FLORIDA PRISON LEGAL

Perspectives

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State and Federal Investigations of FDOC Widening

by Bob Posey

What started out as an investigation into the importation, sell and distribution of illegal steroids by a few current and former Florida prison guards has escalated into wide-ranging investigations into corruption throughout the state prison system by state and federal authorities.

The steroid investigation was sparked in March 2003 when unusual packages sent from Egypt were intercepted at post offices in Raiford, Starke, Keystone Heights and Macclenny, all small towns located in rural North Florida and close to several of the state's major prisons.

The packages, addressed to state prison guards, were opened by U.S. customs and immigration officers who found inside quantities of anabolic steroids. It is illegal to import, sell or distribute such steroids in the U.S. For a while investigators were stymied. Those guards to whom the packages were addressed denied knowledge of the contents and false return addresses lead back to no one. Then on October 27, 2003, a break came in the investigation.

That was the day Ashley Faye Mahoney, 19, called the Clay County Sheriff's Office to send out a deputy to prevent any trouble while she moved her stuff out of her boyfriend's house in Keystone Heights. After she had removed all her property she invited Deputy Dennis Urban into the house to show him something.

Taking the deputy to a bedroom that she had shared with Benjamin Zoltowski, a prison guard at Florida State Prison in Raiford, she opened the top drawer of a dresser and pointed inside. The drawer held a wad of folded up money and a cardboard box full of gallon-sized freezer bags filled with pink and blue pills, according to Urban's report.

Urban called in Clay County sheriff's Detective V.A. Hall who went to the county courthouse to get a search warrant while other deputies watched the house.

With the warrant, deputies searched the house where they found almost 1,800 steroid tablets and ampules of injectable steroids, in addition to a ledger listing sales of steroids between April and June of 2003. The ledger also led investigators to other state prison guards who worked in several North Florida prisons.

As of October 2005 federal investigators had charged five former Florida prison guards with distributing steroids. The story behind the steroids is emerging in federal court records in Jacksonville.

According the those records, former FDOC prison guard Clayton Manning was working as a personal bodyguard in Egypt in 2003 when he began mailing steroids back to friends and relatives in North Florida. Manning made more than $73,000 in profits on the drug importation operation between 2002 and 2004. So far

ON THE INSIDE

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Manning, Zoltowski and two other former prison guards have entered guilty pleas as part of a agreement to cooperate with federal investigators and testify against others. Manning and Zoltowski have already been sentenced to 36 months probation. The other two, Oscar Shipley and Michael Chambliss, are scheduled for sentencing in October and November. The fifth former guard charged, Marcus Hodges, goes to trial in November.

Three other prison guards and a former guard have been named as "unindicted co-conspirators." But the scandal has not ended there.

Corruption is Contagious

Steroid use among corrections and law enforcement officers is becoming an increasing problem around the country. Similar to athletes using steroids to improve their performance, even though they are illegal, many prison guards are turning to steroids to beef up their bodies out of fear of the prison populations they must work with. Experts, however, are increasingly warning about the psychological as well as physical side effects of steroid use.

Experts say that prolonged high-dose use of steroids can result in what's being called "roid rage," a psychological reaction to steroids that can lead to suicide, extreme violence against others, and destruction of property.

Yet, despite national reports of problems with steroids in law enforcement and corrections, Florida state prison officials never even conducted an internal investigation of the guards now caught up in the federal investigation. When contacted by the *St. Petersburg Times*, FDOC Secretary James V. Crosby Jr. refused to discuss the problem within the state prison system or why no internal investigation was conducted. But then Crosby and other top prison officials also appear to be targets of state and federal investigations.

If the Tree is Rotten, so Will be the Fruit

"It has been a pleasure serving as Region I director of institutions. I have made many friends over the years and wish you and the employees of the department much continued success," is what Allen Clark, 40, director of 18 North Florida prisons, wrote to Crosby when he resigned after 16 years with the FDOC and without explanation on August 30. It didn't take long, however, for the reasons behind Clark's resignation to start filtering out. Clark, a close friend and crony of Crosby, had become the target of a criminal investigation.

Investigating a fight started by Clark in April, Florida Department of Law Enforcement investigators told the victim that Clark and other top FDOC officials are part of a much larger investigation being conducted by a statewide prosecutor.

The Federal Bureau of Investigation and the FDLE have both confirmed that they are investigating the

FDOC, but have declined to specify what the investigations concern. Parts of the whole story have been coming out though.

According to FDLE and Tallahassee Police Dept. records, Clark instigated a brawl at the April 1 party hosted by the Florida Council on Crime and Delinquency (FCCD), the sponsor of a softball tournament for prison guards and employees. Late in the evening, James O'Bryan, 38, a former prison guard whose wife still works for the FCOC with the rank of Major, apparently slipped in a puddle of beer and vomit and fell, accidentally knocking down a woman who worked for Clark at the FDOC regional office. Clark, reportedly, then jumped on O'Bryan and began punching him in the face.

Not to be left out of the violence, two other FCOC employees, Major James Bowen and Colonel Richard Frye, also jumped on O'Bryan, slugging him in the face and kicking him repeatedly in the ribs (as if he was a cuffed and shackled prisoner).

O'Bryan was carried out of the Tallahassee National Guard Armory where the party was being held. He didn't request medical attention.

FDLE investigators learned about the vicious, unprovoked attack on April 4, and on April 13 they interviewed O'Bryan, all but begging him to press charges, according to a recording of the interview. O'Bryan refused to press charges, saying he was afraid the FDOC would retaliate by transferring his wife to another prison far from where they now live. O'Bryan told investigators that Clark was allowed to intimidate people because of his close ties to Crosby.

FDLE investigators implied that they knew that. "Like I said, things go higher than Clark," FDLE investigator Tim Westveer told O'Bryan. "We've been working on this for a long time." The investigators repeatedly told O'Bryan that he should press charges so Clark could be removed from his position. "We know he beats people," Westveer said. "We've got to get him out of the system."

The investigators also asked O'Bryan if Crosby was at the FCCD party. Crosby had refused to comment on the incident, saying only he was at the armory earlier, but was not present when trouble broke out. An FDOC spokesman said Crosby has had no discussions about leaving his position as head of the prison system in light of the ongoing investigations.

Crosby was the warden of Florida State Prison in Starke in 1999 when a gang of prison guards brutally murdered death row prisoner Frank Valdes. Instead of being fired after that incident, however, Crosby was promoted to regional director, then a short while later was appointed by Gov. Jeb Bush to head the FDOC. Both Crosby and Clark had campaigned for Bush in both his runs for governor.

According to reports, Crosby and Clark, looking almost like brothers with their shaven heads, were "very close." Clark has been investigated for numerous incidents before while working with the FDOC, but, as usual in the department, he continued to be promoted until he reached the $94,000-per-year regional director position.

In 1994, Clark was suspended for 60 days for using "inappropriate force" on prisoners, an FDOC euphemism used to whitewash the often brutal beating and other abuse of prisoners. In 1997, Clark was chastised for discussing union issues on the job.

In 1999, Clark was charged with having a kitchen from Florida State Prison installed in his state-owned home and using prisoners to do the work without approval, then lying about it. He was also charged with "inappropriate" use of employee trust funds.

No action was taken, however, and in 2000 Crosby promoted Clark. Then three weeks after Crosby was named head of FCOC in 2003, he again promoted Clark to Warden at New River Correctional Institution. One year later, Crosby promoted Clark to regional director, overseeing all prisons in the state's Panhandle region.

There is speculation that Clark may be being investigated in the steroid investigation also. Some of the guards charged in that investigation also worked at New River CI, when Clark was the warden there.

State investigators recently seized a Jeep and several trailers owned by Clark after serving a search warrant in connection with an investigation into the alleged misuse of prison funds and property. Search warrants were also served at prisons in several North Florida counties where Clark and other FDOC employees kept vehicles and other items allegedly made by prisoners. FDLE investigators told witnesses that a statewide grand jury is investigating Clark and others because of crimes that have occurred in several North Florida counties involving FDOC personnel.

Some of the most recent allegations against Clark (again) involve the misuse of employee trust funds that raises money from vending machines and using prisoners as shoeshine boys and to wash personal cars.

Amazingly, considering Clark is a high school dropout who only has a GED and with his past record, in 2001 Gov. Bush appointed him to serve on the Judicial Nominating Commission that selects judges to serve in six North Florida counties.

Several prison employees have been accused or charged with embezzling recycling money and reportedly the investigation has expanded to look at using prisoners to perform personal services for FDOC staff and FDOC employees stealing state property.

Former Prisoner Blows Whistle

In October it was revealed that state law enforcement agents from the FDLE have seized vehicles and trailers from five other prison administrators and guards besides what was seized from Clark.

Search warrants served in six North Florida counties exhibit a new phase in the ongoing investigations by the FDLE and FBI that has the Corrections Department and its leader, James Crosby, under intense scrutiny.

"The items that have been seized in connection with the search warrants are possible evidence for use in court," said FDLE spokesman Tom Berlinger.

In addition to the Jeep seized from Clark, pickup trucks were seized from Colonel Richard Frye (who allegedly assisted Clark in beating up O'Bryan at the FCCD party), who works at Apalachee Correctional Institution, and from Lamar Griffis, assistant warden at Santa Rosa Correctional Institution located near Pensacola.

Frye, 36, joined the FDOC 12 years ago and experienced a meteoric rise through the system, becoming a colonel, the highest ranking correctional officer position in the FDOC, faster that many guards are promoted to sergeant. That despite serious questions about his ethics. In 1997 Frye was suspended for 30 days for destroying evidence, giving false testimony and other violations. On appeal, however, he was cleared and got full back pay for the 30 days. In Frye's most recent job evaluation, in July, his supervisor Al Solomon (who was named by Crosby to replace Clark as interim regional director in September) gave Frye outstanding marks, stating he is a "loyal and dedicated employee" and a "proven leader."

Details from the search warrants, obtained as public records, show investigators were interested in examining the personal vehicles' parts for repairs that may have been done using prison labor or state equipment.

At the center of the October revelations is evidence given by an ex-prisoner who told investigators that he was required to build trailers in a prison welding shop for the personal use of prison guards at Florida State Prison and New River CI. The ex-prisoner's name is not being publicly revealed out of fear for his safety.

The ex-prisoner said he built a utility trailer for prison guard Lt. Bobby Ruise who told him he needed it to transport lawn equipment. The ex-prisoner kept a journal of the work he did and told investigators that he welded his initials in all the trailers he built for guards.

FDLE agents confirmed that Ruise has a homemade trailer registered with the state DMV. However, when Ruise was asked about allegations of his owning a trailer made with state-owned property he told a reporter, "I don't know anything about it. I don't even own one."

Two other search warrants were issued in Union and Bradford counties for similar utility trailers, but the identities of the FDOC employees served with the warrants could not be confirmed.

The affidavit says FDLE investigator Travis Lawson and FBI Special Agent Alexander McDonald were directed to *the ex-prisoner* by Theodore Foray, a former FDOC prison guard, who admitted he had ordered that ex-prisoner to remove FDOC ID numbers from a fiberglass ladder. The ladder disappeared, the affidavit states.

Foray, 45, of Lake Butler and another former prison guard, Paul Lamar Miller, 32, of Starke, are among several prison employees accused in June of this year of conspiring to steal state property and embezzle money from a prison recycling program. The U.S. Attorney's Office said the men worked at the Florida State Prison / New River CI recycling program and sold bales of crushed aluminum cans and other materials to a company in Jacksonville.

Defending the Indefensible

As of mid-October eight FDOC officers had been charged with felonies, and with FDOC Secretary James Crosby under increasing heat and the target himself of a statewide grand jury probe and related federal investigation, he finally spoke out trying to defend his leadership of the prison system.

Crosby said the investigation is a quagmire that could drag on for months and cast a shadow over Florida's prison system, the third-largest prison system in the nation.

"I don't know how you get out of that quagmire," Crosby said. Crosby declined to discuss matters still under investigation, but dismissed criticism of himself and the FDOC, much of it on Web sites, as the rantings of a small group. He pointed to his close alliance with the Police Benevolent Association, the Florida union for police and correctional employees, as disproving a perception spread by critics that he rules with an iron fist.

"If we were ruling through fear and intimidation and that was our modus operandi, do you really believe the PBA would be out there supporting me like they do," Crosby asked.

