850/487-9233)
Project conducted by Maureen Kilovers
Gary R. VanLandingham, OPPAGA Director

Appendix A

FLORIDA PAROLE COMMISSION
2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450

MONICA DAVID
Commissioner/Chairman
FREDERICK B. DUNPHY
Commissioner/Vice-Chairman
TENA M. PATE
Commissioner/Secretary

February 8, 2006

Gary R. VanLandingham, Director
Office of Program Policy Analysis and Government Accountability
The Florida Legislature
111 West Madison Street
Room 312, Claude Pepper Bldg.
Tallahassee, FL 32399-1475

Dear Mr. VanLandingham:

The Florida Parole Commission has reviewed your report that analyzed the Commission's major functions. We fully concur with your findings that the Commission has been successful in carrying out its mission and continues to operate both efficiently and effectively. It has been well documented in your report that the Commission is performing its various functions at less cost to the state as compared to the proposed alternatives.

We also concur with your finding that the backlog of clemency cases has occurred for several reasons which are beyond the Commission's control. The Governor's 2006-07 budget recommendations address the long standing staffing deficiencies that have existed in clemency. As to the other options mentioned in your report to address the clemency workload, I would reiterate that any changes to the clemency process are under the sole purview of the Board of Executive Clemency (Governor and Cabinet).

I want to express our sincere appreciation for the professionalism of your staff and the significant amount of time they took to understand the Commission's issues, processes and the critical role it plays in Florida's criminal justice system. As the report reflects, they were very thorough in their review and analysis.

If you have any questions or need further information, please call me at 487-1978.

Sincerely,

Monica David

Monica David
Chairman

A Critique of OPPAGA Report No. 06-15

by Sandra Arnold

During the 2005 legislative session a bill (H.B. 1899) was introduced in the Florida House that would have abolished the Florida Parole Commission (FPC) as it currently exists and replaced it with four regional volunteer parole boards, of no less than three nor more than seven volunteer commissioners for each region, who would only make parole release decisions. Other duties of the Commission would have also been dispersed out. Revocations would have been handled by the courts and clemency investigations turned over to the governor's office. That bill failed to pass. However, a deal was struck between the House and Senate to reconsider abolishing the FPC in 2006 and a provision was included in the 2005 General Appropriations Act directing the Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) to review FPC operations and report its findings before the 2006 session started. That report 06-15, was submitted and used to defeat House Bill 5017 that was introduced this year and that again proposed abolishing the FPC. That report, however appears to have been especially tailored to defeat any attempt to abolish the FPC.

OPPAGA Report No. 06-15 (reprinted in this issue of *FPLP*) found that the FPC is doing a good job in deciding who to parole or not parole based on an analysis of low recidivism rates for parolees as compared to the recidivism rates of other types of post-prison supervision releases who were mandatorily required to be released from prison because of their sentence structure. The Report also found that abolishing the FPC in favor of regional volunteer parole boards and transferring revocation authority to the courts would likely increase state costs. And while the Report opines that the FPC is having problems keeping up with and reducing an increasing backlog of clemency investigations, part of the felon restoration of civil (voting) rights process, OPPAGA finds that transferring the clemency investigation process to the governor's office would also cost the state more. Instead OPPAGA suggested increasing the FPC's budget so more staff could be hired to work on the backlog or streamlining the investigation process to reduce the FPC's workload.

On the surface OPPAGA's Report appears to be logical and correct. It seems to have been thoroughly researched; used accurate, applicable data; and applied proper analytical methods to that data to reach viable conclusions. However, neither the research, the data, analysis, nor conclusions, in many instances, can withstand critical scrutiny.

In early April, 2006, midway through the 2006 regular session, after H.B. 5017 had been introduced and FPC Chairwoman Monica David was reported to be using OPPAGA Report No. 06-15 to urge legislators not to abolish the FPC, Florida Prisoners' Legal Aid Organization (FPLAO) contacted every state lawmaker warning them that several parts of the Report were questionable. That effort was to no avail, H.B. 5017 failed to pass, a failure credited in large part to OPPAGA's Report.

