FLORIDA PRISON LEGAL

Perspectives

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FPLAO Challenges Newly Proposed FDOC Mail Rule

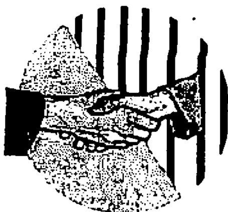
The Florida Department Corrections (FDOC) is at it again—trying to adopt a rule to restrict prisoners' and their outside correspondents' communications by mail. Since 1998 the FDOC has tried no less than five times to adopt a rule to prohibit Florida prisoners from receiving postage stamps through the mail from their families, friends and supporters. Every time the FDOC proposed such rule for formal adoption, however, Florida Prisoners' Legal Aid Org., Inc. (FPLAO), challenged the proposals and was successful in preventing the rules' adoption. Finally, the FDOC ceased trying to adopt a rule prohibiting prisoners from receiving postage stamps in incoming mail. Yet, as is usual when the FDOC is stymied in its constant attempts to roll back prisoners' rights (while ignoring the fact that such actions can and do impact the rights of nonprisoners in certain instances), the FDOC responds by trying to accomplish its original goal in a different manner.

On Sept. 24, '04, the FDOC published its first notice that it intended to adopt a rule to prohibit Florida prisoners from sending postage stamps to anyone in their *outgoing* mail to pay for products or services. The FDOC followed its first notice up with the required second (and final) rulemaking notice on Oct. 22. The full text of the proposed rule, which would be codified at Chapter 33-210.101(22), Fla. Admin. Code, reads:

(22) Inmates shall not use postage stamps as currency to pay for products or services. Postage stamps placed in outgoing mail for this purpose will be deemed contraband. Incoming mail that solicits inmates to purchase products or services and allows payment with postage stamps will be rejected.

After the FDOC gave the second notice of its intent to adopt that rule, FPLAO Chairman Teresa Burns Posey contacted the department's central office questioning how the proposed rule would be applied. Specifically she wanted to know if the rule would prohibit prisoners from sending postage stamps to FPLAO to cover membership dues, to make general donations to help support the organization's services to all members, or to cover return postage for free information provided as a service of FPLAO. The FDOC's response is that the rule would apply to postage stamps sent to FPLAO, just like any other entity, when the stamps are intended as currency. Ms. Burns Posey took that response to mean "Yes" to her inquiry.

On Nov. 12, '04 a petition was filed with the Florida Division of Administrative Hearings by FPLAO challenging the constitutionality and statutory validity of the proposed rule. The petition alleges that the proposed rule would violate FPLAO's free speech, press, association and liberty rights under both the federal and Florida constitutions. The petition



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Gibson Revised Opinion

In the last issue of *FPLP* the case of *Gibson v. FDOC*, 29 Fla. L. Weekly S356 (Fla. 7/8/04), was reported on (pgs. 13-15).

Following the Florida Supreme Court's decision in *Gibson*, the Court granted rehearing and made some rather significant changes. The most notable change was the Court's retraction of the Double Jeopardy finding where the Court had previously determined that the forfeiture of gain time from a sentence previously served impermissibly revived Gibson's sentence in violation of the Double Jeopardy clause. In the revised opinion, the Court held that the gain time forfeiture did not result in a double jeopardy violation because Gibson had received a cumulative seven-year sentence upon revocation of probation. Had he received neither *Tripp* credit nor the gain time forfeiture penalty, he would have been compelled to serve all seven years, less any newly earned gain time. However, the Court recognized that the trial court granted *Tripp* credit, the DOC subtracted 1681 days of *Tripp* credit on the sentences in Case Nos. 93-216 and 93-297, yielding 874 days or 2.4 years to be served on the seven-year (2555-day) term. Then, in order to effectuate the intent of section 944.28(1) in a manner that the prisoner be penalized for probation violation by loss of gain time previously accrued, the DOC applied section 944.28(1) in a manner that required Gibson to serve no less than the forfeiture penalty upon revocation of probation. Because the forfeiture penalty exceeded the sentence imposed upon revocation of probation after *deduction* f time served on the prior sentence, Gibson served *only* the forfeiture penalty, rather then the seven years he would have served without either the credit or the penalty. In sum, the Court found that Gibson did not suffer a *Tripp* penalty in which the forfeiture of gain time from the completed sentences resulted in a sentence on violation of probation longer than he would have received without taking into consideration the completed sentence for purposes of either the *Tripp* credit or statutory forfeiture penalty. With no net increase in the revocation sentence based on the expired sentence, the Court rejected the double jeopardy issue. *See Gibson v. FDOC*, 29 Fla. W. Weekly S626 (October 21, 2004)-oh

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also asserts that the rule, that would authorize rejection of FPLAO's routine mail to prisoners when such mail solicits postage stamps as membership dues from otherwise indigent prisoners, (or as in-kind general donations to the nonprofit organization, or soliciting postage stamps or SASEs in order to receive information from the organization) without providing a constitutionally-acceptable procedure for FPLAO to appeal such rejection of constitutionally-protected mail, the rule violates FPLAO's guarantee of due process under both the federal and state constitutions. Further, the petition claims the proposed rule is an invalid exercise of delegated legislative authority, because Florida statutes do not authorize such a rule, the proposed rule is vague and arbitrary and fails to establish adequate standards, while vesting the FDOC with unbridled discretion, in addition to not being supported by competent substantial evidence. (See § 120.52(8), Fla. Stat.) For example, the proposed rule would authorize the rejection of any incoming routine mail sent to prisoners soliciting them to send postage stamps (or SASE s) to pay for products or receive services, but prisoners would still be able to receive publications containing the exact same solicitations.

FPLAO's rule challenge will effectively stop the FDOC's adoption or legal implementation of the proposed rule while the challenge is ongoing. If a favorable outcome (withdrawal of the proposed rule) is not obtained in the Division of Administrative Hearings, FPLAO will carry the challenge to the courts. The organization will do this because its directors believe the freedoms of speech, press, association and liberty are every person's most precious and valuable rights and that they much be zealously protected, especially from bureaucratic encroachments.

