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Perspectives

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Circuit Court/DCA Engaged In Crusade to Roll Back Court Access for Collateral Criminal Proceeding Litigants

by Sherri Johnson

Tallahassee's Second Judicial Circuit Court joined by the First District Court of Appeal are collaborating in an effort to force the Florida Supreme Court to recede from, or at least limit, its 2003 decision in *Schmidt v. Crusoe*. In that case the high court held that indigent prisoners who bring court actions that could conceivably reduce their time in prison, termed collateral criminal proceedings (such as challenges to gain time forfeitures, loss of gain time from disciplinary actions, adverse parole decisions), are exempt from the filing fees and inmate account liens imposed by § 57.085, Florida Statues, that was enacted in 1996 to reduce frivolous prisoner lawsuits. That circuit court, complaining that the *Schmidt* decision has greatly increased the number of cases being filed by prisoners in that court, has rebelled against the decision by deliberately imposing illegal liens against collateral criminal proceeding litigants and ordering their money to be illegally seized by the Department of Corrections. This in an attempt to force the Supreme Court to fashion new limits on court filings.

The court of appeal, caught in the middle, has so far complied with the law and *Schmidt* decision but has recently issued decisions itself tending to favor the circuit court. While the circuit court's apparent goal is to reduce prisoner litigation, its illegal actions have actually spawned increased litigation and threatens a breakdown in the rule of law.

If the Second Judicial Circuit Court is successful in erecting more roadblocks to prisoners' access to court, there is a concern that it may translate into increased threats to security inside the prisons. When you take away the ability of people to seek relief from wrongs that affect their liberty, you often create desperate people and destroy any faith they may have had in justice or the law.

Before the 1970s, going to prison in America, whether it was in state or federal prisons, was often an experience likened to a descent into hell. Back then there was little or no oversight over the prisons and prison officials and staff were essentially free to run them anyway they wished and treat prisoners anyway they wanted. Documented accounts of inhumane abuse, neglect, extreme overcrowding, violence and widespread sexual assaults in the prisons exist from that period. Congress and state legislatures were reluctant to provide adequate funding to

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prisons, after all, they were largely considered to be a necessary evil, best operated out-of-sight and out-of-mind with bare minimum expense. But it couldn't last. When the conditions became so bad as to be humanly unbearable prisoners revolted, and consequently drew media and public attention to what was really going on behind prison walls and fences.

Another consequence was that where before the courts had adopted a hands-off approach to prisoners' plights, generally refusing to recognize that they had any rights, with the increased scrutiny the courts began to open their doors to prisoners.

The federal courts decided that prisoners did in fact have a constitutional right to access to the courts to challenge prison conditions. Over the next two decades, largely through prisoner-initiated lawsuits, entire prison systems were dragged, often kicking and screaming, into the twentieth century through judicial oversight. The foundations were layed out as to just what rights prisoners had and over time conditions in the prisons improved.

Prison officials, and lawmakers who had to support the improvements with funding, weren't very happy about the changes. Gone were the days when prison officials and staff had free rein to treat prisoners anyway they wanted without fear of being *held* accountable. Lawmakers had to shave the pork to come up with funding to make prisons safer, reduce overcrowding, and provide adequate health care, which many of them considered unnecessary and coddling prisoners.

The backlash came in the mid-1990s when a concerted effort by conservative federal lawmakers, supported by prison officials nationwide, passed The Prison Litigation Reform Act of 1995 (PLRA), which was signed into law by President Clinton. The PLRA's purpose, according to its supporters, is to curtail federal civil rights lawsuits being filed by prisoners over the conditions of their confinement, many of which are legally frivolous. To bolster passage of the PLRA, a media campaign was run to convince the public that the majority of prisoners' lawsuits are frivolous and cost taxpayers tons of money. In fact, statistics compiled by the Administrative Office of the U.S. Courts show that only a very small 4.8 percent of prisoners' civil rights suits were dismissed as legally or factually frivolous in the early 1990s, compared to the 15 percent that prevailed.