While space limitations here do not allow a complete point-by-point critique of every aspect of the Report, some of the more questionable areas are illuminated below,

• In Exhibit 1 of the Report (pg. 2) is reported that in Fiscal Year 2004-05 the FPC conducted 341 parole hearings and paroled 43 prisoners. Conversely, the Florida Department of Corrections, which supervises all persons paroled by the FPC, reported that during that same period only 22 prisoners were placed under parole supervision. (FDOC 2004-05 Annual Report, pg. 45.)

• In Exhibit 2 of the Report (pg. 2), a pie chart (allegedly) created using FPC Fiscal Year 2004-05 data to show the percent of FPC total workload hours by activity, it is reported that the FPC spends 49% of its time on clemency activities, 29% on revocation activities, 16% on parole activities, and 6% on conditional release activities. Curiously, in Dec. 2005, only two months before OPPAGA released its Report in Feb. 2006, the FPC itself released its Fiscal Year 2004-05 Annual Report, which also contained a workload hours by activity pie chart that shows significantly different percentages than those reported by OPPAGA. (See Figure 1. herein, being an exact reproduction of page 17 of the FPC 2004-05 Annual Report.)

• The Report continues (pgs. 3-4) to find that the (implied current) Parole Commission is doing a good job determining which prisoners to parole based on a comparison of Department of Correction's recidivism data from Fiscal Years 1998-99 and 1999-00 for parolees, conditional releases and split sentence releases. OPPAGA claims that an analysis of that data shows that parolees "with similar criminal histories" to those other two types of releases, within 36 mos. of release, had a much lower recidivism rate, indicating that "the commission is successful in determining which inmates are likely to reoffend." The obvious problems with OPPAGA's analysis and conclusion in this section is that none of the current three parole commissioners were commissioners when the parole release decisions were made "within 36 months" before Fiscal Years 1998-99 and 1999-00; and it was impossible for such parolees to have had "similar criminal histories" to the other two categories considered, since all parolees would have served much longer unrelieved time in prison than any conditional releasee or split sentence releasee by simply having a parole eligible sentence. (See, Report, pg. 2, "Parole determination" paragraph.)

• In the Report's discussion of shifting from the current "centralized" FPC to regional parole boards (pg. 4) it is stated that the three current commissioners receive $340,947 in salaries and benefits, of which $213,092 (almost two-thirds) represents the portion of the commissioner's time spent on activities that would be performed by (nonpaid) volunteer commissioners (solely making parole release determinations) under this proposal (H.B. 1899). Such claim that almost two-thirds of the current commissioners' pay represents the amount of time they spend on parole release activities conflicts with: OPPAGA's claim that "parole occupies an increasingly minor part of the staff's time"; the pie chart showing parole workload hours at 16% (10% in the FPC's chart), and Exhibit 1 showing only 341 parole hearings versus 2,887

revocation hearings for FY 2004-05, both of which take up an equal amount of commissioners' time. (Report pg. 2).

Further, OPPAGA (twisting logic) opines that if there were three volunteer commissioners for each of the four regions, total 12, that each one would need a staff support person, requiring funding for six additional people, where each current commissioner already has two staff support people assigned to them, even though, as OPPAGA claims, "each volunteer commissioner would have only one-quarter the parole workload of current commissioners". (Report, pg. 2).

And OPPAGA speculates that regional boards might be less likely to authorize parole releases than the current "centralized" Commission, due to (local) community pressure to deny parole, which could lead to higher incarceration costs. (Report, pg. 4.) Such speculation is not based on any facts to support it, and exhibits poor research by OPPAGA. The current FPC is only "centralized" in that it holds the majority of parole determination hearings in Tallahassee, where its headquarters are located, in direct violation of legislative intent and the law found at Florida Statute § 947.06, seventh sentence. That law mandates that the current FPC hold parole hearings statewide, something the current FPC has not done for several years. And if OPPAGA had been truly interested in presenting a balanced report, it could have reviewed FPC records from when the Commission did hold parole hearings in the various regions, where it is shown that more paroles were granted than they are under the (illegal) "centralized" system. This appears to increase incarceration costs by less paroles being granted.