FPLAO's directors are convinced that the proposed rule noted herein, if allowed to be adopted. will negatively impact not only the ability of all Florida prisoners to receive information from outside the prisons but also improperly restrict the ability of many nonprofit organizations, who depend on postage stamp donations or SASEs, to provide services to prisoners. Under this proposed rule prisoners would be prohibited from receiving a wide variety of services or information from any source that requests a few stamps or an SASE to cover return postage, or to help offset printing costs, and those sources would be prevented from providing the service or information.

FPLP will provide updates on this proposed rule challenge as it proceeds. In the meantime, any prisoners who wish to join FPLAO or renew their membership by sending postage stamps to cover membership dues, or to simply make a donation of stamps to FPLAO, are free to do so. Your help and support is always needed so that we can continue to check and balance FDOC excesses.

[Note: The above noted DOAH case is: *Florida Prisoners' Legal Aid Organization, Inc., v. Department of Corrections,* DOAH Case No. 04-4094RP.] ■

Female Prisoner Held Naked at Male Prison: Six FDOC Employees Lose Jobs

An internal investigation by the Florida Department of Corrections (FDOC) concluded there was no evidence found that a suicidal female prisoner, who was confined at the all-male Zephyrhills Correctional Institution for two months, had been sexually abused, but the warden and five other top officials were still forced to resign, fired or demoted.

The investigation, conducted by the FDOC's office of inspector general, did conclude that the 27-year-old woman had been transferred to the psychiatric unit at Zephyrhills

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from the female prison in Broward County, because she had threatened suicide and then once at the male prison she had been held naked at the prison "for several days." A spokesman for the FDOC said it is unclear how long the woman (who the department refused to identify because of federal privacy laws) had been held naked in a suicide-proof cell, but that was against FDOC policies and was the reason the six employees, all men, are no longer at Zephyrhills CI.

Warden Gary Thomas, assistant warden Ray Mulally, Colonel Donald Leigh, and chief health officer Dr. Stephen Shanklin all resigned from the FDOC in early October. Prison psychiatrist Dr. Noah Jeannette was fired October 6, 2004. And Major Leonard Kuhns was demoted five levels and transferred to Brevard CI.

The incident came to light Sept. 30 when an unidentified whistleblower contacted John Burke, the FDOC's deputy assistant secretary for health services, informing him a female prisoner was being held at Zephyrhills without clothing. FDOC policies require that suicidal prisoners be provided with a special garment made of heavy canvas that cannot be ripped. In this case, the investigation found, the woman was not given the garment even though her regular clothing had been taken from her.

The woman, who is serving a 23-month sentence for having sex while HIV positive and battery on a law enforcement officer, had been transferred to Zephyrhills on July 30, but the investigation was unable to conclude just how long she had been held naked. She was transferred back to Broward CI on Oct. 2 and is still under suicide watch.

Sterling Ivey, the FDOC's spokesman, said the cell the woman had been held in was private, with a solid steel door that has a opening for a food tray and a small Plexiglas window in it. "It is definitely not a fishbowl," Ivey said. Ivey also claims the woman was kept separated from Zephyrhills 600-plus male prisoners but admits that she would have been guarded by male officers. Ivey said that's not uncommon, since male officers work at female prisons.

The FDOC quickly moved to replace those employees who lost their jobs. Ken Miller, who worked in the FDOC's Orlando regional office, was promoted to be Zephyrhills' Warden, while Barry Reddish, a former supervisor at Florida State Prison, was appointed to the assistant warden vacancy.

[Source: *St. Petersburg Times*] ■

Florida Prison Panel Violated Law

Florida's private prisons commission violated state law last year when it hired former corrections secretary Michael Moore as a consultant with a salary of $81,500. But, as usual, it is unlikely there will be any repercussions.

According to officials, there is no enforcement mechanism or penalty and the law violation does not fall under the state Ethics Commission. The Florida Department of Law Enforcement found no evidence of criminal wrongdoing, or so they say.

Apparently the stink surfaced when Alan Duffee, former executive director of the Correctional Privatization Commission, hired Moore to oversee rebidding of two of the state's five private prison contracts. Duffee hired Moore without conducting a public search one month after Moore was forced to quit his corrections position. Moore immediately hired his former chief of staff at the DOC and a departmental staff attorney.

While state law generally does not prohibit agencies from hiring former state employees as consultants, the state Legislature had passed a state law that prohibits the *commission* from hiring anyone who had worked either in state corrections or juvenile justice departments within the previous two years.

Duffee made a lame argument that he did not break state law because he hired Moore's firm, MWM and Associates, not Moore. But no one is buying that red herring.

Last spring the Florida Legislature voted to do away with the Correctional Privatization Commission, turning over all its responsibility to the Department of Management Services effective July 1, 2004. The Legislature's vote came in the midst of expanding controversy about the commission, an independent board created when the state Department of Corrections repeatedly rejected lawmakers' demands to privatize some state prisons.

In the year leading up to its demise, the commission was lobbying to rebid the state's private prison contracts for the first time in eight years. The Moore debate was at least the second time in four years the inspector general found the commission and its employees had violated state law.

In 2000, the inspector general found that former commission employee Ronald T. Jones had violated state law when he accepted a job with a private prison vendor within two years of leaving his commission job. Former commission executive Director Clayton Mark Hodges was also found to have violated state law by failing to report the receipt of an honorarium from another private prison company that was trying to win a Florida prison contract.

[Note: *FPLP* has previously reported on the travails of the Privatization Commission, see Vol. 10, Iss. 3, pg. 28 and Vol. 10, Iss. 4, pg. 8.–editor] ■

Blakely Not Retroactive Until S.Ct. Says So

The Eleventh Circuit U.S. Court of Appeals in Atlanta, with federal jurisdiction over Florida, Georgia and Alabama, has held that the U.S. Supreme Court's decision earlier this year in *Blakely v. Washington* could not be applied retroactively to cases on collateral review, at least until such time as the Supreme Court itself specifically declares that the rule announced in *Blakely* applies retroactively.