Nevertheless, the PLRA became law. Within five years of its enactment it cut the number of federal lawsuits filed by prisoners in half and court monitoring of prisons dropped dramatically. The PLRA not only contains provisions to discourage prisoners from filing civil rights suits, but also provisions to discourage courts from granting them relief, discourage prison officials from settling suits with prisoners, and to discourage attorneys from representing prisoners in such suits.

To discourage prisoners from filing federal lawsuits the PLRA, in part, mandated that indigent prisoners would no longer have filing fees and costs waived. Instead, if they couldn't pay, liens are placed on their prison bank accounts and when and if they receive any money it is taken to satisfy the court liens. That is a heavy disincentive when prisoners receive little money to begin with.

Florida Follows Suit

Shortly after passage of the federal PLRA, several states, including Florida, adopted similar state laws to discourage prisoners from turning from the federal courts to the state courts to seek relief.

In 1996 Florida enacted § 57.085, Fla. Stat., the Prisoner Indigency Statute. Like the PLRA, Florida's act imposes often insurmountable financial burdens on poor and indigent prisoners by requiring liens to be placed on their prison bank account to recover filing fees and costs for bringing civil lawsuits in the state courts. At the same time, another statute was enacted, § 944.279, to allow prison officials to punish prisoners with confinement and loss of gain time when a court finds that they have filed a frivolous or malicious civil lawsuit.

Pertinently, both of those 1996 laws expressly provided that they do no apply to criminal or collateral criminal proceedings filed by prisoners. The Legislature realized that it was necessary to exclude criminal and collateral criminal proceedings from laws designed to curtail prisoners' access to the courts to avoid a serious question to their constitutionality. Habeas corpus provisions in both the U.S. and Florida constitutions fairly guarantee all persons, even the indigent, free access to the courts to challenge wrongful convictions or sentences, which would naturally extend to situations that would require a person to wrongfully spend more time in prison.

There was a consequence of the laws, however, that was not foreseen at the time.

In Florida, although habeas corpus constitutional and statutory provisions still exist on the books, over the years, for various reasons, the traditional remedies of habeas corpus have been replaced by a variety of other forms of remedies and litigational vehicles to seek relief.

For example, where many years ago a state petition for writ of habeas corpus would have been proper to challenge "collateral criminal" issues that could not have been or that were not raised on direct appeal of a criminal conviction or sentence, now what are termed post conviction motions, under rules 3.800 and 3.850, etc., of the Florida Rules of Criminal Procedure, are the established and only available remedies. Unlike habeas corpus, which was to always be freely available, these habeas corpus derivative remedies include restrictions and requirements that limit their availability.

There also exists other "collateral criminal" situations that don't directly stem from a criminal conviction or sentence, but that results in a person doing a longer time in prison on the criminal sentence for which habeas corpus relief is no longer available. Such situations generally include improper or wrongful calculation or forfeiture of gain time, i.e., credit for time off a sentence that is mandated or authorized by law. Unless immediate release from prison would result from a successful court challenge to a situation involving an improper or wrongful lengthening of a sentence, habeas corpus relief is not available.

Instead, over time the courts (where no special procedure or remedy was ever created by the Legislature to allow prisoners to seek relief) have established that in the majority of such situations where a successful challenge would only mean a shortening of the time spent in prison (e.g., in most challenges to in-prison disciplinary actions where gain time was taken or prevented from being earned, or most improper calculations of gain time by prison officials, etc.) the only available judicial remedies are through traditional extraordinary writ petitions—usually a petition for writ of mandamus—which are considered "civil" not "criminal" remedies. Those procedural vehicles really didn't fit the situation, but they were all that were available to the courts to give prisoners some means of bringing such challenges.

For example, a petition for writ of mandamus is a civil action normally used to compel a government official to perform a non-discretionary ministerial duty, not to review decisions of an administrative agency such as the Department of Corrections (DOC) to determine whether disciplinary action was properly taken or whether gain time was otherwise properly credited, withheld, or forfeited. Such hybrid application created confusion for years and created another problem once the Legislature enacted the Prisoner Indigency Statute in 1996.