• OPPAGA's Report asserts that transferring the FPC's revocation authority to the court system would increase state costs by $2.42 million to $3.53 million annually. This because, OPPAGA claims, additional judges and support staff would have to be hired to handle the increased workload to the courts. (Report, pg. 5). OPPAGA "overlooked" that currently FPC parole examiners spend more than half their time on revocation activities (including conducting hearings) that the courts would handle under the transfer proposal. Meaning one-half of parole examiner positions could be eliminated or transferred to fill the anticipated court support staff positions, largely offsetting the increased costs cited by OPPAGA.

• The Report also claims that transferring the FPC victim services to another agency would not save the state money, because services would have to be provided regardless. OPPAGA lists the victim services provided by the FPC. (Report, pgs. 6-7.) The problem here is that if OPPAGA had researched what victim services the FPC is authorized to provide, compared to what is being provided, it would have discovered that the FPC is providing more than it has authority to do. See, Florida Statute Chapter 960.

• And finally, the Report discusses transferring the FPC clemency investigation duties to the governor's office under the Florida Clemency Board, but claims that would cost more also as the transferred staff would have to be paid higher salaries and receive more benefits as employees of the governor's office. (Report, pgs. 7-11.) The best solution to the clemency backlog would be to automatically restore civil rights of felons once they complete their sentence, as OPPAGA suggests as one option. (Report, pg. 10) OPPAGA proposed several other options to address the clemency backlog problem, most of which, however, would simply perpetuate the existing FPC.

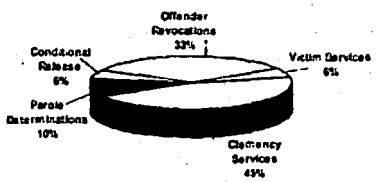
This critique does not address all of the perceived problems with the OPPAGA Report as they are too numerous. Instead, it is intended to provide an opposing perspective to the Report, which appears to have been influenced by forces opposed to abolishing the FPC.

Figure 1

COMMISSION'S YEAR IN REVIEW
FY 2004-2005
Performance Measures/Activity Accomplishments

Percentage of cases placed before the Commission Clemency Board containing no factual errors:	98%
Number of parolees who have successfully completed their supervision without revocation within the first two years:	63
Percentage of parolees who have successfully completed their supervision without revocation within the first two years:	83%
Percentage of revocation hearings completed within 90 days of final hearing:	99.93%
Number of conditional release cases handled:	5,330
Number of revocation determinations:	2,887
Number of clemency cases handled:	43,332
Number of parole release decisions:	1,374
Number of victim assists:	2,913

FY 2004-2005 Workload Hours by Activity



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Incentive Gain-time Is Not Properly Considered a Form of Discretionary Early Release

In an opinion filed May 11, 2006, by the First District Court of Appeals, it was held that incentive gain-time is not properly considered as a form of "discretionary early release" so as to allow the FL Department of Corrections to refuse to award incentive gain-time during any mandatory-minimum portion of a sentence imposed pursuant to § 893.135, Fla. Stat.

That finding, which has resulted in the FDOC having to award incentive gain-time to a significant number of prisoners from whom the Department had withheld such awards, came about in a case filed by prisoner Bruce Mastay.

Mastay had filed a petition for writ of mandamus in the circuit court challenging the FDOC's determination that he was not entitled to earn incentive gain-time while serving a mandatory-minimum term for trafficking in cocaine pursuant to § 893.135, Fla. Stat. The FDOC argued that § 893.135(3), which provides that any person sentenced under that section to a mandatory-minimum term is not eligible for any form of discretionary release, allowed it to not award incentive gain-time during such a term. The circuit court agreed and denied Mastay's petition. Mastay then filed for certiorari review by the appeal court, asserting that the lower court's denial was error because it was a departure from the essential requirements of law. The appeal court agreed with Mastay.

The appeal court noted that the legislature has not defined "discretionary early release," but that a review of § 893.135(3) and other mandatory-minimum statutes supports a conclusion that incentive gain-time is not a form of "discretionary early release."

The court pointed out that in 1999 when § 893.135(3) was amended to exclude persons serving mandatory-minimum terms under that statute from being eligible for discretionary early release, at one point the proposed legislation also included prohibiting eligibility to earn "any form of gain time." But that provision was removed before the bill became law. Thus, indicating the Legislature's intent not to prohibit earning incentive gain-time under that statute.