The Eleventh Circuit decision on *Blakely's* retroactivity came in a case brought by federal prisoner Will C. Dean, who had filed an application with the federal appeals court seeking an order authorizing the federal district court to consider a second or successive motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. §§ 2255 and 2244(b)(3)(A). Under those provisions, as amended by §§ 105 and 106 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), such authorization may be granted only if the appeal court certifies that the second or successive motion contains a claim involving, (1) newly discovered evidence, sufficient to show the movant was not guilty; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was not previously available. 28, U.S.C. § 2255.

In Deans' application he indicated that he wanted to raise one claim in his second or successive § 2255 motion, i.e., that the district court violated his Sixth Amendment right to a jury trial by enhancing his sentence under the federal sentencing guidelines based on his leadership role in the offense and other relevant conduct, even though the facts supporting those guideline enhancements were neither mentioned during his plea colloquy nor proved to a jury beyond a reasonable doubt. Dean asserted that his claim relied on a new rule of constitutional law, citing the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), which announced the rule that the Sixth Amendment right to a jury trial requires that facts supporting sentencing enhancements must be admitted to by a defendant or be determined by a jury beyond a reasonable doubt (facts other than those of a prior conviction, *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000)).

The Eleventh Circuit did not dispute that *Blakely* established a "new rule of constitutional law," but held that regardless of such establishment, the Supreme Court has not "expressly declared *Blakely* to be retroactive to cases on collateral review," and unless or until the high court declares same the rule established in *Blakely* cannot be applied retroactively to collateral review cases, citing *Tyler v. Cain*, 121 S.Ct. 656, 662-63 (2001).

It is not enough that a new rule of constitutional law is applied retroactively by an appeals court or that it satisfies the criteria for retroactive application set forth in *Teague v. Lane*, 109 S.Ct. 1060 (1989), the Eleventh Circuit held, "the Supreme Court itself must make the rule retroactive." Further, while the appeals court noted that while multiple cases can, together, make a new rule retroactive, that's true only if the holdings in those cases necessarily dictate retroactivity, citing *Tyler* at 2484. Which has not happened.

The appeals court pointed out that *Blakely* itself was decided in the context of a direct appeal and the Supreme Court has not since applied it to a case on collateral review. In fact, the appeals court notes that the Supreme Court "has strongly implied that *Blakely* is not to be applied retroactively," where on the same day that *Blakely* was decided, the high court also decided *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004), holding that *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (which like *Blakely* was an extension of *Apprendi*) was not retroactive to cases on collateral review. Thus, the appeals court held that Dean cannot show that the Supreme Court has made the *Blakely rule* retroactive to cases already final on direct review, and Dean's application for leave to file a second or successive (post conviction) motion was therefore denied.

See: *In Re: Will C. Dean, Jr.*, 375 F.3d 1287 (11th Cir. 2004). ■

FDOC Denied Summary Judgment in PLN Censorship Suit

by Bob Posey

Earlier this year it was reported that *Prison Legal News* (*PLN*), a Washington State-based nonprofit magazine, had filed a federal lawsuit against the Florida Department of Corrections (FDOC). See *FPLP*, Vol. 10, Iss. 1, Pgs. 4-5. That lawsuit claims the FDOC violated *PLN*'s constitutional rights when prison officials refused to deliver the magazine to Florida prisoner subscribers last year because it carries advertisements for companies that offer lower prison collect phone call rates to prisoners' families. The lawsuit also claims that *PLN*'s right to due process was violated by FDOC's failure to provide the publisher notice of the rejection of the magazine and that a prison rule prohibiting prisoners from writing for publication and receiving compensation is unconstitutional.

After the lawsuit was filed the FDOC changed its tune and said the phone service ads were okay and they would no longer censor the publication for such ads or for pen-pal company ads. Unfortunately, the FDOC had previously said the ads were okay only to change its position a month or two later and again

censor the publication for the same ads.

Shortly after the lawsuit was filed by *PLN* in the U.S. District Court in Jacksonville, Florida, the FDOC motioned the court to dismiss the claim concerning the prisoner compensation issue. U.S. District Court Judge John H. Moore II denied that motion for partial dismissal on April 26, 2004.

More recently the FDOC filed a Motion for Summary Judgment asking the court to find in the department's favor on the censorship and due process violation claims. In its motion the FDOC said it is entitled to judgment in its favor on those issues because they are moot due to a change in prison policies and practices. The FDOC asserted that "[r]egardless of the past application of the challenged policies and regulations...the evidence submitted herewith conclusively demonstrates that the challenged policy as to 'three way' telephone calling services has been officially changed," rendering *PLN*'s claims moot. Further, the FDOC contended that they have not censored the magazine due to pen-pal service ads because, like the phone service ads, such ads are allowed if 'incidental' to the publication under a newly-enacted prison procedure.

PLN responded that any alleged prison policy change by the FDOC does not render the claims moot. *PLN* pointed out that the FDOC has "flip-flopped" on their policy stance at least three times just while trying to censor their magazine and thus, conceivably, remain free to once again change the policies at the conclusion of the lawsuit. Judge Moore agreed, noting the numerous times that the FDOC "flip-flopped" in censoring *PLN* and comparing this case to "other cases in which courts have held that voluntary cessation of allegedly illegal conduct will not render a case moot if the Defendants can simply return to their old policies," citing *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

Judge Moore held that FDOC had not met their burden of establishing as a matter of law, that *PLN*'s claims are clearly moot because the FDOC have "completely and irrevocably eradicated the effects of the alleged violation." *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001).

On November 16, 2004, Judge Moore denied the FDOC's summary judgment motion and cleared the way for the lawsuit to go to trial.

Prison Legal News v. James V. Crosby, Secretary FDOC, et. al., Case No. 3:04-cv-14-J-16TEM (M.D. Fla., Jacksonville Division).