Ron McAndrews, a retired federal and state warden and critic of Crosby's, said the PBA's support of Crosby only proves on thing. "Crosby's made some deals with the PBA. Instead of fighting the PBA and representing the state as he's hired to do, he's wheeling and dealing behind the scenes with the PBA, or they wouldn't be speaking so highly of him," McAndrews said.

McAndrews, who said he once refused to hire Allen Clark at Crosby's urging, also said about Crosby, "His biggest failure is spreading cronies in key positions."

Crosby praised Clark as a "go-getter," with plenty of leadership potential. He said his and Clark's friendship began at Lancaster CI when he was a rookie warden and Clark was a young prison guard. Clark, when promoted to warden himself by Crosby, is a devoted softball player, he had a team called the Blue Wave at New River CI. (See related article about FDOC softball teams in this issue of *FPLP*.)

Crosby defended the prison culture's seeming obsession with competitive softball, saying it provides a

sense of community and a way to relieve the stress of long days "inside the fence," in high security prisons, surrounded by "hardened criminals."

Crosby, a former Democrat who became a Republican to campaign for Gov. Jeb Bush during elections, said his years in the prison bureaucracy did not prepare him for the politically-charged Tallahassee environment, with its cut throat struggle between lobbyists for lucrative contracts with Florida's prison-industrial complex.

"I thought it would be more about running institutions," Crosby said about his $124,000-a-year job as head of the prison system. "But it's turned into being about procurement, politics and policies."

The procurement of services and goods and awarding contracts has been a problem for Crosby. He hasn't had the willpower to resist going to dinners and social events with vendors and lobbyists eager to influence him to gain access to some of the $2-billion-a-year FDOC taxpayer-funded budget. The Legislature and state auditor general have criticized Crosby's awarding of some big money contracts. (See related article in this issue of *FPLP*.)

On Oct. 17 Crosby held a two-day meeting with dozens of wardens from around the state at Wakulla CI. The meeting came only five days after Gov. Bush reportedly told Crosby to buck up, show strong leadership, and advised him to: "Don't let the 'blanks' let you down."

A spokesman said Crosby told wardens not to be distracted by a recent series of news articles critical of the FDOC. "He spoke to the wardens, and let them know they're appreciated," said FDOC spokesman Robby Cunningham.

According to Crosby's appointment calendar, obtained by the *St. Petersburg Times* with a public records request, Crosby met in his office on Apr. 27 with FDLE inspector Rich Lober. Asked if he could say what that meeting was about, Crosby said "No."

[Sources: *St. Petersburg Times, The Gainesville Sun, The Tallahassee Democrat, Herald Tribune, Ocala Star-Banner, Miami Herald, Orlando Sentinel.*] ■

Lobbyist Ties of FDOC Secretary Scrutinized

Florida Department of Corrections' Secretary James Crosby was placed on the hot seat in September and October '05 when he found his ties to lobbyists seeking business with the state's prison system being closely scrutinized and questioned.

Crosby, 53, apparently ignoring the fact that his actions would, at the least, create an appearance of impropriety, has been going to concerts, dinner meetings and sporting events with lobbyists and executives from companies trying to obtain multimillion dollar contracts with the FDOC. Questions being raised involve: Why, if such contracts are required by law to be let by competitive bidding, with the contracts going to the lowest bidders, are lobbyists and company executives so interested in trying to obtain a favorable status with the head of the FDOC? Even Crosby does not seem to be able or willing to answer that question.

In September Crosby was forced to admit that he has went to several social events with Don Yaeger, a *Sports Illustrated* writer who also happens to own a lobbying firm. But Crosby claims that he always paid his own way and that he and Yaeger do not have a social relationship.

Crosby acknowledges that he took his wife to see the rock group Aerosmith, country singer George Strait, and a rodeo at Yaeger's skybox at the Leon County Civic Center. And he also admits that he went to a Florida State-North Carolina State football game and FSU-Florida baseball game with the lobbyist. Crosby said Yaeger invited him to the events, but says he obeyed state ethics policy requiring him to repay the lobbyist. He says he has the canceled checks to prove it.

Crosby also admitted that he is aware of ethic rules prohibiting contact with venders and agency staff while a bid award is pending, except through official channels. Crosby said he followed that rule since he and Yaeger never discussed state business at any of the events they attended together. At the time Crosby and Yaeger were hobnobbing Yaeger was representing a Miami firm, Medical Care Consortium, which is affiliated with Armor Correctional Health Services, a Broward County firm interested in obtaining a lucrative South Florida prison contract. The contract is for providing medical, dental, pharmacy, and mental health services to 17,000 prisoners in South Florida for five years. A deal worth more than $100 million. Yaeger's clients wanted a piece of that action, but others did too.

Wexford Health Services, a Pittsburgh firm that's had the South Florida prisons' health care contract since 2001, and Yaeger's clients' biggest competitor, wasn't interested in sharing any of the contract. But Wexford has been having problems fulfilling its part of the contract. Things got so bad the FDOC threatened to impose monetary fines against Wexford, but a state official monitoring the contract said Wexford had made substantial improvements in July. By then, however, the Legislature had placed a provision in the new state budget requiring the contract to be rebid in October. That started a scramble among lobbyists for other health care companies, including Yaeger, to try to get all or part of the contract.

The competition was so fierce the FDOC let it be known they were considering splitting the contract into

four parts, with four different companies able to bid on and get a part of the split-up contract. No doubt Crosby and his contract staff suddenly found themselves being wooed by lots of lobbyists and enjoying the perks they were willing to provide to gain influence.

Once legislators learned about what was going on they were outraged and the FDOC was forced to drop its plan to split up the health care contract. Instead, Crosby has directed his staff to redo the bids and only one company will be hired to fulfill the contract through competitive bidding, with the lowest bidder awarded the contract.

Rep. Gus Barreiro, R-Miami Beach, who chairs the House committee overseeing prison spending, said that was only part of the problem, that lawmakers have found serious deficiencies in other prison contracts, including one for repackaging pharmaceuticals in prisons.

Apparently legislators knew more than they said. In October a high-ranking FDOC health care official, John Burke, suddenly quit his $95,000-a-year job amid questions about his past ties to the company that has the contract to package medicines for prisoners.

In his resignation letter Burke noted "increasing turmoil" over his past work for TYA Pharmaceuticals of Tallahassee and another company, MHM Services of Vienna, VA, as a reason for his resignation. "I have done nothing improper, unethical or illegal during my tenure now or before," Burke wrote. Burke had disclosed his past ties to those companies on a financial disclosure form filed with the state's Commission on Ethics, but Crosby and his crew claim Burke never told them about his past ties to those companies. Both of those companies were involved in the frenzy to get part of the split-up health care contract.

While all that was going on, in October another revelation came to light about Crosby.

In July of this year Crosby, over dinner in midtown Manhattan, met with two executives of another company seeking a multimillion-dollar contract with the FDOC. The company, G4S Justice Services, later won a three-year contract with the FDOC to monitor sex offenders in half the state. Reportedly, it won because it had the lowest bid.

Crosby's dinner with the G4S executives in New York came while Crosby was there at a nationwide convention of probation and parole officials. He said no ethic rules were violated because he paid for his own tab and the contract wasn't discussed.

"You can't live in a vacuum and say you're never going to talk to anybody," Crosby said. "Right up front, I said, 'Don't jeopardize your contract, folks.'... Mainly they wanted to get to know me." Crosby had become a very popular fellow.

G4S sales director Leo Carson, who was at the dinner with Fiona Walters, the company's top executive, said it was just a casual get together. "The first thing out of our mouths was, 'We want to avoid this topic, for the obvious reason. Agreed? Agreed.'"

Those revelations have increased the focus on Crosby and the FDOC with the prison system already under investigation for allegations ranging from illegal steroid trafficking to theft of state property, using prisoners to perform personal services for employees, hiring phantom employees to play softball and mishandling recycling grants.

FDOC spokesmen have repeatedly said Crosby is not even considering stepping down as head of the prison system, despite the scandals that keep increasing. Gov. Jeb Bush has said Crosby is doing a fine job.

Crosby is not the first high-ranking state official to get heat from hanging with lobbyists. Last year Jerry Regier, head of the Department of Children and Families, was forced to resign after he and aides went to events, sometimes at their own expense, as guests of Yaeger and other lobbyists. Why Regier would be forced to resign but Crosby would not, for doing essentially the same thing, doesn't make much sense. Perhaps lower ethical standards are expected of FDOC officials. ■

FDOC Captain Found Dead at Garbage Dump

A Florida Department of Corrections (FDOC) prison guard facing accusations that he raped a fellow guard was found dead at a North Florida prison October 4, 2005.

Capt. Keith Davison, 39, was found dead in his Dodge pickup truck at a trash dump at Union Correctional Institution, near Raiford, Florida. Union CI is located only a couple of miles from New River Correctional Institution where Davison worked.

Davison had been fired October 3 by New River CI warden Michael McRae after he had admitted using a visitor's suite at nearby Florida State Prison's bachelor officer quarters to have an unauthorized party.

In the letter firing Davison for conduct unbecoming an officer the warden noted that, "You also engaged in inappropriate behavior with a subordinate employee while at this location." Bradford County Sheriff's Lt. W.H. "Bear" Bryan confirmed that his department was investigating the alleged rape of another guard but would not discuss details of the death investigation being handled by neighboring Union County Sheriff's Department.

Union County officials said that Davison died of a gunshot wound to the head, apparently a suicide.

Davison had worked with the FDOC since 1989, most recently at New River CI, which is across the highway from Florida State Prison. New River CI has been a focus of state and federal investigations recently

involving steroid trafficking and use among prison guards, some of whom also worked at New River CI. (See related article in this issue of *FPLP.*)

Davison left behind a wife and two children. ■

FDOC's Softball Frenzy: Phantom Employee Paid to Play Ball

On October 4, 2005, agents from the Florida Department of Law Enforcement arrested Mark Michael Guerra, 33, in Sneads, a community in Jackson County in North Florida.

Guerra was charged with grand theft for accepting $1,247 as salary for a library assistant's job at Apalachee Correctional Institution when all he actually did was play softball for a prison employee team during the (FDOC) Secretary's 24th Annual Softball Tournament in Jacksonville during May of this year.

With Guerra's help, the Apalachee CI team won the tournament, according to an FDLE affidavit. And James Crosby, FDOC Secretary, was there cheering the Apalachee CI team on with its phantom employee.

FDLE investigators say Guerra, the husband of a prison employee, was "hired" with the knowledge of Col. Richard Frye and Col. Winfred Warren, top-ranking officers at the prison who also coach the staff softball team.

An employee who supervised the prison library where Guerra was supposed to work told investigators that she never met him and he never showed up to work in the library, but that she filled out his time sheets because she feared that if she didn't she would lose her job unless she cooperated with Col. Frye. That employee was not charged even though she was an accessory to the theft and did not claim that Frye or anyone else actually threatened her or her job if she didn't falsify the time sheets. It is not known whether she was on the softball team, was a cheerleader, or just a typical FDOC employee going along with the culture of corruption that permeates the Florida prison system.

Guerra, was paid May 15 and May 27 for four weeks "work." The money he was paid came from the FDOC's taxpayer-funded $2-billion-a-year budget. Before 2003 when the Inmate Welfare Trust Fund (IWTF) was abolished and its money turned over to the state General Revenue Fund, Guerra would have been paid out of the IWTF as a library assistant. And perhaps no one would have been the wiser. Prior to the IWTF being "appropriated" by the Legislature the state auditor general declined several requests from Florida Prisoners' Legal Aid Organization, Inc., that the IWTF be audited. Prison libraries have been a prime target by corrupt FDOC staff out to siphon off money for unauthorized purposes for years.

Guerra told investigators that he was "hired" because he had played minor league baseball and played for a team in Venezuela for about five years.

Mike Hanna, FDOC chief of staff, said the department is cooperating with the FDLE on the investigation. "This kind of behavior is unacceptable and will not be condoned," Hanna said, after Guerra was arrested. Hanna said he does not know whether or how many other phantom employees have been hired to play softball. It is not known if the FDLE is looking at IWTF records where the answers may lie.

Depending on Guerra's past history he may only receive probation or some other community sanction. If so, he could then to work on another prison softball team, with a promotion to full "librarian" perhaps. After all, that is what the FDOC normally does with prison guards and other prison officials when they are caught violating the law. ■

Florida's Death Penalty: State High Court Says Fix it or Lose it

TALLAHASSEE—During October the Florida Supreme Court sent the state legislature a clear message concerning the death penalty as applied in Florida: Either fix it or lose it. If lawmakers don't act on that message, the next message they get may be a U.S. Supreme Court decision finding Florida's death sentencing procedure to be unconstitutional, opined the Court.