Further, the court pointed out that in other mandatory-minimum statutes, whenever the Legislature has intended that gain-time is not to be earned when sentenced under the statute it has used explicit language to that effect. Which, the Legislature did not include in § 893.135(3).

Finally the court noted that while awarding incentive gain-time is discretionary, it will not necessarily result in early release before the mandatory-minimum portion of a sentence has been served, especially when the sentence is longer than the mandatory-minimum portion or when incentive gain-time is lost through disciplinary action.

Therefore, the appeal court granted Mastay's certiorari petition, quash the lower court's order, and remanded for further action consistent with its opinion.

Mastay v. McDonough __ So.2d__, 31 Fla. L. Weekly D1350 (Fla. 1st DCA 5/11/06).

[Note: The FDOC almost immediately began calling prisoners up who had been sentenced under § 893.135 informing them that past incentive gain-time will be awarded to them once the above opinion was issued-editor] ■

From the editor...

It was another rough year for Florida's parole-eligible prisoners. Once again legislation was introduced to abolish the cabal of victim advocates and former police who now make up the parole commission, and who are paroling fewer and fewer each year, in favor of a different system that might actually have worked, or at least could be no worse. But, once again, just like last year, the Commission survived with parole-eligible prisoners the losers.

We, and I use that term because I am a parole-eligible prisoner, got our hopes up that finally there might be some relief for us. We are Florida's longest serving prisoners, except for maybe a few on death row. We are made up of those who were sentenced before 1983, to often outrageous sentences, before parole sentencing was abolished that year as unfair in favor of guideline sentencing. We are also made up of those sentenced for capital felonies up to 1995 and who received life with eligibility for parole only after 25 years. In Sept. '05 there were only 5,178 of us left in prison.

Over the years we have watched thousands of other prisoners come and go. Some more than once, many for the same crimes we were convicted of. With the difference being their sentences were fixed, while we suffer under the arbitrary thumbs of the despots at the parole commission, whose jobs would cease to exist if we were all paroled. As long as they exist, there's little chance of that happening. Five year setoffs between hearings; getting right to the door and having it slammed shut with a suspended date; paroling a few each year only to revoke the parolees of three, four, five times that number for minor technical violations and returning them to prison for 10, 15, 20 years a wop, is now the norm. Whatever it takes to keep the "parole" in Parole Commission.

The commission itself reports that only 10% of its time is actually spent on parole activities, yet it keeps chugging along, convincing the Legislature to give it a new job every few years so it's harder to get rid of. While some legislators finally seem to have it figured out that the

commission is a waste of taxpayers money, others defend it tooth and nail, to the extent of having a legislative audit office report the commission is doing a fine job (See, OPPAGA Report in this issue). This, while two of the three current commissioners still have cream on their whiskers from when the former commission chairman Jimmie Henry was raiding the agency's coffers just three years ago. I sometimes imagine the three up on their bench like three monkeys—seeing, hearing, nor speaking any good of those whose lives they govern on whims.

Be that as it may, I personally, and many others that I know, believe it's time something has to change. In this issue of FPLP, you'll see that I and others are working to change the Commission. Other information is provided in this issue so everyone can understand the recent legislation to abolish the Parole Commission and to help you form your opinion of why it failed. It is our intent at FPLP to provide expanded coverage of the parole situation in future issues. If you have any information about the Commission or parole that you think might be useful, let us know about it. If possible, please send it directly to me at: Bob Posey, 046087, Sumter CI 9544 CR 476 B, Bushnell, FL 33513. I can't receive mail from other prisoners, however.

I'd like to tell all FPLAO members and readers of FPLP that we depend on your support to publish FPLP and fund the projects that we take on. Recently, we've had to cover a lot of court filing and service fees on the Parole Project and more cases are planned. There will no doubt be appeals that have to be taken, with each requiring a $300 filing fee. Membership dues won't cover all that and publishing FPLP, so donations are needed. In the last issue we asked all parole-eligible prisoners to donate just $5 to give us a war chest to work with. The reality is many have been in prison so long that have nothing, we know that. But we ask everyone to donate what they can, no matter how small or large, it all adds up and contributes to the cause. Thank you.