[**Note:** We have received word from the good folks at *PLN* that they and their attorneys are now considering amending their complaint in the above noted case to challenge *additional mail* policies/rules of the FDOC. We'll keep our readers informed about developments in *PLN*'s case as it proceeds. Subscription information for *Prison Legal News* can be found on the back page of this issue of *FPLP*. – bp] ■

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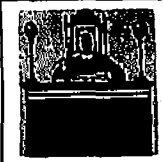

NOTABLE CASES

BY OSCAR HANSON & ANTHONY STUART

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

U.S. APPEALS COURT

Brown v. Johnson, 17 Fla.L.Weekly Fed. C1153 (11th Cir. 10/18/04)

This case revolves around two issues regarding the Prison Litigation Reform Act (PLRA): whether a prisoner, who seeks to file a complaint in forma pauperis, is barred by the PLRA from amending his complaint before either a responsive pleading or an order of dismissal has been filed; and, whether a prisoner who suffers from human immunodeficiency virus (HIV) and hepatitis and alleges both withdrawal of treatment in deliberate indifference to his serious medical needs and imminent danger of serious physical injury is barred, under 28 U.S.C. section 1915(g), from proceeding in forma pauperis because he has filed three or more frivolous lawsuits.

Such a case triggers three separate provisions of the PLRA: 1) 28 U.S.C. section 1915(g), bars a prisoner from proceeding in forma pauperis after he has filed three meritless lawsuits, unless he is in imminent danger of serious physical injury; 2) 28 U.S.C. section 1915(e)(2)(B)(ii), directs the district court to dismiss the complaint of any plaintiff proceeding in forma pauperis if the court determines that the complaint fails to state a claim on which relief maybe granted; and, 3) 28 U.S.C. section 1915A, directs the district court to dismiss the complaint of a prisoner if it fails to state a claim.

The district court, in this case, erroneously dismissed the complaint citing two of the above provisions. It ruled that section 1915(e) barred the amending of the complaint, and based on the three-strikes rule of section 1915(g), the case could not proceed in forma pauperis.

On appeal to the United States Court of Appeal, the Eleventh Circuit addressed those two provisions that the district court cited for its dismissal.

Under Federal Rule of Civil Procedure 15(a), a party may amend a complaint once as a matter of course at any time before a responsive pleading is served. It was found that the complaint was amended before any responsive pleadings had been filed.

The Court of Appeal further determined that section 1915(e)(2)(B)(ii) does not allow the district court to dismiss an in forma pauperis complaint without allowing leave to amend when required by Fed.R.Civ. P.15.

As to the second provision the district court cited, section 1915(g), the three strikes provision, bars a prisoner from filing a complaint in forma pauperis, *unless the prisoner is under imminent danger of serious physical injury*. HIV and hepatitis are medical illnesses that are well known to ultimately lead to serious physical problems and even death, especially without any treatment.

However, the showing of imminent danger of serious physical injury is not enough. The amended complaint must state deliberate indifference to serious medical needs. The question to consider is whether a valid claim is stated under the Eighth Amendment.

A deliberate indifference to serious medical needs of a prisoner is well established to constitute the necessary and wanton infliction of pain, which is proscribed by the Eighth Amendment. To show that a prison official acted with deliberate indifference to a prisoner's serious medical needs, both an objective and a subjective inquiry must be satisfied.

First, prove an objectively serious medical need, then prove that the prison official acted with deliberate indifference to that need. A serious medical need is considered one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention, such as the HIV and hepatitis illnesses involved in this case.

After showing the serious medical need, the element of deliberate indifference to that need must be established. To do so, the complaint must show three facts: 1) subjective knowledge of a risk of serious harm; 2) disregard of that risk; and, 3) by conduct that is more than mere negligence.

According to the complaint that was before the Court of Appeals, it was found that the prison officials were well aware of the prisoner's HIV and hepatitis diagnosis, knew the risk of serious harm it would cause the prisoner if he went without proper medical treatment, but still completely withdrew the proscribed treatments needed.

The Court of Appeals found that the district court abused its discretion in dismissing such a complaint and reversed the judgment

and remanded the case for further proceedings. –as

U.S. DISTRICT COURTS

Hogarth v. Crosby, 17 Fla.L.Weekly Fed. D1045 (N.D. Fla. 5/17/04)

Richard Hogarth properly filed a petition pursuant to 28 U.S.C. section 2254 for writ of habeas corpus where he complained that his plea of guilty was entered involuntarily. He asserted that the trial court nor his defense counsel informed him of the nature of the crime he was charged with.

After a review of the record, the Northern District of Florida's United States District Courts found that Hogarth's complaint was correct. The District Court, in their ruling, cited to numerous authorities of clearly established law in the determination of a guilty plea's validity.

In brief, it was expressed of the importance involved for an accused to have adequate notice of the nature of the charge against him, and the trial court to have proof that he in fact understands the charge. Without such, the plea cannot be considered voluntary.

A defendant receives real notice of the charge when he has been informed of both the nature of the charge to which is being pled guilty to and its elements. Thus, for a plea to be knowing and voluntary, the defendant must also be informed of the elements of the offense either at the plea hearing or on some prior occasion, and he must understand them.

The extent to which the elements must be explained varies with the circumstances, but at the very least, due process required that the defendant receives a description of the critical elements of the charged offense, such as the element defining the requisite intent.

The accused should also understand how his conduct satisfies the elements of the charge, and this entails that the accused have sufficient background information about the facts of his case to make an informed decision about the case against him.

The District Court, in Hogarth's case, concluded that the records of his plea proceedings were devoid of evidence showing that he was informed of the causation element of the crime with which he was charged.

Hogarth's petition was granted and the District Court ordered the trial court to discharge him from custody unless: (a) the State of Florida allowed Hogarth to withdraw his guilty plea; and (b), if he withdrew his plea, a trial should be commenced within sixty days from the date of withdrawal of guilty pleas. –as

FLORIDA SUPREME COURT

Amendments to Florida Rule Of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing), 29 Fla.L.Weekly S482 (Fla. 9/15/04)

The Florida Bar Criminal Procedure Rules Committee filed an emergency petition to amend Florida Rule of Criminal Procedure 3.853, Motion for Postconviction DNA Testing, namely the time limitation at 3.853(d)(1)(A).