That possibility has existed since 2002 when the U.S. Supreme Court held in an Arizona case that juries rather than judges must be the ones to decide whether there are aggravating circumstances that warrant death instead of life in prison. Following that decision most states that have death penalties, but whose laws didn't comply with the decision, acted to change their laws. But not Florida. Though different than the Arizona law that was struck down, Florida's law is considered vulnerable because it allows a jury to recommend a death sentence by less than a unanimous vote and the judge can impose death even when the jury doesn't call for it.

The Florida Supreme Court has been reluctant, however, to strike down its own state's law and the U.S. Supreme Court has yet to accept a Florida appeal that presents a clear-cut challenge to the state's law. However, there are such cases working their way up to the highest court.

The Florida Supreme Court took the opportunity of a procedural appeal in a Pasco County murder case in October to urge the Legislature to act now "to require some unanimity in the jury's recommendations." Florida is now the only state that doesn't.

Of the 38 states with the death penalty, the court noted, 35 require at least that the jury vote unanimously that aggravating factors exist. Most also require, as does the federal government, that the jury must unanimously vote to recommend the death penalty.

"Many courts and scholars have recognized the value of unanimous verdicts," wrote the Florida Supreme Court.

New death sentences are already at a historic low because judges and juries now recognize that the alternative, life without parole, protects society without risking execution of an innocent person. With Florida leading in the number of people who have been exonerated years after wrongful convictions, some who came very close to being executed, if law makers don't do something its only a matter of time before Floridians will have a provable wrongful execution on their conscience. ■

Closing the DNA Exoneration Door

by Sandra Arnold

Over the past few years those police and criminal prosecutors who willingly manipulate the criminal system, fabricate evidence, suborn perjured testimony and otherwise pervert justice to obtain convictions, have increasingly been being exposed for what they are. The spate of exonerations from DNA testing across the country, freeing innocent people from prison, where many spent 10, 15 or even 20 or more years, has shown the public just how fallible the system is. It has also shed light on just how corrupt some supposedly good guys really are, where many of the convictions that were later proven to have been wrongfully imposed with DNA testing have also been found to have been obtained through police and prosecutor misconduct. So what should be done about it? Well, stop the DNA exonerations, of course.

Although the U.S. Constitution embodies within it the principle that all persons have a right to prove their innocence at any time, even after having been convicted of an alleged crime, there are those in power who have been working hard to make such right meaningless. To those people, justice is what they say it is and justice should expire when they say it should.

In September '05 Luis Diaz became one of over two dozen Florida prisoners exonerated by DNA testing. Florida has the highest number of such wrongful convictions in the nation. Since 2000 there have been 99 such exonerations nationwide.

But the 2001 law that let Luis Diaz get DNA tested to set him free after 26 years in prison for rapes he didn't commit won't help free many more. It expired October 1. After that date Florida prisoners can no longer motion the courts for post conviction DNA testing. Now, the only hope left for the wrongfully convicted in Florida will be to ask the prosecutor, who did everything possible to send them to prison, to reopen their case and allow DNA testing. The odds of that happening are slim to none.

"It is quintessentially un-American for the very people who may have caused this kind of miscarriage of justice to be the people who decide whether DNA testing occurs," said Jenny Greenburg of the Florida Innocence Initiative.

Not satisfied with that almost insurmountable obstacle, the four-year window in Florida that required the preservation of DNA evidence for older cases also expired October 1. And unlike in California, where last year a law was passed requiring the preservation of evidence throughout a person's imprisonment, in September Florida Gov. Jeb Bush mandated that law enforcement agencies only have to give a 90-day notice before destroying such evidence. That's a sure way to reduce exonerations that embarrass the state.

And it's not only Florida. Right now a bill is working its way through the U.S. Congress that threatens to prevent many prisoners from filing even one last-ditch petition in federal court. Already Congress has adopted so many restrictions on prisoners seeking to file a petition for federal habeas corpus (which the U.S. Constitution states must always be available) that one would have to be a legal scholar just to figure them all out. Something prisoners, with low literacy rates and poor to boot, are not.

One has to wonder why Florida, with its high number of DNA exonerations, would now want to close the DNA testing door. Maybe in Florida it's not really about justice. After all, so what if a few innocent people spend their lives in prison, or are even executed, so long as the status quo is preserved? ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

A common fee arrangement with an attorney for a criminal case consists of a one -time payment of a flat-fee, for which the attorney will perform all services necessary, up to and including a trial. The flat-fee arrangement is usually a fair contract which will serve to ensure that a criminal defendant receives sufficient representation while at the same time imposing a cap on the amount that is spent on the case. Sometimes, though, if the fee agreement is not properly structured, it can work to the disadvantage of the client. Some attorneys' fee arrangements provide for a flat-fee payment which will cover the attorney fees as well as any expenses which are incurred in conducting the defense. This type of agreement creates a serious conflict of interests which could work to the detriment of the client's case. Inherent in such an arrangement is the temptation for the attorney to cut corners on the preparation of the defense in order to limit the amount of the flat fee which will be spent on investigation of the case, deposition costs, expert witness fees, etc. In other words, the less money that is spent on client expenses means more money which goes toward the attorney's fee.

A flat fee retainer arrangement which also encompasses client expenses is an actual conflict of interests which may present a viable postconviction issue for a collateral attack on a judgment and sentence. Implicit in the Sixth Amendment of the United States' Constitution's guarantee of the right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, An actual conflict of interest on the part of trial counsel can impair the performance of a lawyer and ultimately result in a finding that the defendant did not receive effective assistance of counsel. Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997); Cuyler v. Sullivan, 446 U.S. 335 (1980). To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must establish both: (1) that his attorney had an actual conflict of interest; and, (2) that said conflict affected the lawyer's performance. Herring v. State, 730 So.2d 1264 (Fla. 1998).

If the issue of counsel's actual conflict is preserved and raised on direct appeal, the failure of a trial court to conduct an inquiry and appoint separate counsel requires that the resulting conviction automatically be reversed. Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997); Holloway v. Arkansas, 435 U.S. 475 (1978). A different rule is applied, however, if the issue of an attorney's conflict of interests is raised in a post conviction proceeding. When ineffective assistance of counsel is first asserted in a postconviction motion, the defendant must show that the conflict impaired the performance of the defense lawyer. Cuyler v. Sullivan, 446 U.S. at 348. Even then, though, "it is not necessary to show that counsel's deficient performance resulting from the conflict affected the outcome of the trial. **As the Court held in Sullivan, prejudice is presumed.**" Lee v. State, 690 So.2d at 669 (Fla. 1st DCA 1997).

Therefore, if an improper fee arrangement (or any other situation which creates an "actual" conflict of interests) was present, there may be an available postconviction attack on the judgment and sentence. If such an issue is available, it should be raised in a Florida Rule of Criminal Procedure 3.850 Motion for Postconviction Relief. It is important to point out both: (1) that an actual conflict of interests existed; **and**, (2) that the conflict of interests impaired the

performance of the defense attorney. If issues of failure to properly prepare a case, investigate a case, or other like deficiencies exist, these issues should be argued to show that the attorney's performance was adversely affected by the conflict of interests. It is important to understand that even though the conflict of interests creates a presumption of prejudice, said presumption is not irrefutable. Obviously, the conflict issue becomes stronger with more facts demonstrating prejudice to the defendant. Therefore, it is important to argue any facts which demonstrate how the attorney failed the client as a result of the conflict.

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. ■

- FLORIDA PAROLE - Lawsuit Claims Sunshine Law Violations

by Teresa Burns Posey

TALLAHASSEE—A lawsuit filed in September accuses Monica A. David, Chairman of the Florida Parole Commission (FPC), of violations of the state's open public meetings and records laws. The ramifications of this lawsuit could be particularly damaging to the state agency, that many feel is already reeling on the ropes, where intentional violations of Florida's open public meeting laws, commonly termed Sunshine Laws, and violations of public records laws, are criminal offenses. If successful, this lawsuit, which does allege intentional criminal acts by Monica David, could result in David joining former FPC Chairman Jimmie Henry in prison. At a minimum it is going to result in changes at the Commission.

The lawsuit was filed September 12, 2005, in the Leon County Circuit Court by Erica Flowers, a resident of Orlando, Florida. For over 10 years the FPC, which is responsible for deciding parole issues and that conducts clemency investigations as part of the restoration of felon's civil rights process in Florida, has provided false and misleading information about how and where to attend FPC public meetings, obtain public records, and about the commission's organization and operations, according to Flower's lawsuit.

The suit specifically names the current chair of the FPC, Monica David, as being statutorily *responsible and accountable* for having intentionally allowed erroneous information to remain in the commission's official administrative rules that misinforms and actually obstructs the public's access to FPC public meetings and public records.

Flower's, who asserts standing to sue David as a taxpayer and member of the public, claims in the lawsuit that David has been a parole commissioner for over five years and chairman of the commission for over two years, yet has failed to take any action to ensure that the commission's rules provide correct information. The lawsuit identifies numerous rules in Chapter 23, Florida Administrative Code, which contains the FPC's official rules, that no longer are correct and that do not comply with currect law. None of the commission's rules have been updated since 1994, Flowers claims. And in several places the rules direct the public wishing to attend or participate in FPC public meetings or wishing to obtain FPC public records to an address that the FPC moved from in Tallahassee over 10 years ago.

The FPC's rules, that are on file with the Department of State, also provide false and outdated information about how the commission is organized and operates, Flowers says in her complaint.

As chairman of the Parole Commission, David, according to Florida law, is also the agency's chief administrative officer and responsible for ensuring that the agency's rules provide accurate and current information to the public concerning public meetings and records and about how the agency is organized and operates.

David, the lawsuit states, as a parole commissioner and responsible for all FPC administrative functions, has read the agency's rules and knows that they provide false information that would prevent members of the public who rely on them from attending FPC public meetings, from obtaining public records and from knowing how the agency is currently organized and operates. Flowers claims David's intent in not updating and correcting the rules is to limit and obstruct the public's knowledge about the commission's activities to limit criticism of the controversial agency.

The only alternative, Flowers asserts, is that David has never read the rules of the agency that she heads and has no idea they are seriously outdated or even contrary to the law in several instances. That scenario, which could save David from potential criminal charges, would raise serious questions about how David has been running the agency, making parole decisions, etc., if she doesn't even know what the agency's rules require her to do, claims Flowers.

Flowers, who states she was obstructed from attending and participating in FPC public meetings and from obtaining public records when she relied on the erroneous information in the FPC's rules, is asking the court to declare that the rules violate Florida's Sunshine and public records laws and that David has herself intentionally violated those same laws.

Earlier this year, dissatisfied with the job it has been doing, the Florida House voted unanimously to abolish the parole commission, turn its few remaining parole duties over to volunteer, regional parole panels and its clemency investigation responsibilities over to the governor's clemency office. That legislation, however, stalled in the Senate, which did agree not to fund any increase in the FPC's budget this year and to reconsider the House's abolishment legislation during the 2006 legislative session. (See: *FPLP*, Vol. 11, Iss. 2, "Florida Parole Commission Escapes Abolishment, At Least for One More Year," pg. 18.)

David was appointed to the FPC chair position in 2003 after the last chairman, Jimmie Henry, was forced to resign and later charged, convicted and sentenced to 3 years in prison for gross misuse of FPC and taxpayer funds. Since taking over as head of the commission, records show that David has focused more on using the position to advance her own ambitions while neglecting her FPC duties and responsibilities, claims Flowers.

"It's ridiculous. Here's an agency that should have been abolished ten years ago, that the legislature intended to abolish ten years ago, still hanging in there by faking that it still serves some useful purpose. The little that the Parole Commission does do could easily be done by other existing agencies or offices, at much less cost and waste to taxpayers," Flowers said in an interview with *FPLP* staff. "When I discovered how out of date the commission's rules are I was stunned. I understand now why so many people believe it's time to get rid of the commission as it exists for something new. Incompetence only breeds more incompetency."

Florida Prisoners' Legal Aid Org., Inc. (FPLAO), will be assisting Flowers with her suit as it goes forward. Staff from the FPLAO Parole Project distributed a news release concerning the suit to every state legislator and several media outlets in mid-September. *Erica L. Flowers v. Monica David, Chairman, Florida Parole Commission*, Case No. 2005-CA-002194, Second Judicial Circuit Court, filed 9/12/05.