Spread the word, encourage others to become an FPLAO member. Together we have caused positive change in the past, and together we'll do so in the future. Wishing everybody well, Bob Posey. ■

- NOTICE -

The mailing address for FPLAO, Inc., and *Florida Prison Legal Perspectives* (*FPLP*) has changed. The new address is as follows. Please send all mail for either FPLAO, Inc., or FPLP to this new address:

P.O. Box 1511
Christmas FL 32709-1511

MEMBERSHIP RENEWAL

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

More Prisons Coming

The 2006-2007 state budget that was approved by the Legislature and signed by Gov. Jeb Bush in May, 2006, approves $2.5 million for new prisons. Reports are that a new prison will be built in Suwanee County, which purchased private land and gave it to the state in hopes of gaining a major prison holding up to 1,500 prisoners. The county expects such a prison would create 400 to 500 jobs for county residents.

[Source: NPR, 5/30/06]

NEWS IN BRIEF

CA - The head of California's Department of Corrections and Rehabilitation, Roderick Q. Hickman, resigned in Feb. '06. Hickman had been under fire by state legislators, union officials, and prison watchdog groups, who all have different agendas concerning the prison system. The last straw appeared to be criticism of Hickman's commitment to break the "code of silence" that prevents prison guards from reporting misconduct of fellow guards. Undersecretary Jeanne Woodford is acting as interim secretary until the position is filled by the governor.

CA - During May '06, over 1,100 prisoners at eight state prisons in Northern and Central CA became sick from a bacterial disease called campylobacteriosis that required the hospitalization of some of the prisoners. Symptoms included fever, headache, stomach cramps, diarrhea, and vomiting. Ten prison employees also contracted the disease.

CT - State officials announced in May '06 that they are investigating allegations that at least eight guards at the state's women prison had inappropriate sexual contact with prisoners. The CT DOC is reviewing the claims and forwarded them to the state police for possible criminal charges against guards working at the Janet S. York Correctional Institution.

FL - On Feb. 25, 2006, Florida prisoner Dwight "Tommy" Eaglin, 30, was convicted by a jury of capital murder for killing Charlotte Correctional Institution prison guard Darla Lathrem, 38, and prisoner Charles Fuston, 36, with a sledgehammer while trying to escape from the prison in 2003. Eaglin was sentenced to death for the murders by Judge William Blackwell on Mar. 30. Prisoners Stephen Smith, 44, and Michael Jones, 49, Eaglin's co-defendants, are scheduled for trial for their part in the murders later this year.

FL - Under legislation passed in May '06, Florida's four county-operated juvenile boot camps will no longer use physical or psychological intimidation on prisoners. Instead, the programs will be renamed Sheriff's Training and Respect programs and will focus on treatment and education, not scare tactics. The legislation was prompted by the controversy created when 14-year-old Martin Lee Anderson died after guards beat and punched him at a county boot camp in Panama City. The beating was videotaped and was aired by national media.

FL - During Feb. '06, former FDOC prison guard Bryan Griffis pleaded guilty to embezzlement related to a prison recycling center that he managed and agreed to cooperate with federal prosecutors in their investigation of other current and former FDOC employees. Griffis had also pleaded guilty in Dec. '05 for his role in a steroid trafficking ring in which he sold the drugs to fellow guards and others.

FL - On Dec. 5, '05, four prisoners at Glades Correctional Institution were charged with smuggling a loaded gun and cell phones into the prison. Prosecutors allege Blas Duran, 34, Angel Rodriguez, 39, William Ortiz-Ponce, 36, and Antone Jones, 39, were going to turn the gun over to prison officials to curry favor with them, and that the cell phones were used to smuggle the gun into the prison. An unidentified informant apparently sought to curry favor too when he allegedly informed on the plot in June '05. The gun, a loaded automatic, was buried under a sidewalk at the prison.

FL - In Mar. '06, former minor league baseball player Mark Guerra, who was hired to play softball for a prison employee team but was being paid as a assistant librarian, pleaded guilty to a reduced charge of lying to investigators and was sentenced to 50 hours of community service and $1,400 restitution. Guerra was originally charged with grand theft. Under the plea deal he will cooperate with FDLE and FBI investigators who are looking at corruption within the prison system. (See *FPLP*, Vol. 11, Iss. 5 & 6, pg. 7, for full story.)