On May 20, 2004, Governor Jeb Bush signed into law legislation that extended the DNA testing deadline set forth in section 925.11, Florida Statues.

After hearing comments presented at an oral argument, the Florida Supreme Court amended the rule to extend the deadline from October 1, 2003, to October 1, 2005. The amount of time to petition for postsentencing DNA testing was changed from two years to four years for a defendant who is not subject to the October 1, 2005 deadline making the rule consistent with section 925.11, Florida Statues.

It was ruled that the amendments would become effective immediately. –as

Franklin v. State, 29 Fla.L.Weekly S538 (Fla. 9/30/04)

This case was before the Florida Supreme Court to answer the question of whether Chapter 99-188, Laws of Florida, violates Article III, section 6 of the Florida Constitution.

Chapter 99-188, Laws of Florida (the Act), was designated by the Legislature as the "Three Strike Violent Felony Offender Act." However, only two of the Act's twelve substantive sections relate specifically to the "Three Strike" violent felony provisions. The controversy that was between the Third and Fourth District's conclusions and that of the Second District mainly involved sections 11 and 13 of the Act.

In *Taylor v. State* the Second District concluded that the Act was entirely unconstitutional because sections 11 and 13 violated the single subject clause. In brief, it opined that the Act in whole, along with what is in its lengthy title, reveals the subject to be of sentencing. However, section 13 amended the substantive definition of conveyance in the burglary statute to include a railroad vehicle which the Second District determined was *not* a sentencing provision. As to section 11, the Second District pointed out that it concerns a purely administrative subject that bears even less relationship than section 13 does to the Act's other provisions and it impermissibly combines civil and criminal subjects in violation of the single subject rule.

In Franklin's case the Third District ruled (contrary to the Second DCA) that the Act does not violate the single subject rule. It focused on the purpose of the Act rather than specifically defining the single subject. It noted that section 11 is reasonably related to the Act's purpose because it ensures the removal of felons from the country

after they have served their sentences. As to section 13, the Third District observed as in relation to the Act's purpose, it expands on the definition of the offenses included in the Habitual Offender Act.

More recently, in *Hernandez-Molina v. State*, the Fourth District reached the same conclusions as found in *Franklin*.

The single subject clause contains three requirements. First, each law shall embrace only one subject. Second, the law may include any matter that is properly connected with the subject. The third requirement, related to the first, is that the subject shall be expressed in the title.

After a lengthy single subject rule analysis, the Florida Supreme Court turned to the controverted issue of whether sections 11 and 13 are properly connected to sentencing. The test it utilized is whether there is a natural or logical connection to sentencing, or whether a reasonable explanation exists for how these provisions are either necessary to sentencing or tend to make effective or promote the purposes of the sentencing legislation.

In section 11 the Supreme Court concluded that there is a natural and logical and thus proper connection between the requirements of it that sentences of non-citizen offenders be provided to INS and the Act's subject of sentencing, in that section 11 is a post-sentencing measure.

In section 13 the Supreme Court concluded in agreement with the Third and Fourth Districts. The proper connection between the expanded definition of burglary and sentencing is found in the fact that armed burglary is one of the qualifying offenses for a harsher *sentence* in the Act. In broadening the definition of conveyance in section 810.11, Florida Statues, which previously encompassed a "railroad car" but not a "railroad vehicle," the Legislature ensured that a serious crime against a person inside a railroad vehicle (to wit, a locomotive) will be punished accordingly. Thus, the Supreme Court held that there is a proper connection to sentencing in that section 13 makes effective one of the purposes included within the subject – imposing harsher *sentences* on violent offenders. The Supreme Court further considered that the purpose of the Act is to protect the public from serious and repeat violent offenders, a reasonable explanation exists for including section 13 within an Act whose subject is sentencing.

In its final conclusion for the summarized reasons above, the Florida Supreme Court held that Chapter 99-188 does not violate the single subject clause of Article III, Section 6 of the Florida Constitution. The Third and the Fourth Districts' decisions were approved and the Second District's was disapproved.

Banks v. State, 29 Fla.L.Weekly S579 (Fla. 9/14/04)

In answer to two certified questions of great public importance, involving the unconstitutional 1995 guidelines and agreements made in reliance on the validity of those guidelines, the Florida Supreme Court ruled as follows, in brief.

A defendant who was sentenced to the low end of the unconstitutional 1995 guidelines is not entitled to be resentenced where the sentence was imposed pursuant to a negotiated term of years and not pursuant to the guidelines, and where the sentence received could have been imposed under the 1994 guidelines. A defendant is precluded from challenging his plea agreement on the ground that he relied on the validity of the 1995 guidelines in deciding to enter his plea where the sentence imposed pursuant to the plea agreement could have been imposed under the 1994 guidelines without a departure. –as

DISTRICT COURT OF APPEALS

David v. Hershel, 29 Fla.L.Weekly D1894 (1st DCA 8/18/04)

This case revolves around the intent of the Florida Legislature in their adoption of Fla. Statutes section 947.1405, the Conditional Release Program Act (CRPA), and whether in the adoption of this supervised program scheme there was an intent to allow offenders to be subjected to the conditions included within the CRPA while the offender is civily committed.

Relying on its prior opinion in *Bolden v. Fla. Dept. of Corrections*, the First District Court of Appeal (1st DCA) ruled that there are no restrictions found in the CRPA or the Jimmy Ryce Act that prohibit simultaneous compliance. – as

Perez v. State, 29 Fla.L.Weekly D1919 (2d DCA 8/20/04)

Ramon Perez, III, appealed a trial court's order that revoked his illegally extended probation and sentenced him to seven years prison.

On November 7, 2000, an order from the trial court was made but not signed until February 22, 2001, to extend Perez's probation period by one year because he failed to report to the probation office as instructed between 4 p.m. and 5 p.m. on a certain date.

On the certain date Perez was to report his work supervisor asked him to stay late to clean out his work truck. While Perez did as instructed he noted the time, 4:30 p.m., and called his probation officer explaining that he would be running late due to his work.