[Editor's Note: Updates on this case will appear in *FPLP* as it proceeds. FPLAO Parole Project staff expects more lawsuits to be filed against the Parole Commission in coming months. Stay tuned. – bp] ■

Parole Commission Jockeys for Legislative Influence

Earlier this year, shortly after the regular legislative session in the Spring that had the state Legislature seriously considering the complete abolishment of the Florida Parole Commission (FPC), the commission's chairman, Monica David, announced the appointment of Kurt Ahrendt as Director of Operations of the FPC effective July 26, 2005. Ahrendt replaced Andrea Moreland as FPC operations chief. Moreland moved to a position with the Department of Financial Services, Securities and Banking Division.

Ahrendt was previously employed with the FPC as an assistant general counsel from 1984 through March 1997 and is therefore part of the FPC culture. More importantly, perhaps, with the Legislature scheduled to again consider abolishing the commission during the 2006 legislative session, Ahrendt, after leaving the commission in 1997 worked for the Legislature as a council attorney and staff director for the House of Representatives. Before coming back to the commission he was Policy Chief for public safety issues in the Governor's Office of Policy and Budget. ■

NEWS IN BRIEF

FL – In early September '05 Allan Duffee, former director of the Florida Correctional Privatization Commission (CPC) that was abolished by state lawmakers in 2004, was indicted by federal authorities for fraud. Duffee, at arraignment, pleaded not guilty to the accusation that he skimmed almost $225,000 from a maintenance fund. For more information about the controversial CPC, which was set up to oversee privately-operated prisons in Florida, but that ended up working with private prison companies to bilk taxpayers: See *FPLP*, Vol. 10, Iss. 6, pg. 4, and Vol. 11, Iss. 4, pg. 9.

FL – In Sept. '05 the Florida Supreme Court held that ex-prisoners can be held in custody while the state appeals decisions by judges against detaining them as violent sexual offenders under the Jimmy Ryce Act. The Ryce Act allows the state to indefinitely hold convicted violent sexual offenders after their prison sentences are completed for treatment and public protection.

FL – During Aug. '05 Duval Co. Chief Circuit Judge Donald Moran held that the first graduate of the state's treatment center for sexual offenders will continue to be held indefinitely. Moran rejected a finding from the Florida Civil Commission that Doug Carlin, 50, was ready to be released from the Florida Civil Commitment Center in Arcadia. Carlin was convicted of raping a woman in Jacksonville in 1983. Carlin's attorney, Mark Miller, said his client did everything asked of him in five years of treatment and was promised that he would be released from civil commitment to continue treatment on an outpatient basis. Miller said he will appeal Moran's continued confinement of Carlin to the 1st District Court of Appeal.

FL – A veteran inspector with the Florida Department of Law Enforcement, Florida's version of state police, was arrested and charged Oct. 4 with 50 counts of criminal possession of child pornography. Raymond Meresse, 58, who was awarded a Bronze Star in Iraq with his Army Reserve unit, was booked into the Leon Co. Jail after his arrest. According to FDLE records, Meresse became the focus of an investigation in early September when the FDLE's internal security system alerted authorities that Meresse was using his work computer to access Internet porn sites. It was later found some of the sites contained child pornography. Meresse was charged with 46 counts of child porn possession, three counts of distributing child porn, and one count of attempting to distribute same. Meresse had received the Bronze Star in June for his performance as wartime group command sergeant major of the 375th Transportation Group and 143rd TRASCOM during Operation Iraqi Freedom.

National – As of Oct. 3 federal prisoners will be charged a $2 medical co-payment fee for requested health care visits, including sick call, after-hours requests to see medical personnel, and medical evaluations. Indigent prisoners (those who have not had at least $6 in their inmate trust fund account for the past 30 days) will not have the co-payment deducted from their accounts.

National – This fall the National Prison Rape Elimination Commission, a nine-member, bipartisan commission studying the impact of prison rape, will hold its third hearing. The hearing comes on the heels of the first-ever statistical report done by the U.S. government on prison rape and sexual abuse. That report, released this summer by the Justice Department's Bureau of Justice Statistics, estimated that in 2004 there were 8,210 incidents of prison rape or sexual abuse in U.S. adult prisons, local jails and juvenile facilities. The report noted that it was impossible, however, to estimate unreported sexual victimization. Statistics substantiated almost 2,100 incidents of sexual violence, with 42 percent happening in state and federal prisons. State-operated juvenile facilities had the highest rate of substantiated incidents at 5.2 per 1,000 youths. The rate was 5 per 1,000 for local and private-operated juvenile facilities. Those rates were almost 10 times higher than those reported in adult state prisons. The report is available at: www.ojp.usdoj.gov/bjs/pub/press/svrca04pr.htm

OH – In Oct. '05 Ohio prison officials said life will change for the state's death row prisoners when they are moved to a new prison soon. Death row prisoners will not be allowed to smoke at the new facility but will be allowed to eat outside of their cells and will have more recreation time. Ohio is moving its death row from Mansfield Correctional Institution to a maximum-security prison in Youngstown to save money. Prison officials refused to say when the move will occur for security reasons.

WA – A Washington man turned himself in to Bellingham police during Sept. '05 for the murder of 2

convicted child rapists. Michael Anthony Mullen, 36, told police he picked his victims—Hank Adolf Eisses, 49, and Victor Manuel Vasquez, 68—from a sheriff's Web site that list the addresses of convicted sex offenders. Both men, who live together, had been shot in the head execution style. They were found dead hours after a man claiming to be an FBI agent showed up at their apartment and told them they were on an Internet "hit list," a witness told police. Days after the murders an anonymous letter was sent to a local paper, the Bellingham Herald, claiming responsibility for the murders and threatening to kill other sex offenders living in the area.

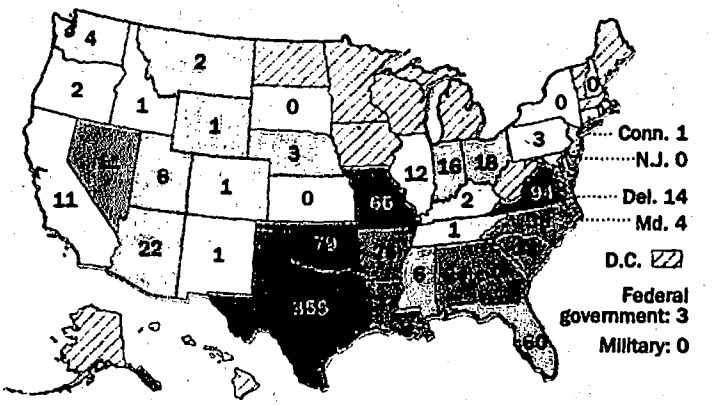
WY – A second former jail detention guard in Wheatland was charged with having sex with two female prisoners and abusing a third at the Platt Co. Jail in September '05. Glenn Durham, 37, was placed on $10K bond and released on his own recognizance after being charged. Former jail guard Jeremy King also faces charges of abusing a female prisoner. ■

Data on death row

Since the US Supreme Court reinstated the death penalty in 1976, almost 1,000 executions have been carried out. The map below shows the number of executions that have occurred in each state, and the shading shows the rate of executions.

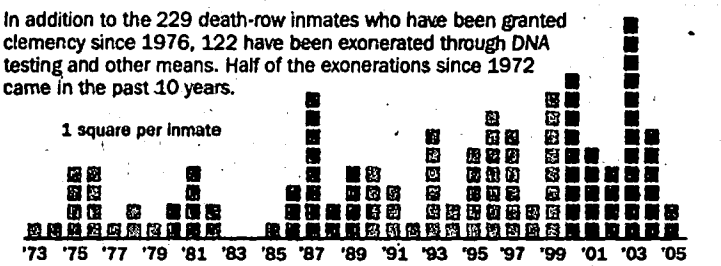
Execution rate per 1 million population

None | 0.2 to 0.9 | 1.6 to 3.4 | 4.2 to 9.4 | 11.5 to 16.9 | 22.4 | No death penalty

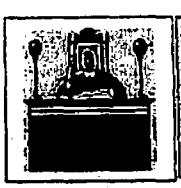


Exonerations

In addition to the 229 death-row inmates who have been granted clemency since 1976, 122 have been exonerated through DNA testing and other means. Half of the exonerations since 1972 came in the past 10 years.



SOURCE: Death Penalty Information Center



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.

U. S. APPEALS COURT

Howell v. Crosby, 18 Fla.L.Weekly C691 (11th Cir. 7/6/05)

The main issue this case pointed out was that attorney negligence is not a basis for equitable tolling under 28 U.S.C. section 2244(d)(2), when filing a petition for a writ of habeas corpus.

Paul A. Howell, a Florida prisoner, argued that the district court had erred in dismissing his petition as untimely. He conceded that he did not file his petition within the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. section 2244(d)(1). However, he argued that he was entitled to equitable tolling under section 2244(d)(2). He contended that the statute of limitations should have been tolled because his private attorney that was appointed to him during his state postconviction proceeding failed to file a petition for state postconviction relief within one year after Howell's conviction and sentence became final.

"Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." See: *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)

In Howell's case, his sentence became final on June 26, 1998, when the Supreme Court of the United States denied his petition for a writ of certiorari. Howell had one year from that date to file a petition for a writ of habeas corpus in a federal district court. A properly filed motion for State postconviction or other collateral review would have tolled the federal statute of limitations. See: 28 U.S.C. section 2244(d)(1)(A), (d)(2). On December 21, 1998, the Circuit Court of Jefferson County, Florida, appointed an attorney to represent Howell in his state postconviction proceeding. On March 19, 1999, that attorney filed a motion for an extension of time within which to file a petition for postconviction relief. That motion was granted, and on August 30, 1999, more than two months after the federal limitations period elapsed, Howell's attorney filed a state petition for postconviction relief. (It was found and was undisputed that Howell's motion for extension of time did not meet the criteria of section 2244(d)(2) as "a properly filed application" for postconviction relief. See: *Artuz v. Bennett*, 121 S.Ct. 361, 364 (2000) ("an application" for state postconviction relief "is properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings); *State v. Boyd*, 846 So.2d 458, 459-60 (Fla. 2003) (distinguishing motions for extensions of time, under Fla.R.Crim.P. 3.050, and those for postconviction relief, under Fla.R.Crim.P. 3.850 .)

The 11th Circuit determined that Howell was not a victim of extraordinary circumstances beyond his control, and the district court did not commit clear error when it determined that Howell was not diligent. As the 11th Circuit has concluded in *Sandvik*; *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000); and *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001), attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline. Therefore, the dismissal of Howell's petition as untimely by the district court was affirmed.

Lawrence v. Florida, 18 Fla.L.Weekly Fed. C884 (11th Cir. 8/26/05)

The main question this case presented was whether Gary Lawrence's petition for writ of habeas corpus' one-year limitations period was tolled during the pendency of Lawrence's petition for writ of certiorari in the United States Supreme Court that challenged the state court's denial of his motion for state collateral review.

The 11th Circuit noted that there was a circuit split on the issue, although it has clearly stated that the limitations period is not tolled during the pendency of a petition for certiorari challenging a state court's denial of postconviction relief. See: *Coats v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000). Under that reason, the 11th Circuit stood firm in its holding and did not find the issue debatable.

FLORIDA SUPREME COURT

Clines v. State, 30 Fla.L.Weekly S525 (Fla. 7/7/05)

This case was before the Florida Supreme Court to resolve a conflict regarding whether the recidivist sentencing statute allows a

court to sentence a defendant as both a habitual felony offender and a violent career criminal. The First District held that it does, *Clines v. State*, 881 So.2d 721 (Fla. 1st DCA 2004), while the conflicting district courts held it does not. See: *Works v. State*, 814 So.2d 1198 (Fla. 2d DCA 2002) and *Oberst v. State*, 796 So.2d 1263 (Fla. 4th DCA 2001).

Section 775.084, Florida Statutes (2002), establishes four categories of recidivists whose sentences may be enhanced. Recidivists within those categories are subject to enhanced punishment, which generally increases with each category. The two habitual offender categories are permissive, where such offenders "may" be sentenced more harshly than otherwise. The other two categories are mandatory. Three-time violent felony offenders "must" be sentenced to mandatory minimum terms, and the violent career criminals "shall" be sentenced to lengthy minimum terms and may also be sentenced to even longer maximum terms, with no eligibility for discretionary early release.