FL - During Mar. '06, Seminole County Judge John Sloop blamed his attention deficit hyperactivity disorder for his having 11 people arrested for accidentally going to

the wrong courtroom. Sloop said he now takes medication and is getting mental health treatment. The FL Supreme Court, who is considering disciplinary action against Sloop, said it will base its final decision on the Judicial Qualifications Commissions recommendation.

FL - On Apr. 26, 2006, the U.S. Supreme Court heard arguments in a case brought by FL death row prisoner Clarence Hill, who is asking the court to find that prisoners can use a civil rights law (*42 U.S.C. § 1983*) to challenge lethal injection as a method of execution. Hill has exhausted his usual criminal appeals. Hill's case is being closely watched to see how the court will rule in the wake of a series of challenges by condemned prisoners across the nation challenging lethal injection execution as cruel and unusual punishment. They say current lethal injection methods conceal excruciating pain to those being executed. Florida has suspended executions while Hill's case is pending before the Supreme Court.

IN - In April '06, prosecutors charged nine former employees of Marion County Juvenile Detention Center with abusing their positions of authority to have sex with six girls, ages 13 to 15-years-old. The former employees face charges including child molestation and sexual misconduct with a minor.

OK - In Mar. '06, the Oklahoma Pardon and Parole Board announced that it will use a video-conferencing system to handle prisoners' hearings that had been face-to-face. Officials say the system will save travel expenses and reduce security risks of transporting prisoners to the hearings. The OK DOC will also use the system for training and meetings.

WI - A lawsuit filed during May '06 claims that Taycheeday Correctional Institution, a women's prison, is providing grossly inadequate health care, causing prisoners great physical and mental suffering. The federal suit was filed on behalf of all the prisoners at the prison. The WI DOC says it plans to improve health care over the next six years.

WI - A judge entered not guilty pleas on May 3, '06, for Steven Avery, 43, charged with raping and killing a woman prosecutors say he lured to his family's property on Halloween. Avery, who stood silent in court, was charged with Teresa Halbach's murder about two years after he was freed from prison for a rape that DNA testing proved he didn't do. ■

LEGISLATIVE WATCH

2006 REGULAR SESSION BILLS PASSED

On May 4, 2006, the Florida Legislature passed a House bill (H.B. 585) which authorizes the Florida Department of Corrections to adopt rules allowing the FDOC to charge solvent prisoners, or place a lien on indigent prisoners' inmate accounts, for the cost of making photocopies of legal documents which must be filed to initiate or to be served in judicial or administrative proceedings.

The bill, which, if signed into law, or allowed to become law without signature, will create Section 945.6038, Florida Statutes, and will take effect July 1, 2006. Under such new law, and any implementing rules, the FDOC will be authorized to charge prisoners up to $.15 for each 8½" x 11" photocopy made, or the actual cost of duplication, if another size copy is required.

If enacted, the new law, entitled "Inmate Litigation Costs," will also authorize the FDOC to charge prisoners, and place liens on indigent prisoners' inmate accounts, for the cost of postage for legal mail sent to courts or attorneys when such mail involves a lawsuit.

Obviously, the first part of this legislation came as a result of the decision in *Smith v. FDOC*, 920 So.2d 638 (Fla. 1st DCA 2005), cert. denied, *FDOC v. Smith*, 923 So.2d 1162 (Fla. 2006). The Smith court held that the FDOC did not have statutory authority to have adopted a rule allowing the department to charge prisoners, or place a lien on indigent prisoners' inmate accounts, for the cost of legal photocopies. Yet, the department had been doing so for many years. See, FPLP, Vol. 11, Iss. 3, and Vol. 12, Iss. 1, pg. 8.

And it's obvious that the legal mail postage charge aspect of this legislation was also initiated by the FDOC. The department has tried several times since the mid-1990's to adopt a rule allowing such legal mail postage charges, but had every attempt to do so defeated by Florida Prisoners' Legal Aid Organization, Inc. FPLAO successfully challenged such attempts administratively because the FDOC had no statutory authority to adopt such a rule. Now the FDOC hopes to have such authority with this new legislation.