Although Perez called and reported by 5:20 p.m. his probation officer filed a violation on him for failing to report on time. The trial court extended Perez's probation. Later, Perez violated again and the trial court sentenced him to seven years prison, and Perez appealed.

On appeal, the Second District Court of Appeal (2d DCA) found that the lower court failed to determine in their *first* order extending Perez's probation period whether the violation of failure to report on time was willful and substantial and supported by the greater weight of evidence, or stated differently, whether Perez made reasonable efforts to comply with the terms and conditions of his probation.

Because of the lower court's failure, the 2d DCA ruled that Perez's probation period was improperly modified when the lower court extended the period one more year. Consequently, absent that added year, the trial court lacked jurisdiction to revoke Perez's probation and sentence him to prison for the second alleged violation.

The 2d DCA reversed the trial court's orders, remanded the case back for the lower court to vacate its order extending Perez's probation and to vacate its order revoking his probation and the resulting judgment and sentence. –as

Dozier v. State, 29 Fla.L.Weekly D1948 (3d DCA 8/25/04)

Wayne Dozier pled guilty to his charges in exchange for an agreed upon 8 year prison term, a 5 year downward departure sentence, and he appealed.

On appeal, Dozier's argument was based on an incorrect reasoning that once the state agreed to a downward departure the judge can depart further downward at his discretion. The Third District Court of Appeal found that since Dozier's issue had not been presented to the trial court, nor was it the subject of a reservation of the right to appeal, nor was the claim brought to the attention of the trial court by motion after sentencing or during appeal, Dozier's sentence was affirmed.

[**Note**: In Dozier's appellate case Judge J. Cope concurred with a lengthy opinion pointing out what Dozier was misunderstanding.

In brief, Cope's opinion outlined that when there is an agreement between the state and defendant for a specified sentence below the guidelines and the judge approves the downward departure, the judge is bound by the specified sentence. If the judge disapproves of a downward departure sentence, then the defendant should be allowed to withdraw his plea. However, in Dozier's case there was a specified sentence and the judge could not go below that even if he wanted to.

Now, if there had been an agreement between the state and defendant that a downward departure sentence was appropriate with no specific length of time included, then Dozier would have been correct in that the judge would have had the discretion of any length of time below the guidelines.

Judge Cope's opinion relied mostly on the analysis found in *State v. Hale*, 682 So.2d 613 (Fla. 2d DCA 1996)] –as.

Davidson v. Crosby, 29 Fla.L.Weekly D2006 (1st DCA 8/31/04)

David A. Davidson's case revisited the question of which court has jurisdiction of a prisoner challenging a disciplinary action that was imposed by the Florida Department of Corrections (DOC).

In challenging a DOC disciplinary action Davidson filed his petition for writ of mandamus in the Second Judicial Circuit Court for Leon County, Florida (Second Circuit). The Second Circuit dismissed the petition without prejudice, ruling that it did not have jurisdiction to hear the case and transferred the petition to Davidson's sentencing court. In turn, Davidson appealed the dismissal to the First District Court of Appeals (First District).

The First District held, in reliance on *Burgess v. Crosby*, that the Second Circuit *is* the correct venue for claims such as Davidson's. The Second Circuit opined that the matter was still in doubt after *Burgess* in light of certain language held in *Schmidt v. Crusoe*.

In reply, the appellate court explained that in *Burgess* it showed the Supreme Court's holding in *Schmidt* was limited to the question of the applicability of section 57.085, Florida Statutes, in determining a complaintant's indigency in Davidson's type of case. Furthermore, the Supreme Court denied the rehearing in *Schmidt* and, despite the certification of a question of great public importance that was made in Burgess' case, no further review was sought by either of the parties to that decision.

In conclusion, the First District ruled that contrary to the Second Circuit's disposition in Davidson's case, the matter is not in doubt, but is controlled by the decision in *Burgess*.

Davidson's case was reversed and remanded with directions for the Second Circuit to take jurisdiction over the petition and proceed to a disposition on the merits. –as

[**Note**: Also see *Eastman v. State*, 29 Fla.L.Weekly D2204 (Fla. 2d DCA 10/1/04), where Armando R. Eastman's case mirrored Davidson's except Eastman failed to pursue the Second Circuit's defective order in the First District appellate court. Instead, Eastman refiled his petition in his sentencing court, the Thirteen Judicial Circuit Court (Thirteenth Circuit). Eastman's petition was denied as time-barred. He appealed that decision to the Second District Court of Appeals (Second District) where it ruled that its jurisdiction was limited to the Thirteenth Circuit's decision which it affirmed. However, the Second District opined, even though it was not a matter before them, Eastman could possibly fashion a sufficient motion pursuant to Florida Rule of Civil Procedure 1.540 that

would persuade the Second Circuit to vacate its erroneous order of dismissal and entertain the petition on its merits.

At any rate, due to Eastman's failure to seek review of a circuit court's order in its proper district, *he found* himself time-barred.] –as

Reed v. State, Fla.L.Weekly D2001 (3d DCA 9/1/04)

Royce M. Reed filed a motion to correct illegal sentence complaining that it was improper to use a 1989 prior charge to habitualize him on his 1991 *charges* since he had never been sentenced for the 1989 charge. Reed argued that although he had been adjudicated guilty of the 1989 offense, the case had not been finalized since the sentencing for it was still pending when he was convicted and sentenced for the 1991 offenses.

Reed was adjudicated guilty of the 1989 case, but because he was a juvenile at the time, the court placed him in a juvenile detention facility where Reed escaped. While a fugitive, Reed committed several other crimes in 1991. Reed was caught, arrested, convicted, and sentenced as a habitual violent felony offender for the 1991 offenses using the 1989 *felony*, which Reed claimed was improper. After the conviction and sentencing on the 1991 cases, Reed was finally sentenced for his 1989 case.

The lower court denied Reed's motion to correct illegal sentence. Reed appealed and the denial was affirmed by the Third District Court or Appeal (3d DCA). Reed then filed for a rehearing and clarification. The Third DCA denied the rehearing, but clarified its prior opinion.