In reviewing the recidivist statute, the State Supreme Court noted that a defendant could meet the criteria of more than one category because of the substantial overlap among the four categories. However, the main issue that the district courts disagreed on was whether the "or" in subsection (4)(f) is disjunctive or conjunctive. If it is disjunctive, as the Second and Fourth Districts endorsed, then trial courts may only sentence a defendant under one category. But, as the First District believes, in that the "or" is conjunctive, defendants may be sentenced under multiple categories.

The First District's reasoning was, had the Legislature used the conjunctive "and", the statute would have been hopelessly confusing. Thus, the reason "or" was used instead, as a conjunctive. This explanation was unpersuasive. The Supreme Court related that it would be a rare circumstance for the word "or" to have the plain meaning "and." If the Legislature had been aware of the grammatical dilemma and had wanted to make its conjunctive meaning clear, it would not have relied on the typically disjunctive word "or" to do so. Instead, the Legislature would have added an explicitly clarifying phrase, such as "or any combination thereof," to the end of the sentence. That it did not evidences that the Legislature either: (a) intended a disjunctive meaning, or (b) simply did not anticipate the grammatical dilemma that was raised in the conflict. The State Supreme Court doubted that the latter was true, "because the dilemma is so readily apparent." Thus, it could not be found for sure that the plain meaning of the word "or" was intended to have a disjunctive meaning, let alone conjunctive.

The word "or" is usually, if not always, construed judicially as a disjunctive unless it becomes necessary in order to conform the clear intention of the Legislature to construe it conjunctively as meaning "and." After a lengthy review of the statutory structure to determine if the Legislature intended it to be conjunctive, it was found that section 775.084 is ambiguous as to the issue. However, the evidence to the word being disjunctive is stronger.

Therefore, the rule of lenity was applied. Florida has codified that rule as follows: "The provisions of this [criminal] code and offenses defined by other statues shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." See section 775.021(1), Florida Statutes (2002). In *Nettles v. State*, 850 So.2d 487, 494 (Fla. 2003), it has been explained that the lenity rule "is applicable to sentencing provisions" if they "create ambiguity or generate differing reasonable constructions."

As a result, the Florida Supreme Court concluded that section 775.084 permits - the application of only one recidivist category to the defendant's sentence. Therefore, the First District's decision in *Clines* was quashed and that case was remanded for resentencing in light of the ruling.

State v. Cregan, 30 Fla.L.Weekly S535 (Fla. 7/7/05)

The issue that the Florida Supreme Court had to resolve in this case was whether a court may grant jail time credit for time spent in a drug rehabilitation facility as a condition of community control.

It was noted that the statute, which governs jail time credit, section 921.161(1), Florida Statute (2003), when read literally, applies only to time served in a county jail awaiting a sentence. But in *Tal-Mason v. State*, 515 So.2d 738, 740 (Fla. 1987), the statute has been interpreted to require credit for time served "in any institution serving as the functional equivalent of a county jail."

Time spent in the control release program or in a drug rehabilitation facility as a condition of probation, is not the functional equivalent of time spent in a county jail. Likewise, it has been held that one does not receive credit for time spent on community control. See: *Young v. State*, 697 So.2d 75 (Fla. 1997), where the decision was supported by the provision under section 948.06(2), Florida Statutes (1993), "[n]o part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced to serve." That was interpreted prior to it being renumbered as section 948.06(3), see ch. 97-299, section 13, Laws of Florida, which established a general rule that "credit cannot be given for time served on community control."

Therefore, the Florida Supreme Court held, as it did in *Young*, that a defendant who violates the conditions of community control cannot be given credit against a subsequent term of incarceration for

time spent in community control. See: section 948.06(3), Fla. Stat. (2003). This prohibition applies when a defendant spends time in a drug rehabilitation facility as a condition of his community control.

FLORIDA APPEAL COURTS

Joseph v. State, 30 Fla.L.Weekly D1489 (4th DCA 6/15/05)

Irique Joseph's case presented an issue of an involuntary plea of no contest based on an inadequate plea colloquy.

Upon being granted an evidentiary hearing from a motion to withdraw plea, Joseph claimed that his counsels failed to do anything and kept pushing him to take a plea or be convicted at trial. Also, while admitting that he signed a plea form, Joseph claimed he did not understand what a plea of no contest meant. He further stated that he had not really listened to the judge's questions: whether he had discussed the case with his lawyer; whether he was satisfied with his counsel's services; whether he understood what was occurring and that by entering a plea of no contest he was giving up his *right to trial*; whether he understood the plea; whether everything was true to which he signed his name, of which Joseph had answered yes. Joseph further asserted at the evidentiary hearing that, although he told the judge during his plea that he had read the plea form or had it read to him, he just signed the form and saw where it indicated the amount of sentence.

It was decided to deny Joseph's motion to withdraw the plea at the evidentiary hearing because it was opined that: Joseph's counsel had fully prepared the case for trial; Joseph was advised of the strength of the state's case, the maximum penalties he faced; Joseph understood what he was doing when he entered into the negotiated plea; and Joseph had stated under oath that he understood the plea and voluntarily entered into it.

Rule 3.172(c), Florida Rules of Criminal Procedure, sets forth certain consequences that can result with the entry of a plea that a trial court should inquire into the defendant in order to determine the voluntariness of a plea. The failure to follow any of the procedures in that rule shall not render a plea void absent a showing of prejudice. See: Fla.R.Crim.P. 3.172(i).

On appeal in Joseph's case the appellate court pointed to *Koenig v. State*, 597 So.2d 256, 258 (Fla. 1992). In *Koenig*, the Florida Supreme Court held that a plea of no contest was deficient where the court failed to inquire into the defendant's understanding of the plea so that the record contained an affirmative showing that the plea was intelligent and voluntary.

In Joseph's case, he signed a form which described in detail the rights he was waiving. Also, in response to the lower courts inquiry, Joseph stated that he discussed it with his counsel. However, there was nothing in the record to demonstrate that Joseph understood the waiver of rights form he signed or what his attorney told him about it. Under *Koenig*, due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, and that the absence of a Rule 3.172(c) inquiry by the court compels remand.

Accordingly, Joseph's case was reversed and remanded to allow him to withdraw his plea and proceed to trial.

McKeehan v. State, 30 Fla.L.Weekly D1528 (5th DCA 6/17/05)

Ronald McKeehan sought mandamus relief in his case from the appellate court, asking it to compel the Circuit Court of Orange County, Florida, to rule on his motion for postconviction relief filed pursuant to rule 3.850. Although his petition was insufficient as a matter of law, the appellate court ordered a response from the state because, "Mr. McKeehan's petition incorporated a letter, purportedly written by his trial counsel, admitting to a variety of professional sins, which, if true, would constitute ineffective assistance of counsel. The state responded that "Mr. McKeehan's counsel denied writing the letter." It was noted that the trial court, in denying McKeehan's motion, concluded that the letter was of "dubious origin" and appeared to have been "cut and photocopied together."

The appellate court stated, "It appeared Mr. McKeehan may have filed a forged letter with both this Court and with the circuit court in Orange County." Consequently, McKeehan's petition was denied.

Furthermore, the appellate court directed its Clerk of Court to provide a copy of their opinion to the State Attorney of the Ninth Judicial Circuit for investigation to determine whether McKeehan had violated any criminal laws of Florida.

[Note: A copy of the forged letter, reduced in size, was shown on page D1528 just below the end of McKeehan's case.]

Isaac v. State, 30 Fla.L.Weekly D1528 (Fla. 1st DCA 6/23/05).

In regards to the non-retroactivity of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this case provided an interesting twist to its applicability to a resentencing after *Apprendi* was decided.

Lemuele Isaac had been resentenced on March 17, 1999, he did not appeal any issue involving that resentencing. A short time later, Isaac was resentenced again: that involved being sentenced under the 1994 guidelines (*Heggs* issue), in response to a rule 3.800(a) motion that was filed. Isaac appealed that resentencing complaining about the lower court's imposition of an upward departed sentence. The appellate court affirmed the

sentencing on July 23, 2002, issuing a mandate on October 10, 2002.

Now, while Isaac's appeal of that resentencing was pending, he had filed his initial rule 3.850 motion in the trial court on November 9, 2000. When the resentencing issue was affirmed (July 23, 2002), Isaac filed an amendment to the still-pending rule 3.850 motion on May 30, 2003, prior to any rulings made on the initial motion. This amendment pertained to the resentencing issue regarding the upward departure. The lower court summarily denied Isaac's rule 3.850 motion and the subsequent amendment as being untimely. Isaac appealed this decision.

On appeal it was found first that Isaac's two-year time limit did not begin to run until the mandate was issued October 10, 2002, from his direct appeal of the resentencing. Thus, both Isaac's initial rule 3.850 motion and the amendment were timely filed.

Regarding the departure issue on appeal, Isaac argued that the reason for a departure that the trial court used, an escalating pattern of criminal activity, is a factual determination that must be found by a reasonable doubt by a jury, and that the trial court had violated his Sixth Amendment right to a trial by jury as explained in *Apprendi*, and clarified by *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

The state argued that *Apprendi* would not apply because it's holding is not retroactive. The appellate court found this to be a valid statement of the law, citing *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002); "however," the appellate court opined, "as *Apprendi* was decided prior to the appellant's resentencing, the trial court was bound by its holding." It was further explained that although the appellate court had previously affirmed Isaac's departure sentence (July 23, 2002, mandate issued October 10, 2002) on the basis *Apprendi* did not apply so long as a sentence does not exceed the statutory maximum set forth in section 775.082, Florida Statutes, the statutory maximum has since been revealed to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." See: *Blakely*, 124 S.Ct. at 2537. Therefore, a departure sentence imposed pursuant to the trial court determining a fact by merely a preponderance of the evidence violates the holding of *Apprendi* as explained by *Blakely*.

In the appellate court's conclusion, it was opined that under the particular facts of Isaac's case, reliance on the law of the case doctrine would be manifestly unfair because the United States Supreme Court made clear that the State of Florida's post-*Apprendi* and pre-*Blakely* interpretation of the phrase "statutory maximum" violated Isaac's Sixth Amendment right to a jury trial. See: *Blakely*, 124 S.Ct. at 2537; *Horton v. State*, 682 So.2d 647, 648 (Fla. 1st DCA 1996) (applying the exception to the law of the case doctrine in a collateral proceeding where [the First DCA] relied on an interpretation of case law that the Supreme Court later held erroneous).

The trial court's summary denial of Isaac's amendment to his motion was reversed and his case remanded for resentencing or for the trial court to refute the *Apprendi* claim with record attachments.

[Note: See: *Galindez v. State*, 30 Fla.L.Weekly D1743 (Fla. 3rd DCA 2005), and noted within this issue of *FPLP*, where the Third District has decided contrary to the decision here in *Isaac*.]

Viglione v. State, 30 Fla.L.Weekly D1598 (Fla. 5th DCA 6/24/05)

The issue involved in this case was whether a trial court erred in summarily denying a rule 3.850 motion which claimed that a defendant being convicted of both kidnapping and false imprisonment, that appeared to be committed against one victim, violates double jeopardy.

On appeal, it was first noted that the trial court relied upon *State v. Smith*, 840 So.2d 987 (Fla. 2003), in denying relief to the double jeopardy claim. In *State v. Smith*, it was held that a defendant could be convicted of both false imprisonment and robbery without violating double jeopardy. That opinion discussed a *Faison* test (*Faison v. State*, 426 So.2d 963 (Fla. 1983)) for determining when a charge of kidnapping with the intent to commit a felony could stand separate from the other charged felonies in which a form of abduction, imprisonment or confinement is inherent in the offense. The Florida Supreme Court held that the *Faison* test was inapplicable to the offense of false imprisonment as that offense, unlike kidnapping, does not contain as an element the intent to commit or facilitate commission of a felony.

The appellate court determined that, although *State v. Smith* stated that kidnapping and false imprisonment were different offenses for purposes of the *Faison* analysis, it did not hold that kidnapping and false imprisonment were different offenses under a double jeopardy analysis.

False imprisonment is a general intent crime, while kidnapping is a specific intent crime. Double jeopardy prohibits separate convictions and sentences for those two offenses if based on the same factual act or occurrence. Thus, the appellate court determined that the trial court's reliance on *State v. Smith* does not conclusively refute the double jeopardy claim in this case.