A Failure to Distinguish

Prior to passage of Florida's Prisoner Indigency Statute indigent prisoners, like any indigent citizen, could petition the courts for a waiver of circuit court filing fees and court costs to bring a civil lawsuit or a civil extraordinary writ petition challenging a situation that affected the duration of time spent in prison. Such waiver could also be obtained to pursue any appeals from adverse decisions made by the circuit courts in such cases.

After passage of the Prisoner Indigency Statue, however, indigency waivers were no longer available to prisoners filing civil lawsuits in the state courts. Instead, under the statue, unless filing fees and costs were paid up front, the courts required prisoners to file a six-month printout of their inmate bank accounts and, if insufficient funds existed in same to cover fees and costs, an order from the court would direct the DOC to place a lien on the account and send any money received by the prisoner to the court until the fees and costs were paid. And although the statute provided that the lien only applied to money

more than $10 deposited in the account (ostensibly to allow indigent prisoners at least $10 to buy hygiene items, etc.), the DOC never complied with that provision. The DOC froze all money deposited in such accounts until the amount built up through deposits (even if it took years to do) to cover the court fees and costs, then took it all and sent it to the court. (This illegal practice is still utilized by the DOC, its own little contribution to discourage prisoners from filing lawsuits involving the department or its employees.)

Another problem arose, however, when the courts failed to distinguish between "civil lawsuits" and "civil extraordinary writ petitions" (that were "collateral criminal proceedings" filed by prisoners) in requiring compliance with the Prisoner Indigency Statute. To the courts, especially the Second Judicial Circuit Court and First District Court of Appeals in Tallahassee, there was no distinction between "civil" lawsuits and "civil" collateral criminal proceedings were the Prisoner Indigency Statute was concerned. It's in those two courts were prisoners have to file most actions against the DOC or Parole *Commission* due to the "home venue privilege," a doctrine allowing agencies to require that court actions be brought against them in the venue where their headquarters are located.

After the Prisoner Indigency Statute was passed, those courts began requiring all indigent prisoners to comply with it and either pay all court fees and costs up front or suffer having their money taken regardless of whether they filed a civil lawsuit challenging prison conditions or an extraordinary writ petition involving collateral criminal issues, and any appeals from same.

That situation went on for years. During that period only a few prisoners realized that the § 57.085, Fla. Stat., indigency provisions did not apply to collateral criminal proceedings. In instances where those few prisoners protested those courts requiring prepayment of court fees and costs or tried to require compliance with § 57.085's other provisions, those courts usually backed down and waived the fees and costs rather than allowing such to be challenged further. Most prisoners, however, were hit with the fees and costs or liens for same.

The result was a significant reduction in the number of prisoners filing writ petition collateral criminal proceedings.

That pleased both the courts, as it reduced their workload, and the DOC, as it meant less challenges to improper or even illegal withholding or forfeiture of prisoners' gain time. For the DOC it also meant a substantial drop in the number of prisoners challenging flawed disciplinary actions involving the loss of gain time. That alone was a big benefit to prison officials who frequently, without regard to right or wrong, or Due Process, or the department's own rules, impose arbitrary disciplinary action on prisoners. With prisoners discouraged from going to court to challenge such disciplinary actions, there was even less reason for prison officials to "waste their time" being concerned about following the law or rules.

Everybody was happy with that arrangement, except prisoners, who were having their access to the courts curtailed and obstructed.

Attempt to Extend Stymied

Some courts, drunk with their new found freedom from having to handle prisoners' civil lawsuits (of which few were ever filed in the state courts to begin with) or civil writ petition collateral criminal cases, actually sought to extend the Prisoner Indigency Statute to cover prisoners' criminal post conviction motions, which had never had any filing fees or costs associated with them. That attempt was quickly quashed. Only one year after the Indigency Statue was passed, the Fifth District Court of Appeal in *Ferenc v. State*, 697 So.2d 1262 (Fla. 5th 1997), conclusively held that the Prisoner Indigency Statute does not apply to post conviction motions because they are collateral criminal proceedings (and progeny of habeas corpus).