In their clarification the DCA relied on *McCrae v. State*. The DCA explained that for purposes of the habitual offender statue, the term "conviction" is equivalent to adjudication. In *McCrae* the Supreme Court ruled that a defendant was "convicted" within the meaning of the [habitual] statue if he had entered a guilty plea to a qualifying felony, but had not yet been sentenced.

[Note: Third District Court Judge J. Cope concurred with the clarification but pointed out that in 1993 the Legislature amended the habitual offender statue. The analysis would be different for offenses committed on or after the effective date of the 1993 Act. See: *Rhodes v. State*, 704 So.2d 1080, 1083 (Fla. 1st DCA 1997); Ch. 93-406, subsection 2, 44, Laws of Florida; and section 775.084(5), Florida Statues (1993).] –as

Washington v. State, 29 Fla.L.Weekly D2011 (4th DCA 9/1/04)

Otis Washington appealed the denial of a motion to correct sentencing error and argued 3 issues. The Fourth District Court of Appeal (DCA) addressed one regarding the sentences.

The issue addressed encompasses Washington being served a "shotgun" notice of intent to seek a habitual felony sentence which included all sentencing schemes under Florida Statutes section 775.084. Washington contended that he had no notice of the precise sentencing enhancement being sought by the state.

The DCA relied on *State v. Bell*, 747 So.2d 1028 (Fla. 3d DCA 1999), and ruled that the notice did not give Washington any useful notice of what particular classification, and hence penalty, he may be subjected to upon conviction.

During Bell's case there were 3 different classifications under the habitual statue, currently it encompasses four sentencing schemes. To serve a general "shotgun" notice that does not depict the specific sentencing scheme under the statute is tantamount to filing no notice of intent at all. Washington's sentence was reversed and remanded to impose a guidelines sentence.

Davis v. State, 29 Fla.L.Weekly D2033 (3d DCA 9/9/04)

Meltin A. Davis' case pointed out a misunderstanding offenders have in qualifying as a habitual violent felony offender (HVFO).

As the Third District Court of Appeal explained, it is not the *current* offense that must be one that is enumerated in section 775.084(1)(b)1., Fla. Statute, to qualify as a HVFO. An offender qualifies if he has *previously* been convicted of a felony or an attempt or conspiracy to commit a felony enumerated in the statue. –as

Enriquez v. State, 29 Fla.L.Weekly D2041 (3d DCA 9/9/04)

The Third District Court of Appeal cited to *Alvarez v. State*, in this case to reemphasize the Florida Supreme Court's decision that a life sentence is not impermissible as *indefinite imprisonment* for purposes of Article 1, Section 17 of the Florida Constitution. –as

Roundtree v. State, 29 Fla.L.Weekly D2029 (2d DCA 9/8/04)

Randy Roundtree challenged the denial of his motion for postconviction relief filed pursuant to Fla. Rule of Criminal Procedure 3.850.

One of the grounds in Roundtree's motion in particular dealt with a prima facie claim of newly discovered evidence.

Roundtree alleged that his co-defendant had just recently admitted that he had not testified on Roundtree's behalf because he had been coerced by the State. Roundtree further claimed in his motion that the testimony of his co-defendant would have proven that he had no knowledge that a robbery would take place. He further claimed that this con-defendant's testimony would have refuted the State's argument that Roundtree

acted as a lookout during the robbery.

The lower court denied Roundtree's newly discovered *evidence* because he failed to attach an affidavit. The Second District Court of Appeal ruled that a motion under rule 3.850 does not require the filing of supporting affidavits; it only requires a brief statement of facts in support of the motion.

Roundtree's case was reversed and remanded for the lower court to hold an evidentiary hearing. –as

Miller v. State, 29 Fla.L.Weekly D2094 (5th DCA 9/17/04)

This case revisited and followed the issue found in *Singletary v. Marchette*, 691 So.2d 65 (Fla. 3d DCA 1997), where the court affirmed an order allowing additional time credited to a defendant's sentence that he would or could have received through gain time in state prison.

Although it is well established that courts do not have the authority to order the Department of Corrections (DOC) to award or credit a defendant prisoner with additional gain time credits, a court *does* have the authority and jurisdiction to effect a fair sentence by awarding credit for time served.

Due to circumstances beyond a defendant's control, e.g., time served in a county jail awaiting disposition of post-judgment motions, the courts can order a computation of the sentence, crediting it with the amount of gain time he would have received had he been at a DOC facility. Thus insuring the defendant has been accorded due process where the right to accrue gain time has been denied through no fault of his own. –as

Pritchett v. State, 29 Fla.L.Weekly D2202 92d DCA 9/29/04)

In this case, before the trial court ruled on Drake Pritchett motion for postconviction relief, Pritchett amended his motion with another claim. Upon denying the amended claim the lower court ruled that Pritchett failed to allege a reason or reasons, beyond his general statement that he just discovered the grounds for the new claim, for his failure to include these claims in his original motion. As such, the trial court concluded that Pritchett had failed to demonstrate good cause to amend as required by *McConn v. State*.

On appeal, the Second District Court of Appeal found that in *Gaskin v. State*, 737 So.2d 509 (Fla. 1999), receded from on other grounds, *Nelson v. State*, 875 So.2d 579 (Fla. 2004), the Florida Supreme Court impliedly overruled *McConn*. In *Gaskin*, where the appellant had filed an amended motion before the trial court ruled on the original motion and before the two year time limit had expired, the Supreme Court determined that when both the original and amended 3.850 motions were filed within the statutory two-year time limitation it would be error for the trial court not to consider the merits of the new allegations.

Because Pritchett filed his amended claim within the two-year period, as well as before the trial court ruled on his original motion, the appellate court reversed the denial of his motion to amend with instructions for the trial court to consider the additional claim. –as

Savery v. State, 29 Fla.L.Weekly D2199 (5th DCA 10/1/04)

Craig A. Savery had sought his secondary (appeal) review with the Secretary of the Department of Corrections of an administrative punishment that was imposed on him

In an order dated March 24, 2004, but was not filed until March 29, 2004, the Secretary concluded that his secondary request for review was untimely and refused to consider Savery's administrative appeal.