It was decided to reverse the lower court's denial of the rule 3.850 motion and remand the case for further consideration of the claim. It was further instructed that on remand, the trial court should either set aside the false imprisonment judgment and vacate the imposed sentence for that charge, or attach

documents to show that the two offenses involved different factual acts or victims.

McDowell v. State, 30 Fla.L.Weekly D1636 (Fla. 4th DCA 6/29/05)

Jimmy McDowell had filed a rule 3.850 motion in a lower court claiming, among other issues, that his counsel failed to advise him, at the time he was considering a favorable plea offer, of potential prison release reoffender sentencing. The lower court summarily denied this claim for relief.

On appeal, the state conceded that the claim was legally sufficient and warranted further review. The appellate court agreed, reversed the denial and remanded the case for an evidentiary hearing.

Colon v. State, 30 Fla.L.Weekly D1640 (Fla. 5th DCA 7/1/05)

The issue in this case involved whether a judge's silence as to sentences being imposed in concurrent or consecutive terms is to be interpreted that the imposed sentences are to run consecutively.

At the defendant's sentencing in this case the judge did not pronounce whether the imposed sentences were to run concurrently or consecutively. When the state inquired whether the judge had stipulated this, the judge's response was, "I did not say anything." Likewise, the written sentencing document was silent as to that issue.

In a timely manner, the defendant filed a Rule 3.800(b)(2) motion to correct or clarify his sentencing, arguing that if the sentences are consecutive, the sentences would be illegal because it was not specifically expressed that the court's intent was for the sentences to run in consecutive terms. The lower court denied the motion and that decision was appealed.

The appellate court noted that it was the belief of the lower court's judge that under the statute, section 921.16(1), it stated that if the court was silent on the issue, then the imposed terms are consecutive. That in order for them to be considered concurrent, it would have had to be specifically pronounced that the sentences are to run concurrently.

Contrary to the sentencing judge's belief, however, as the appellate court opined, section 921.16, Florida Statutes, provides that the "*[s]entences are concurrent unless the court states that they are consecutive.*"

As a result, the appellate court decided that the sentences in this case were statutorily required to be concurrent. The lower court's order denying the rule 3.800(b)(2) motion was reversed and the case remanded for the lower court to provide that the sentences shall be served concurrently.

[Note: This particular case involved two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, information s, or affidavits.]

Galindez v. State, 30 Fla.L.Weekly D1743 (Fla. 3rd DCA 7/20/05)

In this case, the third District Court of Appeals has decided contrary to, and certified conflict with the First District's decision in *Isaac v. State*, 30 Fla.L.Weekly D1582 (Fla. 1st DCA 2005), and noted within this issue of *FPLP*.

Alexander Galindez was convicted in 1998, and the appellate court, on January 13, 2003, reversed and remanded his case for resentencing. It was opined that the trial court had over-assessed Galindez's victim injury points. Following his resentencing on November 21, 2003, Galindez filed an appeal. His complaint was the victim injury points were invalid because they were assessed by the court, rather than by the jury. *Apprendi* and *Blakely* were cited in support of the argument.

Apparently, Galindez argued this issue because his resentencing was executed after the *Apprendi* decision and pre-*Blakely*, the same as in Isaac's case. On appeal, however, the Third District rejected Galindez's contention, and opt agreement with Judge Kahn's dissenting opinion in *Isaac*.

In *Isaac*, Judge Kahn related that *Apprendi* and *Blakely*, which have no retroactive application, see *Hughes v. State*, 901 So.2d 837 (Fla. 2005), cannot be applied to alter the effect of a jury verdict and conviction rendered prior to those decisions, notwithstanding that further resentencing proceedings are *pending* afterwards.

In agreeing with the dissenting opinion in *Isaac*, the Third District affirmed Galindez's resentencing and certified that its decision was in conflict with the First District's in *Isaac*.

Desue v. State, 30 Fla.L.Weekly D1775 (Fla. 1st DCA 7/25/05)

In this case, a defendant argued that using Department of Corrections (DOC) records, consisting of a computer printout "Crime and Time Report," to establish the date he was released from prison for purposes of determining eligibility for sentencing as a prison releasee reoffender violated his right to confrontation as explicated by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

Regarding Desue's argument on appeal, the First District opined that the very opinion which he relied, *Crawford*, refutes his argument. On Sixth Amendment grounds, the *Crawford* Court held "testimonial" hearsay inadmissible against a criminal defendant who had not been afforded an opportunity to cross-examine, or where the declarant was available to testify and be cross-examined at trial. The U.S. Supreme Court in *Crawford* stated that the prosecution's use of "nontestimonial" hearsay was not so restricted. Although it "le[ft] for another day any effort to spell out a

comprehensive definition of 'testimonial,'" the Supreme Court did not procrastinate when it came to business records. These it excluded from the definition of "testimonial" in no uncertain terms, stating matter-of-factly that most hearsay exceptions cover "statements that by their nature [are] not testimonial—for example, business records."

Desue had conceded that the "Crime and Time Report" was admitted as a business record. Also, DOC's custodian of records, Diane Thompson, testified that the "Crime and Time Report" was an official document copied from DOC records, that an inmate's admit and release dates are recorded at or near the time the inmate is jailed or released, as the case may be, and that records of inmates' release dates are kept in the ordinary course of DOC's business.

Due to its findings, the First District concluded that the Confrontation Clause does not require the exclusion of "nontestimonial" hearsay that falls, as do business records for which the predicate is proven under Florida law, within a firmly rooted exception to the rule excluding hearsay. Thus, Desue's sentencing was affirmed.

[Note: Compare Desue's case with *Gray v. State*, 30 Fla.L.Weekly D1776 (Fla. 1st DCA 2005), and noted herein this issue of *FPLP*.]

Gray v. State, 30 Fla.L.Weekly D1776 (1st DCA 7/25/05)

On direct appeal, Maurice Keith Gray contended that the trial court erred in sentencing him as a prison releasee reoffender because the state presented only hearsay evidence to prove the date of his release from prison.

In order to impose a prison releasee reoffender (PRR) sentence, the sentencing court must find that a defendant had been released from prison no more than three years before committing another enumerated offense under that statute. See: Section 775.082(9)(a)(1.), Florida Statutes. Unless the defendant admits he was released within three years of his current conviction, proof of the release date is an essential requirement for sentencing pursuant to the PRR Act. The state must provide record evidence of the date the defendant was released from any prison term or supervision imposed for the last felony conviction. See: *Glover v. State*, 871 So.2d 1025, 1025 (Fla. 1st DCA 2004); *Sinclair v. State*, 853 So.2d 551, 552 (Fla. 1st DCA 2003); and *Boyd v. State*, 776 So.2d 317, 318 (Fla. 4th DCA 2001).

In Gray's case, the sole evidence the state provided to establish Gray's last release date was a letter that depicted a DOC employee's declaration or affirmation certifying that the seal in the letterhead was official, and that Gray was released on a certain date.

The First District opined that the document failed to identify the official records on which it relied, if any, did not state that it was a true and correct representation of any record, and did not say where or in whose custody any original official or business records are kept. As such, the evidence the state relied on constituted hearsay, and the state proved no proper predicate for its admission under any exception to the rule excluding hearsay.

Because the state relied solely on inadmissible hearsay evidence regarding Gray's release date, it failed to prove an essential requirement for sentencing pursuant to the PRR Act. Thus, Gray's sentence was vacated and his case remanded for resentencing.

Keevis v. State, 30 Fla.L.Weekly D1901 (Fla. 2d DCA 8/10/05)

Rusty Keevis had filed a motion for postconviction relief in a trial court that claimed his counsel was ineffective for failing to call witnesses to his trial. However, Keevis failed to state that those witnesses were available to testify at the time of his trial. As such, the trial court *denied* the claim without prejudice for Keevis to refile a facially sufficient claim.

On appeal, the Second District Court noted that the trial court was correct to recognize the holding *Nelson v. State*, 875 So.2d 579 (Fla. 2004), applied and that Keevis, having filed a facially insufficient claim, should be afforded the opportunity to *amend* the claim. However, rather than denying the claim without prejudice, the appellate court opined that the trial court should have granted Keevis *leave to amend* the claim, according to the language in *Nelson*. See: *White v. State*, 884 So.2d 279 (Fla. 2d DCA 2004).

An amended motion would relate back to the date of Keevis' originally filed motion, where an order of denial could be found not to relate back to the original filing date. Allowing an amended motion would prevent a trial court from inadvertently denying a sufficient claim as either successive or untimely. See: *Bryant v. State*, 901 So.2d 810 (Fla. 2005).

Therefore, the appellate court reversed the order denying Keevis' claim without prejudice and remanded for the trial court to strike Keevis' motion with leave to amend his claim. It was noted in *Bryant* that thirty-days was suggested as a generally appropriate time limit within which an insufficient motion could be amended.

Further in this case, Keevis had also claimed that his counsel failed to impeach two witnesses that testified at this trial. However, Keevis failed to allege either deficient performance or prejudice. As such, the trial court denied relief on the claim.

Although the appellate court affirmed the denial order of this other claim, it recognized a need of uniformity in the procedure for addressing pro se, facially insufficient claims of ineffective assistance of counsel. Thus, the Second District certified a question

of great public importance to the Florida supreme Court: "Should the procedure of quashing the order of the trial court denying a facially insufficient claim of ineffective assistance of counsel, with instructions that the trial court grant appellant leave to amend the rule 3.850 postconviction motion, be extended to include claims of ineffective assistance of counsel that are insufficient as a result of a failure to allege one or both prongs of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)?"

Clark v. State, 30 Fla.L.Weekly D1945 (Fla. 4th DCA 8/17/05)

In this case it was pointed out the importance of entitling motions to the courts properly when filing them.

Robert Clark entitled his motion as "Defendant's Motion for Expedient Relief from Judgment Entered upon Defendant for an Uncharged Crime." After filing this motion in January 2005, Clark filed a "Motion to Rule' on May 5, 2005. Apparently, Clark received no response or court ruling because subsequently he filed a petition for writ of *mandamus* in the appellate court to compel the lower court to rule on his initial motion. However, Clark failed to show that he made any effort to bring the initial motion to the attention of the trial judge.

Most documents or pleadings filed in the clerk's office are merely stepping-stones to a hearing or trial and do not require immediate action by the assigned judge. The clerk does not normally review and interpret each and every filing to determine whether a court file needs to be forwarded to a judge for action. Normally, litigants schedule an appointment for a hearing with a judge's judicial assistant in order to bring a matter to the attention of the judge and to give notice of the hearing to all other interested litigants. It has been acknowledged that there are variations to this traditional manner of handling matters before the trial court. The variations are either explained by local court rules or by local custom and are easily determined by discussion with the judge's judicial assistant. If the litigant does not know to which judge the case has been assigned, the clerk of court can assist with that information. See: *Smartt v. First Union National Bank*, 771 So.2d 1232 (Fla. 5th DCA 2000). Even where the litigant is pro se and a prisoner, he or she must take some responsibility to bring the matter to the attention of the trial judge. See, e.g., *Powell v. Watson*, 565 So.2d 845 (Fla. 5th DCA 1990).

The appellate court opined that if Clark had properly designated his motion as a rule 3.850 motion, as such it appeared to be, then the clerk would have sent it to the judge, and mandamus relief would be appropriate. However, the clerk's office cannot be held responsible for determining whether a motion not designated as a rule 3.850 motion is in fact one.

It was further opined that while a prisoner's ability to contact the trial court directly is limited, a letter to the judge requesting a hearing or merely sending a copy of the motion to the judge may very well bring the matter to the court's attention. Merely filing the paper in the clerk's office does not.

Therefore, the appellate court denied Clark's petition for writ of mandamus without prejudice to Clark filing another petition after he had fulfilled his responsibility of bringing the matter to the attention of the assigned judge.

Contreras v. State, 30 Fla.L.Weekly D2045 (Fla. 3d DCA 8/31/05)

Raul Contreras appealed from an order denying his Rule 3.800(a) motion that claimed the habitualization notice provided to him was not sufficiently specific.

The appellate court opined that a notice deficiency of this nature does not render a sentence illegal under Rule 3.800(a) and must therefore be raised in a motion for postconviction relief under Rule 3.850. See: *Cooper v. State*, 817 So.2d 934 (Fla. 3d DCA 2002). Unfortunately, under Rule 3.850, Contreras' claim was found to be time barred. Therefore, the appellate court affirmed the lower court's order of denial.