However, such legal postage charge provision may itself be subject to challenge, at least by indigent prisoners. First, such statute would appear to conflict with Section 944.09(1)(o), Florida Statutes, which states: "The department may not adopt a rule that requires an inmate to pay any postage costs that the state is constitutionally required to pay." And second, the U.S. Supreme Court has held that indigent prisoner litigants must be provided with, at least some, free legal mail postage, *Bounds v. Smith*, 97 S.Ct. 1491 (1977). Other cases exist holding the same.

Legal challenges may also be brought (some may already be filed) by prisoners seeking reimbursement for money illegally taken from their inmate accounts for legal photocopies before the *Smith* decision. The FDOC is responding to grievances filed by prisoners seeking reimbursement claiming the photocopy fee rule was "valid" up until the time the Fla. Supreme Court denied the FDOC review of the *Smith* decision. That is an excellent response for prisoners, as it is so obviously ridiculous. The *Smith* court made it very clear that the FDOC did not have statutory authority to adopt a rule to impose charges for legal photocopies. Meaning the rule FDOC adopted and used to impose such charges for years was *never* valid.

Please inform FPLP of any court wins on that latter situation so we can inform everyone.

DNA BILLS

The legislature also passed two bills concerning DNA:

- A bill that passed both the House and Senate concerning DNA evidence will allow charges to be brought against someone after the statute of limitations has run out on a crime, if the charges are based on new DNA evidence.
- A bill was also passed that will remove the time limit and allow anyone convicted of a felony and sentenced at any time to petition the courts for DNA testing when DNA evidence exists. Going beyond Florida's past DNA law, if this bill becomes law, even prisoners who pleaded no contest or guilty will be allowed to seek to have their plea thrown out if DNA evidence exists that they did not have access to before they entered their plea. The bill (H.B. 61) would also require DNA evidence from crimes to be kept as long as the person's sentence. Effective date: July 1, 2006.

[Note: Bills that are passed by the Legislature are sent to the governor, who can sign them into law, veto them, or allow them to become law if not signed or vetoed within 30 days. The governor's action on particular bills can be checked by calling 1-800-342-1827 toll-free during business hours or at www.myflorida.com and follow these links: Governor's Webpage, News Room, Laws and Legislative Actions, 2006 Legislative Actions. The complete text of bills that become law will also be in the 2006 Session Law pamphlets as they become available in the prison law libraries over the next couple of *months.*]

FBI Raids Prison Canteen Vender's Offices

GAINESVILLE – The state and federal investigations of the Florida Department of Corrections (FDOC) continues to widen (See, *FPLP* Vol. II, Iss. 5 and 6, and Vol. 12, Iss. 2) and has now cast a shadow on the gubernatorial ambitions of Democratic State Senator Rod Smith, who has had close ties to prison officials in the past.

On June 8, 2006, Smith said he would return about $2,500 in contributions to his campaign for governor that were made by his long-time friend Eddie Dugger and his prison visiting park canteen business, American Institutional Services Inc., which had its offices raided and records seized by the FBI on June 7 and was banned from serving in state prisons on June 8.

The raid was part of the ongoing FBI and FDLE investigations into corruption in the Florida prison system, which earlier this year lead to the forced retirement of FDOC Secretary James Crosby. The investigations so far have found prison officials and employees trafficking in illegal steroids, embezzling state money, issuing no-bid contracts, and using inmates to perform personal services. Numerous arrests of current and former prison employees have been made and the new interim secretary, James McDonough, has fired or forced the resignation of numerous top FDOC officials since he took over in February.

This latest development in the corruption investigations indicates that the corruption isn't confined just to prison officials.

In addition to American Institutional Services, which Dugger, 50, started just to get a sub-contract from D-Keefe Commissary Network (which contracts with the FDOC to operate prison inmate canteens) to run the prison visiting park canteens, also operates an insurance agency, a couple of liquor stores, a pawn shop, and "George's," a bar near Florida State Prison popular with prison guards.

The FBI raid on American Institutional Services offices in Gainesville lasted twelve hours and records were seized. The FBI is not saying why they raided the offices and Dugger (who reportedly is no relation to Richard Dugger, a top FDOC official) was not arrested.