On April 27, 2004, Savery filed a petition with the circuit court for writ of mandamus that sought to compel the Secretary of DOC to exercise his jurisdiction and consider his appeal on the merits. The circuit court denied Savery's petition as untimely, concluding that it was filed more than thirty days after disposition of the disciplinary proceedings. Savery then sought certiorari review of the circuit court's order in the Fifth District Court of Appeal.

On review, the appellate court stated that pursuant to Florida Rule of Appellate Procedure 9.100(c)(4), a petition challenging a DOC order entered in a prisoner disciplinary proceeding must be filed within thirty days of *rendition* of that order. Rule 9.020(h) defines "rendition" (of an order) as an order rendered when a signed, written order is *filed* with the clerk of the lower tribunal. Rule 9.020(b) defines "clerk" as the person or official specifically designated as such by the court or lower tribunal or if no person or official has been specifically so designated, the official or agent who most closely resembles a clerk in the functions performed.

The DOC conceded that the Secretary's order dated March 24, 2004 was not rendered as defined by the rule until March 29, 2004. As such, Saver's petition filed in the circuit court was timely filed on April 27, 2004. Thus, the appellate court quashed the circuit court's order and remanded Saver's case for further proceedings. –as

Gill v. Crosby, 29 Fla.L.Weekly D2208 (1st DCA 10/1/04)

Marvin C. Gill petitioned the First District Court of Appeal (1st DCA) for a writ of certiorari to review the denial of his petition for writ of mandamus that challenged the imposition of a disciplinary sanction by the Fla. Dept. of Corrections.

The disciplinary report charged Gill with the *infraction* of disobeying regulations. The report described a document discovered by an inspector containing minutes of a

corporate stockholder meeting supposedly conducted by Gill, the corporation's majority stockholder, at the correctional institution. At his D.R. hearing the disciplinary team convicted Gill of violating the FDOC's rules which prohibits an inmate from *conducting* business through the use of any avenue of communication during his or her incarceration.

The 1st DCA agreed with Gill's argument that the D.R. served did not comply with the 33-601 rule, which requires a description of the violation, including date, time, and place, along with the specific rules violated.

Gill's petition was granted and the 1st DCA remanded his case back to the lower court with directions to grant his petition writ of mandamus. –as

Harrison v. State, 29 Fla.L.Weekly D2206 (2d DCA 10/1/04)

Johnny J. Harrison, Jr., appealed the denial of his Rule 3.800(a) motion where he claimed it was error for him to be sentenced as a habitual offender for his offenses that were committed June 4, 1996.

Harrison was convicted, after he pled guilty to an agreement, of trafficking in cocaine, 28 grams or more but less than 200 grams, and possession of cocaine with the intent to deliver. He alleged that neither offense was subject to habitual offender sentencing under the guidelines in effect at the time.

The Second District Court of Appeal found that Harrison was correct in his allegation and that he had presented a facially sufficient motion for relief.

Section 893.135(1)(b)(1)(a), Florida Statutes (1995), provides that if the quantity of the cocaine involved is 28 grams or more but less than 200 grams, the defendant shall be sentenced pursuant to the sentencing guidelines. Furthermore, pursuant to section 775.084(1)(a)(3), Florida Statutes (1995), a defendant cannot be sentenced as a habitual offender for violating section 893.13 relating to the purchase or the possession of a controlled substance. This includes the offense of possession of cocaine with intent to sell of deliver. (See: *Virgil v. State*, 29 Fla.L.Weekly D2060 (Fla. 2d DCA 9/10/04)).

The appellate court stressed that whether Harrison entered a negotiated plea or not he must be resentenced to the guidelines or be allowed to withdraw from the plea agreement and proceed to trial.

As such, Harrison's sentence was reversed and remanded for further proceedings. –as

McBride v. State, 29 Fla.L.Weekly D2235 (4th DCA 10/6/04)

Charles McBride appealed the denial of his rule 3.800(a) motion to correct illegal sentence where he challenged his habitual offender sentence under the United States Supreme Court's decision in *Blakely v. Washington.*

As explained many times, the Fourth District Court of Appeals held that in *Blakely* the Supreme Court revisited *Apprendi v. New Jersey* where it was specifically held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt." Habitual Offender enhancements deal with the fact of prior convictions.

The Fourth District further cited *In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004), where it was recently held, "Regardless of whether *Blakely* established a 'new rule of constitutional law'...the Supreme Court has not expressly declared *Blakely* to be retroactive to cases on collateral review." Without an express declaration by the Supreme Court, *Blakely* cannot be applied retroactively.

Regarding McBride's case, the Fourth District affirmed the trial court's denial.

Rodriguez v. State, 29 Fla.L.Weekly D2238 (2d DCA 10/6/04)

Basically, in this case the Second District Court of Appeals expressed that the Prison Release Reoffender Act was not intended by the Legislature to permit a court to enhance the individual sentences from a single criminal episode and then *further increase* the total penalty by ordering that the sentences run consecutively. –as

Wells v. Harris, 29 Fla.L.Weekly D2287 (4th DCA 10/13/04)

Thomas Perry Wells filed a writ of mandamus and declaratory judgment in the trial court against James Harris, Warden for Martain Correctional Institution where he was serving his sentence, and one of its employees, challenging disciplinary action against him and seeking declaratory judgment that the *rule* under which he was disciplined is unconstitutional. The trial court denied the petition as to the disciplinary action and dismissed the declaratory action. Wells sought certiorari review in the Fourth District Court of Appeals (Fourth District) where it treated his petition as a notice of appeal.

In *Smith v. Florida Department of Corrections*, 752 So.2d 59 (Fla. 1st DCA 2000), it was held that where the petition stated a cause of action for declaratory judgment, it was error for the court to make a final determination as to the disciplinary action *before* hearing the prisoner's challenge to the validity of the rule under which he was disciplined.

The Fourth District ruled that *Smith* applied to Wells' case and reversed the order of the trial court and remanded for further proceedings consistent with their opinion. –as ☐

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