Rodriguez v. State, 30 Fla.L.Weekly D2062 (Fla. 4th DCA 8/31/05)

This case on appeal presented a question of whether a trial court abused its discretion in denying a motion to sever a count charging Rodriguez with manufacturing cannabis from counts charging him with armed kidnapping and aggravated battery.

Rodriguez's charges for armed kidnapping and aggravated battery arose from an incident involving his ex-girlfriend, Bernice DeLa Vega. After DeLa Vega was able to flee away from Rodriguez, she called police. Subsequent to her call, police confronted Rodriguez at his home, requested and gained consent to search his home. During the search, a crime scene technician found 182 marijuana plants in one of the bedrooms. Rodriguez was arrested and later tried for manufacturing cannabis, along with armed kidnapping and aggravated battery that he allegedly committed against DeLa Vega.

Before trial, Rodriguez sought to sever the manufacturing cannabis count from the other counts. However, the trial court denied the motion for severance, reasoning that the cannabis charge was the least egregious, the least serious charge. and would not inflame or otherwise influence the jury in considering the verdict.

Subsequently, the jury found Rodriguez not guilty of the armed kidnapping and aggravated battery charges, but guilty of manufacturing cannabis. Rodriguez, who had no prior criminal convictions, was sentenced to a maximum term of five

years in prison on the cannabis conviction.

On appeal, Rodriguez argued that the cannabis charge should have been severed and tried separately from the other counts. He contended that there was no significant causal link between the criminal offenses, and that joining them in a single information and trying them together resulted in harmful error.

Before permitting charges of separate crimes to be tried together, a trial court must be careful that there is a meaningful relationship between the charges. See: *Crossley v. State*, 596 So.2d 447, 450 (Fla. 1992). The danger in improper consolidation is that evidence relating to one crime may improperly bolster the proof of the other.

The appellate court found that although Rodriguez's charged crimes may have been connected temporally and geographically, the cannabis cultivation charge was not similar to the kidnapping and aggravated battery charge. A causal link between them could not be found either. In sum, there was no meaningful relationship between the charges. As a result, the appellate court opined that it could not find that the trial court denying the motion to sever was harmless beyond a reasonable doubt.

Due to the appellate court's findings, Rodriguez's case was reversed and remanded for a new trial on the manufacturing cannabis charge.

Ellis v. Florida Parole Commission, 30 Fla.L.Weekly D2035 (Fla. 1st DCA 8/31/05)

In this case Derrick Ellis sought to quash an order of the circuit court that approved the Florida Parole Commission (FPC) revocation of his conditional release. Ellis did this by filing a petition for writ of certiorari in the First District Court of Appeals.

Ellis' main argument was the order of the FPC wrongfully disregarded findings of the hearing examiner, which were based on competent substantial evidence. The FPC replied that it had a right to reject the hearing examiner's recommendation because it constituted a conclusion of law rather than a factual determination.

The background of this case was Ellis had been released from prison and placed on conditional release. His job had taken him out of his home county and Ellis did not have permission to leave his home county. Ellis had explained and his job supervisor confirmed the explanation that Ellis was unaware his job would take him out-of-county till they were crossing the county line. He returned to his home county that day after completing his work task.

The hearing examiner found Ellis guilty of the violations, leaving his home county and going to another county without permission. However, the examiner specifically stated as part of the disposition recommendation, "[T]his examiner does not feel that releasee willfully violated the terms and conditions of his supervision and therefore is recommending that the releasee be reinstated to supervision." FPC rejected the recommendation and revoked Ellis' conditional release.

The First District opined that in order to establish a violation it must be proven that the releasee willfully violated a substantial condition of release. The determination of willfulness involves a factual determination. The examiner's determination was based on factual findings. As such, the FPC was in error to reject the hearing officer's recommendation.

Ellis' petition was granted to quash the circuit court order. It was concluded that the lower court had departed from the essential requirements of law.

Johnson v. State, 30 Fla.L.Weekly D2107 (Fla. 2d DCA 9/7/05)

The main issue involved in this case was whether an admission of a Florida Department of Law Enforcement (FDLE) lab report is admissible hearsay evidence during a trial.

Lorenzo Cephus Johnson was charged and convicted of possession of cocaine, introduction of contraband (marijuana) into a detention facility, obstructing an officer without violence, and possession of marijuana. To support the possession charges and the introduction of contraband charge, the State introduced the testimony of the officers who performed the presumptive field tests. Additionally, the State sought to introduce the result of an FDLE lab test performed by an Anna Deakin. Johnson objected, and argued that the lab report was inadmissible hearsay and that its admission without the presence of the person who prepared the report violated his Sixth Amendment right to confront his accuser. Consequently, however, the trial court ruled the evidence admissible.

On appeal, it was found whether the hearsay statement admitted at trial violated the Sixth Amendment's Confrontation Clause would be controlled by *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court did away with the reliability analysis set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), in cases involving testimonial hearsay.

The problem the appellate court had to overcome was whether the FDLE report was testimonial, it's technically being a business record because, it was found that in *Crawford*, the Supreme Court noted, in dicta, that certain hearsay statements are by their nature nontestimonial—such as business records. The appellate court opined, however, that despite *Crawford's* suggestion that all business records are nontestimonial, an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay. See other

supporting case law: *Belvin v. State*, 30 Fla.L.Weekly D1421 (Fla. 4th DCA 6/8/05); *Shiver v. State*, 900 So.2d 615, 618 (Fla. 1st DCA 2005); and *People v. Rogers*, 780 N.Y.S. 2d 393 (N.Y. App. 2004)(determining a private lab result requested by and prepared for law enforcement was both inadmissible as business record and testimonial hearsay violating Confrontation Clause because its purpose was to provide evidence against the defendant).

A presumptive test by a field officer is not sufficient to establish a prima facie case, therefore, FDLE reports are vital to the State's prosecution. See: *Futch v. State*, 744 So.2d 540 (Fla. 2d DCA 1999). The business records exception may have been the vehicle for admitting the report, but the vehicle did not determine the nature of the out-of-court statement. It was opined that the nature of the statement was one that intended to lodge a criminal accusation against a defendant—in other words, it was testimonial. Consequently, there was a Sixth Amendment violation because the preparer of the FDLE report, Anna Deakin, was not determined to be unavailable at the time of the trial for confrontation Clause purposes. Therefore, the appellate court reversed and remanded Johnson's case for a new trial on the possession charges and the introduction of contraband charge.

[Note: See also *Rivera v. State*, 30 Fla.L.Weekly D2144 (Fla. 5th DCA 9/9/05), that regarded a similar issue where the case was reversed and remanded for a new trial.]

Frazier v. State, 30 Fla.L.Weekly D2117 (Fla. 4th DCA 9/7/05)

The point of interest in this case regarded whether it was error to summarily deny Marcia Frazier's claim that her criminal Punishment Code Scoresheet was incorrectly scored, and the State had conceded to the error.

Apparently, the lower court's sentencing judge was unaware that 12 points for community sanction violation was added to Frazier's scoresheet in error. However, the State contended that she was not entitled to a re-sentencing because the same sentence *could* have been imposed.

The Florida Supreme Court recently held, in *State v. Anderson*, 905 So.2d 111 (Fla. 2005), that the record must conclusively show that the same sentence *would* have actually been imposed, or it will not be considered a harmless error.

In light of the *Anderson* case, the appellate court reversed the denial and remanded for the lower court to either attach conclusive record proof that the same sentence *would* have been imposed, or to re-sentence Frazier with a corrected scoresheet. ■

From the editor...

As this issue of *FPLP* goes to the printer in December '05 the Florida Department of Corrections (FDOC) is reeling internally from ongoing state and federal investigations. In recent months investigations have resulted in 11 arrests of department personnel, ranging from the top to the bottom. With new revelations coming almost weekly, we here at *FPLP* decided that the only way to present comprehensive coverage of recent events was to run this combined issue covering the period from September to December. No doubt, if it continues as it has, there will be more revelations to come as the state and feds continue their investigations. *FPLP* will cover them as they occur.

I have yet to talk to a fellow prisoner who was surprised by what is now coming out about the FDOC. Corruption throughout the prison system is simply a fact of life to those who experience it every day. Apparently it's only a short distance for those who are in control of criminals to cross the line into criminality themselves. The temptation must be particularly hard to resist when the culture fosters and protects wrongdoing. The culture ostracizes those who won't adhere to the code of silence and punishes or gets rid of those employees who can't or won't adapt to the culture. It's nothing new. Just the opposite, in fact, it's the way it has always been in Florida prisons, and it's passed on from one generation of employees to the next.

The current investigations have focused on problems primarily at the Union CI, FSP, New River CI complex, although similar problems exist within the FDOC from one end of the state to the other. And the investigations have only revealed crimes that basically were forced in investigators' faces. There hasn't been any real digging. If there had been, the resulting scandal of just how bad taxpayers are being ripped off would result in major changes in the prison system. Hopefully the investigations will continue and expand to give the public a better understanding of the seedy reality of corrections in Florida.

Also in this issue is an article reporting on a citizen-initiated lawsuit that was recently filed against the Florida Parole Commission (FPC). As all parole-eligible prisoners should know, the state Legislature will again consider replacing the current Parole Commission with regional volunteer parole panels, before whom people up for parole will actually appear, during the next regular session that starts in March '06. We here at FPLAO and *FPLP* think that is an excellent idea. Between now and then more citizen-initiated lawsuits are going to be filed against the Commission, to either force its reform or give legislators the ammunition and support they need to legislate reform. What parole-eligible prisoners need to do is have their families and friends call, write and email state representatives and senators demanding (respectfully, of course) abolishment of the current FPC. If we all work together, we can make it happen. Now is the time.

This issue of *FPLP* also contains the regular Notable Cases and Post Conviction Corner sections, both published to help prisoners thread their way through legal situations, especially post conviction issues. Attorney Loren Rhoton, who writes Post Conviction Corner, is planning on publishing a self-help post conviction book soon that will be useful to Florida prisoners. We'll inform *FPLP* readers when it becomes available.

You'll also see some new advertisements in this issue. Please let advertisers know you saw their ad in *FPLP* when contacting them. Their ads help support this magazine and FPLAO.

And concerning support: FPLAO and *FPLP* depends on members' support to keep publishing and operating. However, membership dues and advertising payments don't cover all the expenses. The rest has to be made up through donations. If you haven't made a donation to FPLAO recently, please consider doing so. No amount is too small or too large, it all helps out and keeps the important work being done. Thank You.

Bob Posey, Editor ■

Correctional Offenders

♦ **Former FDOC Regional Director, Two-High-Ranking COs Arrested.** Updating the lead article in this issue of *FPLP*: On Nov. 8, 2005, Florida Department of Corrections Col. Richard Allen Frye, 36, and Maj. James Bowen, 33, were arrested and charged with felony battery stemming from their alleged participation in attacking and beating former prison guard James O'Brien at a banquet held by the Florida Council on Crime and Delinquency on Apr. 1 of this year. A warrant was also issued for Allen Clark, 40, who resigned as a regional director of 13 North Florida prisons in Sept. Both Frye and Bowen were booked into the Jackson County Jail, where they were being held without bond. Clark surrendered the following day to Tallahassee police where he was also arrested and charged with felony battery. A spokesman for FDOC Secretary James Crosby said Frye and Bowen will remain on paid leave despite their criminal charges. Another FDOC employee, Bradley Tunnell, was also placed on paid leave in Oct. Allegedly, Tunnell, the son of Florida Department of Law Enforcement Commissioner Guy Tunnell, was not involved in the banquet beating but was accused of coming to the banquet afterwards and threatening a corrections officer.

♦ **Bringing Joints into the Joint.** FDOC prison guard Michael W. Eberline was arrested and charged with introducing contraband into Zephyrhills Correctional Institution on July 24, 2005. Eberline, 24, a five-year veteran with the FDOC, was caught with a partially-smoked marijuana joint in a cigarette pack by a contraband interdiction team when reporting to work. A search of his vehicle discovered an unsmoked joint and 15 more partially-smoked joints, for a total of 4 grams. On Nov. 9 Eberline pleaded guilty before a Dade City circuit judge, and despite evidence coming forward that he had smoked marijuana two weeks before, he was only sentenced to 18 months probation and adjudication was withheld to prevent him from having a felony record.