According to FDOC records, Edward Dugger is a subcontractor to Keefe, a private company that took over operating inmate canteens in 2004. In 2004 Dugger started AIS and subcontracted with Keefe just to operate the weekend visiting park canteens where inmates' visitor purchase food and snack when visiting prison inmates. Another company, a vending machine company, had been set up in the visiting parks statewide, but was forced out when AIS subcontracted with Keefe to compete against the vending machines with inmate-operated canteens stocked with Keefe products – a cash-only business.

Florida's Auditor General has criticized the FDOC (under James Crosby) for issuing the canteen contracts without bids and for amending them without written justification or cost analysis (Auditor General Report 2005-044).

Recently Dugger had become a political contributor, State election records show that he personally had contributed $500 to Republican gubernatorial candidate Tom Gallager and $500 to Democratic candidate Rod Smith. Additionally, his company, AIS, had donated $500 to Republican Charlie Crist for his run for governor and another $500 to Jim King, a Republican running for re-election to the state senate.

Perhaps more significantly, AIS, which made money by charging inmate visitors very high prices in the visiting park canteens, donated $30,000 to a political group, Floridians for Responsible Government, earlier this year, the largest donation to the group, which had raised about $90,000 to campaign for Rod Smith.

Smith, it might be remembered, was the former state attorney in Union County in 1999 when a gang of prison guards beat death row prisoner Frank Valdes to death. The guards who were charged for that murder were later acquitted at a trial, that many people felt that Smith deliberately botched. After all, Smith had been friends with James Crosby, who was then warden at Florida State Prison where Valdes was murdered, for 20 years.

Smith defended Crosby when he was ousted as FDOC secretary earlier this year, and defended Dugger, a 30-year friend, after the FBI raided the AIS offices, saying he doesn't believe he would break the law.

Smith said he knew about Floridians for Responsible Government and that they were distributing fliers campaigning for him, but dodged other questions about the group, which shut down after the AIS office raid.

FDOC Secretary James McDonough said that when the Keefe canteen contract is up in October '06, that it will be re-bid.

McDonough also has contracted with a management consultant firm, MGT of America, to review and report on the entire prison system. The firm will be paid $900,000 to review, analyze, and make recommendations about FDOC internal investigations, contracting, personnel administration, information technology, health services, prison operations, and probation operations, in addition to other areas. MGT has agreed to have a final report on McDonough's desk by the first week of August.

As related to the AIS fiasco, Keefe said it will take over operating the prison visiting park canteens.

[Sources: *St. Petersburg Times, Gainesville Sun, The Ledger, Miami Herald,* June 9, 2006.] ■

Flagler Beach Police Officer Has Cases Dismissed

Flagler Beach Police Chief Roger Free has asked the FDLE to investigate an officer whose credibility has come under fire after his arrest of a state attorney's daughter.

Free said he asked the FDLE to look into findings by a Flagler Co. grand jury and State Attorney John Tanner that Flagler Beach Police Officer Nathaniel Juratovac :is simply not believable."

In mid-May Tanner issued a statement saying he plans to dismiss all pending criminal cases "based solely" or "dependant in any material way" on Juratovac's testimony. No one has stated that cases where Juratovac's testimony resulted in a conviction and sentence will also be reviewed.

Juratovac's March 2005 arrest of Lisa Tanner, John Tanner's daughter, set off a chain of events that resulted in two Flagler Co. jail guards' arrest. In early May '06 a grand jury charged Flagler Co. sheriff's Sgt. Betty Miller Lavictoire, 50, and Cpl. Brian Pasquariello, 28, for strapping Lisa Tanner into a restraint chair after Juratovac arrested her. Charges were later dropped against Lisa Tanner.

Prisoners who were arrested or testified against by Juratovac need to follow up on this situation, it may provide an issue for legal relief.

[Source: *Daytona Bch. News Journal,* 5/18/06, pgs 1A and 9A. Thanks to E. Walker for bringing this to *FPLP's* attention.]

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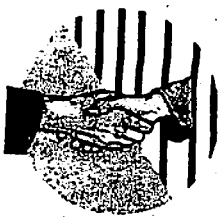

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