In 2001 the Florida Supreme Court clarified that the Indigency Statute does not apply to writ petition cases challenging a criminal conviction or sentence as they are collateral criminal proceedings in *Geffken v. Strickler*, 778 So.2d 975 (Fla. 2001). But that court added confusion by opining without supporting authority that the "collateral criminal proceeding" exemption in the Statute, at § 57.085(10), Fla. Stat., "means that if an inmate files an action which is considered a 'collateral criminal proceeding,' and that the court finds that the inmate is without funds to pay for the action, i.e., that the inmate is indigent, the inmate may, in some circumstances, be considered completely exempt from the partial payment provisions of the statute." *Id.* at 976.

That court did not explain its "some circumstances" statement or where the authority existed to require any prisoner to pay any fees or costs for filing any "collateral criminal proceeding," which are nothing more or less than habeas corpus actions by a different name. Florida law provides that habeas corpus petitioners cannot be charged any such fees or costs, even if they have the ability to pay. *See*, Chapter 79, Fla. Stat.

Neither of those cases addressed other type collateral criminal proceedings, i.e., those that did not challenge a criminal conviction or sentence, but instead challenged some other issue that affected the amount of time done on a criminal sentence. And so the lower courts continued to require prisoners' to comply with the fees and costs provisions of the Prisoner Indigency Statute in those latter type cases. And the number being filed continued to decline.

Schmidt v. Crusoe

It wasn't until 2003 that a court squarely addressed the applicability of the Prisoner Indigency Statute to writ petition cases challenging a gain time forfeiture issue. In *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), the Florida Supreme Court accepted review of a case where the Second Judicial Circuit Court and First District Court or Appeal had attempted to force prisoner Daniel Schmidt to comply with the Prison Indigency Statute to challenge prison disciplinary action involving forfeiture of gain time.

Schmidt had filed a petition for writ of mandamus in the circuit court contesting the disciplinary action and gain time forfeiture imposed as punishment. The circuit court told Schmidt that in order to proceed he must pay the court's filing fee or file an affidavit of indigency and six-month printout of his inmate account (the preliminary to imposing an account lien) pursuant to the Prisoner Indigency Statute. Schmidt responded that he was not subject to those requirements because his petition was not a civil lawsuit, but instead was a "collateral criminal proceeding" exempted under the statute.

The circuit court rejected Schmidt's position and he then filed a petition for writ of prohibition (to stop the circuit court's exercise of jurisdiction it did not have to require compliance with the inapplicable statute) in the First District Court of Appeal. The district court also invoked the Statute and informed Schmidt that his petition in that court would be dismissed if he did not comply with it or pay that court's filing fees. Schmidt then petitioned the Supreme Court with a mandamus action for review. The Supreme Court stayed the lower court's actions until it issued a decision.

The *Schmidt* court examined the PLRA and Florida's Prisoner Indigency Statute, and the intent of Congress and the Legislature in enacting them, and concluded the intent was "almost identical." They both were enacted, according to the Schmidt court, "to discourage the filing of frivolous civil lawsuits, but not to prevent the filing of claims contesting the computation of criminal sentences." *Id.* at 365-66. The court noted that federal decisions concerning the scope of the PLRA have held the same. Federal courts are aligned in concluding that claims contesting the computation of criminal sentences (although brought as a hybrid "civil" action) should continue to be treated as traditional collateral proceedings under habeas corpus, since they are not the type of "civil lawsuits" challenging prison conditions that Congress meant to discourage or restrict.

The *Schmidt* court further noted that "it is apparent that an action affecting gain time does in fact affect the computation of a criminal defendant's sentence, because the length of time the inmate will actually spend in prison is directly affected." *Id.* at 367. The court explained that "a gain time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding because the end result is the same—the inmate's time in prison is directly affected." *Id.*

The *Schmidt* court concluded that Schmidt's loss of gain time effectively lengthened his sentence, therefore:

> [H]is gain time challenge should be considered a "collateral criminal proceeding," and the Prisoner Indigency Statute should not apply. To hold otherwise would result in an unlawful "'chilling' of a criminal defendant's right to appeal or otherwise challenge the propriety or constitutionality of the conviction or sentence," *Geffkin v. Strickler*, 778 So.2d 975, 977 n. 5 (Fla. 2001), and raise a serious issue as to criminal defendants' constitutional rights of access to the courts to challenge their sentences.
>
> *Id.*

However, the court included a footnote (n. 7) to the first sentence of the above-quoted finding that was not only legally wrong but actually injected more confusion. That footnote states, in part: "Because the Prisoner Indigency Statute (section 57.085) does not apply here, the general indigency statute (section 57.081) does. That means that if Schmidt still seeks to proceed in forma pauperis [as an indigent], he must prove his inability to pay by filing an affidavit with the information required according to section 57.081."