♦ On Nov. 12 four FDOC prison guards and an ex-prisoner were arrested and charged with offenses ranging from disorderly conduct to resisting arrest stemming from a fight at a bar near the sprawling prison complex in Starke, Florida. The bar, George's, is a popular hangout for prison guards and the scene of frequent brawls, according to police reports. The guards charged were Kevin Barfield, 37, Robert Bonsall, 37, Joey Hill, 31, and Edwin Lee Johnson, 29. All work at Florida State Prison in Starke. Also charged was Robert Craven, 37, of Starke, who was released from prison in 1999 after serving almost two years for carrying a concealed firearm and trafficking in stolen property.

♦ On Nov. 24 WTSP, Channel 10 TV, St. Petersburg/Tampa, aired a special investigative report on the 11pm news concerning an investigation of prison staff housing located on state-leased property adjacent to Florida State Prison and Union Correctional Institution near Starke, Florida. The televised investigation revealed that a whole community of taxpayer-built and subsidized housing for prison employees, their families and friends exists off State Road 16, largely hidden from the highway and public view. When investigators went door-to-door asking questions in the community, few of the occupants would speak with them. One woman who did talk indicated she and others in the development only pay $50 a month rent and all utilities are paid for by the state. She works as a secretary at a nearby prison, although such housing is only suppose to be available to security staff to have a nearby emergency response force in case of prison problems. Also revealed was the fact that although such subsidized housing is considered a job perk, the difference between the $50 monthly rent paid and fair market rental rates is not being reported to the IRS on occupants' income tax returns. It is estimated that several thousand houses and mobile homes are being furnished by the FDOC to prison employees around the state, all built or purchased and subsidized by taxpayer money. During the course of the filmed report by Channel 10 the television station's helicopter was forced out of the air by guards at a nearby prison and prison guards came to the homes where investigators were filming and trying to interview occupants and forced them to leave, claiming the community was on state property and restricted to the public, Contacted later, Gov. Jeb Bush and Attorney General Charlie "Chain Gang" Crist had no comment on the investigation's findings.

■

LITIGATION UPDATES

♦ Recently, word was received from attorney Peter Siegel, at the Florida Justice Institute, that the prisoner class in the Close Management (CM) litigation case (Osterback et al. v. Crosby) is going to trial during the federal district court's next trial calendar. It should take place sometime after Feb. 2006. Although the case has resulted in numerous charges in the FDOC's CM confinement policies, the prisoners' class attorneys believe a trial is necessary now because of the FDOC's continued and repeated breaches of the settlement agreement and physical and psychological abuse of prisoners that is occurring in the CM units.

♦ In March 2005, Judge Rassmussen, of the First Judicial Circuit Court, on remand, issued a declaratory judgment in Case No. 00-600-CA-01, that the 1996 repeal of Rule 10D-7, Florida Administrative Code, was an invalid exercise of delegated legislative authority. This was in line with the appellate court's holding in Osterback v. Agwunobi, 873 So.2d 437 (Fla. 1st DCA 2004). (See: *FPLP*, Vol. 10 Iss. 4., "Back From the Dead: Revival of the Prison Health Code," pgs 1-4.) However, the Dept. of Health now claims the circuit court lacks jurisdiction and appealed Judge Rassmussen's judgment. All briefs have been filed and an opinion should be issued between now and August 2006. First DCA Case No. 1D05-1848

♦ On July 28, 2005, Judge John Moore, of the federal Middle District Court of Florida, after a bench trial held June 6, 7 and 8, '05, ruled against plaintiff *Prison Legal News* in the lawsuit brought by *PLN* against the FDOC for censorship and prohibiting prisoners from receiving compensation for writing for outside publication. (See: *FPLP*, Vol. 10, Iss. 1, pgs. 4-5 and Vol. 10, Iss. 6, pgs. 5-6.) The judge ruled that the FDOC has legitimate penological interests in preventing prisoners from writing for compensation and that the FDOC has shown *PLN* did not suffer any First Amendment injury in the censorship of the publication because of its phone call services and pen-pal ads, and since FDOC will no longer censor the publication for such ads. *PLN* is appealing Judge Moore's decision to the 11th Circuit Court of Appeals. PLN v. Crosby et al., Case 3:04-CV-14-J-16TEM. [**Note:** The FDOC also claimed that all previously rejected issues of *PLN* have been delivered to prisoner subscribers. If you did not receive your rejected issues of *PLN*, please notify Randall Berg of the Florida Justice Institute. It appears that FDOC's claim in this regard may have been false and constitute fraud upon the court-*bp*]

♦ In *FPLP*, Vol. 11, Iss. 3, the case Smith v. FDOC, 30 Fla.L.Weekly D1299 (Fla. 1st DCA 5/23/05), was reported concerning the First DCA's decision that FDOC's legal photocopying fees rule is invalid since no statutory authority exists authorizing such a rule. The FDOC subsequently motioned the DCA for rehearing, rehearing en banc and requested the court to certify a question to the Fla. Supreme Court. Those motions and request were denied. The FDOC then petitioned the state Supreme Court for review and motioned to stay the DCA issuing its mandate. As of the end of Nov., the motion to stay mandate has been granted, but the high court had not yet granted review.

FPLP will continue to provide updates on the above cases as they proceed. ■

Merry Christmas
And
Happy New Year
From everyone
at
FPLP

fyi

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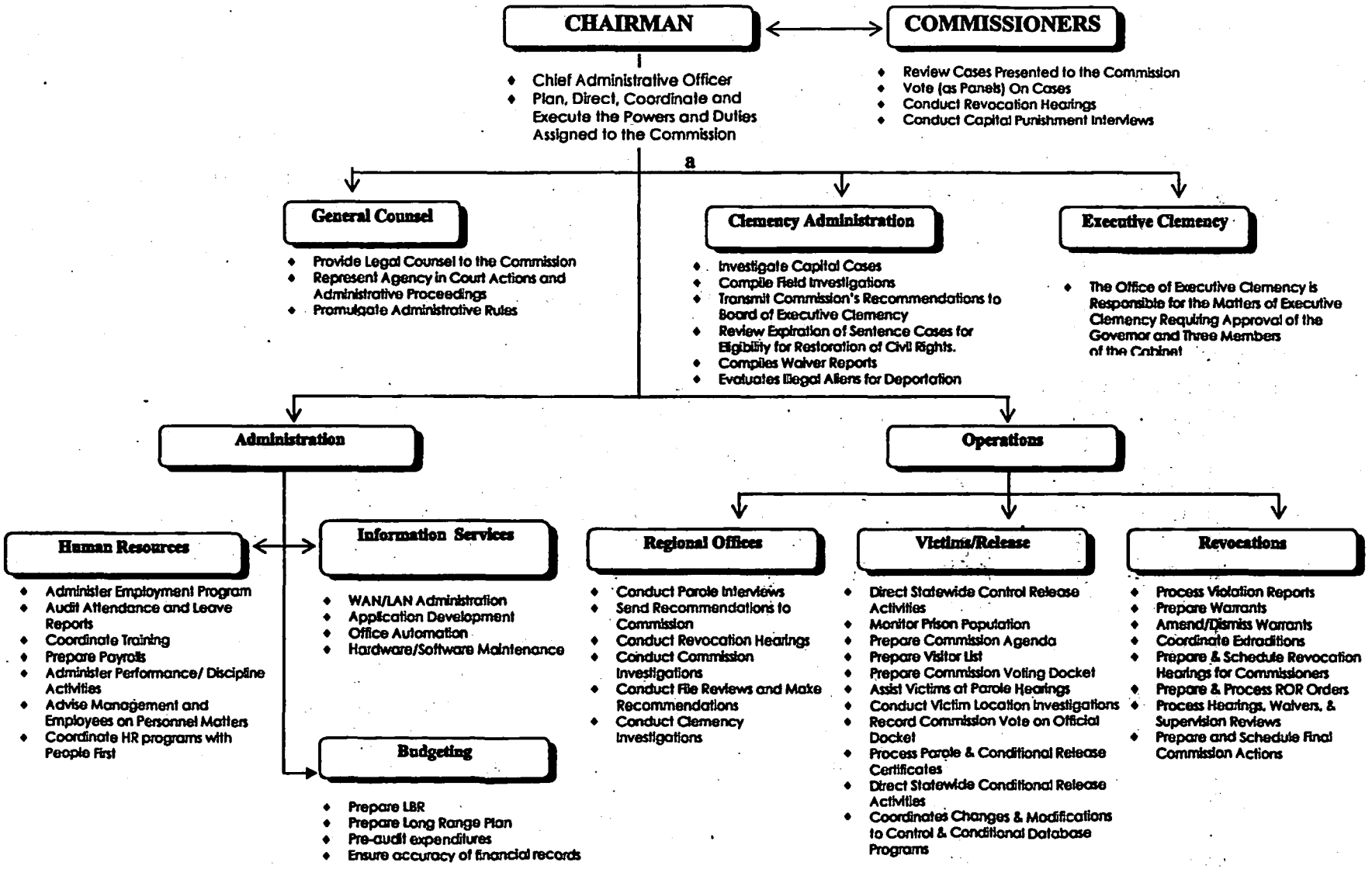

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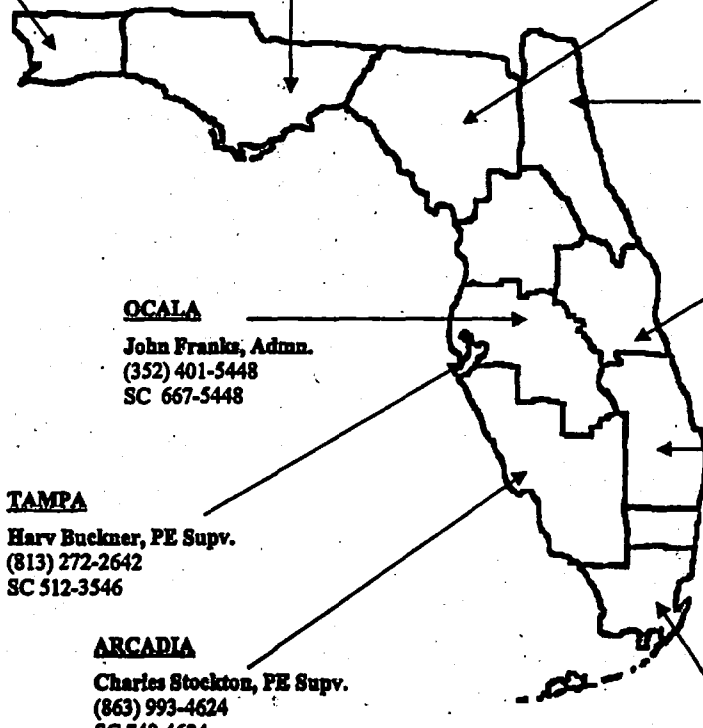

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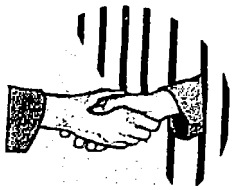

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Please check the mailing label on this issue of FPLP to determine when you need to renew so you don't miss an issue. On the top line of the mailing label will be a date, such as ***Nov 07***. That indicates the month and year that your FPLAO membership 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!

- 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:

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U.S. Incarceration Levels Set New Record

WASHINGTON—According to a new report released October 23, 2005, by the Justice Department's Bureau of Justice Statistics, the number of people incarcerated in the U.S. grew by 1.9 percent in 2004 to a total now of almost 2.3 million people. That number includes 1.4 million in state and federal prisons, 713,990 prisoners in local jails, 102,338 in juvenile prisons and the rest in immigration, military or Indian jails or lockups.

State prison populations increased by 1.8 percent last year, with about half that growth in just three states: Florida, Georgia and California.

The Sentencing Project, a Washington, D.C. group that promotes prison alternatives, says the U.S. incarceration rate—724 per 100,000—is 25 percent higher than any other country in the world.

The Justice Department report also notes that about 8.4 percent of our nation's black men ages 25 to 29 are in state or federal prison, compared to 1.2 percent of white men and 2.5 percent of Hispanic men in the same age group. Blacks make up about 41 percent of prisoners with a sentence of one year or more, according to statistics in the report. ■

SUBMISSION OF MATERIAL TO *FPLP*

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

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

PRISON LEGAL NEWS

Prison Legal News is a 48 page monthly magazine which has been published since 1990. Each issue is packed with summaries and analysis of recent court decisions from around the country dealing with prisoner rights and written from a prisoner perspective. The magazine often carries articles from attorneys giving how-to litigation advice. Also included in each issue are news articles dealing with prison-related struggle and activism from the U.S. and around the world.

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

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

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