The problem with that codicil to an otherwise legally accurate decision is that in 1996 when section 57.085, the Prisoner Indigency Statute was enacted, section 57.081, the general indigency statute, was also amended to provide that it does not apply to prisoners. Additionally, that note implied that prisoners should have to pay filing fees and costs or apply for indigency status and receive a waiver under section 57.081 to file what the court had just held was a collateral criminal proceeding—which is akin to a habeas corpus proceeding for which there is no filing fee or costs under Florida law.

The Crusade Begins

It was obvious from the beginning that the judges in the Second Judicial Circuit Court didn't like the *Schmidt* decision. Before the ink had hardly had time to dry on the decision the circuit court was trying to figure out a way to prevent prisoners from freely filing collateral criminal writ petition actions in that court to challenge improper or illegal actions by the DOC or Parole Commission that affects the duration of their sentences.

The first attempt by the circuit court to twist the *Schmidt* decision to block access involved the court claiming it did not have jurisdiction to hear such cases. When prisoners filed such actions in that court they would be dismissed, with the court claiming that since the *Schmidt* decision held that an action affecting gain affects the computation of a criminal defendant's sentence, and is therefore a collateral criminal proceeding, then it follows that such actions should be filed in the court which sentenced the defendant prisoner, not the Second

Judicial Circuit Court. Exhibiting that the court knew it was wrong, it began dismissing prisoners' collateral criminal writ petition cases, rather than transferring the cases to the (supposedly correct) sentencing courts around the state as required by the rules of court. Rule 1.060, Fla.R.Civ.P.

Nevertheless, it didn't take long before the First District Court of Appeal ruled that the circuit court does have jurisdiction, finding that *Schmidt* was limited to the inapplicability of the Prisoner Indigency Statute to collateral criminal proceedings and could not be extended by the circuit court to claim lack of jurisdiction. *Burgess v. Crosby*, 870 So.2d 217 (Fla. 1st DCA 2004). *See also, Davidson v. Crosby*, 883 So.2d 866 (Fla. 1st DCA 2004); *Cason v. Crosby*, 892 So.2d 536 (Fla. 1st DCA 2005) and *Mora v. McDonough*, 31 Fla.L.Weekly D1937 (Fla. 1st DCA 7/20/06).

However, although reversing the circuit court on the jurisdiction block, the appeal court in *Burgess* encouraged that lower court by certifying a question to the Florida Supreme Court, asking: Whether all challenges affecting the length of a sentence, including gain time award or forfeiture challenges, should be filed in the sentencing court, pursuant to *Schmidt*?

Also of note, appeal court Judge P. Padovano dissented in *Burgess*, exhibiting support for his former circuit court, stating, "I think that this case is but one of many problems Courts will face in the wake of the Schmidt decision," and exhibiting his belief that he knows more than the Supreme Court Justices, commenting, "I do not think that a petition for writ of mandamus that is used to review a decision by an administrative agency should be treated as though it were a collateral proceeding in a criminal case."

The circuit court's "lack of jurisdiction" blockade on access to the court didn't last very long before being disapproved by the appeal court. But the circuit court judges weren't about to give up. They had become use to not having to handle many prisoner collateral criminal writ petition actions in the years between 1996 and 2003 before *Schmidt* was decided and they intended to keep it that way. The problem was building by that time. It had taken a while, but increasingly prisoners were learning about the *Schmidt* decision and had started to file more cases to challenge improper or illegal DOC gain time withholdings or forfeitures that had become prevalent from the preceding years' scarcity of legal challenges.

But what was the circuit court to do? If it complied with *Schmidt*, even more prisoners would be encouraged to file writ petitions. And with the number already being filed by then, and the issues being raised, it was clear that the DOC was riding roughshod over the law and its own rules to withhold and take prisoners' gain time at will. Meaning many more writ petitions were coming, unless something stopped them.

That was when judges in the Second Judicial Circuit Court, feeling their backs were against the wall, decided to violate the law.

Schmidt Ignored

Although the Supreme Court had made it clear, the Prisoner Indigency Statute does not apply to prisoners' collateral criminal writ petition cases, judges in the Second Judicial Circuit Court once again began to apply it to such cases. The court clerk was directed to require all prisoners filing writ petition cases in that court to either pay the filing fees up front or to file a § 57.085 indigency affidavit along with a six month inmate account statement (a § 57.085 requirement). When prisoners complied with that last requirement then the court would order the DOC to place a lien on the prisoners' accounts and seize any money placed into the account and send it to the court to cover the filing fee.

If prisoners refused to comply with the court clerk's directions their cases were dismissed. If prisoners motioned the court to stop the clerk's improper requirements, their motions were never ruled on or were summarily denied. If prisoners protested too much about the illegal application of § 57.085, even after paying the filing fee or having a lien placed on their accounts and their money taken, then their petitions would be denied or they would be threatened by the court with the possibility of an order directing the DOC to *consider* disciplinary action for filing frivolous, false, or malicious legal pleadings, or in instances, actually have such orders issued.

The message was clear, the Second Judicial Circuit Court was not going to comply with *Schmidt* and prisoners could shut up and either pay the filing fees and costs or allow their money to be taken from their accounts or, preferably, stop filing writ petitions in that court.

Prisoners who sought to appeal the illegal liens and seizure of their money were slapped with appellate filing fees or liens by the circuit court, compounding the offense, but no doubt discouraging many appeals. *See, Cason v. Crosby*, 892 So.2d 536 (Fla. 1st DCA 2005).

And prisoners who sought to circumvent the circuit court's illegal imposition of fees and liens to file an appeal (or seek certiorari review) by going directly to the appeal court were shocked when the appeal court clerk also illegally required § 57.085 compliance to proceed in that court. Fortunately, a few cases did get through that double roadblock.

The first of those cases was *Cox v. Crosby*, 31 Fla.L.Weekly D310 (Fla. 1st DCA 1/26/06), review granted sub nom. *McDonough v. Cox*, 924 So.2d 809 (Fla. 2006)(the Supreme Court has yet to issue a decision on its review of this case, as of 10/15/06). The appeal court's decision in *Cox* is printed here in its entirety:

31 Fla. L. Weekly D310

LEO J. COX, a/k/a, LEONARD COOK, Appellant, v. JAMES V. CROSBY, JR., Secretary, Department of Corrections, Appellee. 1st District. Case No. 1D05-3857. Opinion filed January 26, 2006. An appeal from an order of the Circuit Court for Leon County. Janet E. Ferris, Judge. Counsel: Leo J. Cox, pro se, appellant. Charlie Crist, Attorney General, and Joy A. Stubbs, Assistant Attorney General, Tallahassee, for appellee.

ORDER ON APPELLANT'S MOTION FOR REVIEW

(WEBSTER, J.) By petition for writ of mandamus, Leo J. Cox argued in the Circuit Court for Leon County that a 1993 amendment to section 944.275, Florida Statutes, which precluded him from receiving basic gain time, was unconstitutional. If successful, Cox would have been entitled to more than five years of additional gain time. The petition was denied and Cox has appealed to this court.

The circuit court issued an order which found Cox to be indigent for the appeal in accordance with section 57.085, Florida Statutes, and imposed a lien on his inmate trust account to recover the applicable filing fees. Cox moves for review of that order pursuant to Florida Rule of Appellate Procedure 9.430(a) and argues that his circuit court petition was a "collateral criminal" proceeding as described in *Schmidt v. Crusoe*, 878 So. 2d 361 (Fla. 2003). He contends that his indigency should therefore be resolved under section 57.081, Florida Statutes, which does not contain a lien provision. *See Cason v. Crosby*, 892 So. 2d 536 (Fla. 1st DCA 2005). Appellee opposes the motion and argues that the holding in *Schmidt* should be limited to its facts, where the appealing party has challenged the forfeiture of gain time by corrections officials.

Appellee's argument is not without appeal. We cannot, however, accept it in light of the reasoning of the court in *Schmidt*. There, the court said "it is apparent that an action affecting gain time does in fact affect the computation of a criminal defendant's sentence, because the length of time the inmate will actually spend in prison is directly affected." 878 So. 2d at 366. Further, the court stated:

> It is clear that the [United States] Supreme Court has refused to be bound by the variations in terminology used in the various challenges to the computation of an inmate's sentence. Instead, it has looked to the effect the challenged action had on the amount of time an inmate has to actually spend in prison. We think we should do the same; thus, we conclude that a gain time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding because the end result is the same—the inmate's time in prison is directly affected.

Id. at 367. Here, if appellant's claim is successful the result would be that his time in prison would be "directly affected," i.e, significantly reduced. We are, therefore, constrained to conclude that this proceeding is a "collateral criminal" one as defined by our supreme court in *Schmidt*. Accordingly, we grant appellant's motion for review and reverse the trial court's order to the extent it imposes a lien on his inmate trust account to recover applicable filing fees. However, because we share many of the dissent's concerns regarding what we perceive to be the logical implications of *Schmidt* in cases such as this, we certify to the supreme court the following question, which we believe to be of great public importance:

> DOES THE HOLDING IN *SCHMIDT V. CRUSOE*, 878 So. 2d 361 (Fla. 2003), EXTEND TO ALL ACTIONS, REGARDLESS OF THEIR NATURE, IN WHICH, IF SUCCESSFUL, THE COMPLAINING PARTY'S CLAIM WOULD DIRECTLY AFFECT HIS OR HER TIME IN PRISON, SO TO PRECLUDE IMPOSITION OF A LIEN ON THE INMATE'S TRUST ACCOUNT TO RECOVER APPLICABLE FILING FEES?

MOTION FOR REVIEW GRANTED; ORDER REVERSED; and QUESTION CERTIFIED. (LEWIS, J., CONCURS; HAWKES, J., DISSENTS WITH WRITTEN OPINION.)

(HAWKES, J., DISSENTING,) Beyond dispute, Appellant's challenge to the 1993 amendment to section 944.275, Florida Statutes, as violative of the constitutional single subject requirement, was a routine civil suit. This type of challenge is not exclusive to criminal cases or even criminal offenders. In fact, cost to the plaintiff is the only difference in the action filed by this prisoner, and an identical action filed by a citizen who remains at liberty. The citizen would have financial consequences from which the majority, contrary to express statutory requirements, chooses to exempt Florida's entire prison population.

The justification for this judicial largesse is the majority's speculation[1] that, if the suit had merit, Appellant may have earned more than five years of additional gain-time from his 20-year sentence. This may explain why Appellant brought the suit. However, it does not, and cannot, magically transform this civil suit into a "collateral criminal" action.

As support for its decision, the majority relies on *Schmidt v. Crusoe*, 878 So. 2d 361 (Fla. 2003). In *Schmidt*, an inmate challenged the loss of vested, earned gain-time for an alleged infraction. The question confronting the *Schmidt* Court was whether "a writ petition contesting the *forfeiture* of gain-time which results in a *longer* period of incarceration should also be considered a collateral criminal proceeding and thus exempt from the statute..." *Id.* at 362 (emphasis added). The Court concluded "Schmidt's *loss* of gain-time effectively *lengthened* his sentence, since, by the Department of Corrections' action he now has to serve that *additional* time in prison." *Id.* at 367 (emphasis added).

This court applied the *Schmidt* reasoning in *Cason v. Crosby*, 892 So. 2d 536 (Fla. 1st DCA 2005). In *Cason*, the inmate challenged a disciplinary action of the Department of Corrections. This court recognized *Schmidt* held cases "where the prisoner challenges the *loss* of gain-time, are collateral criminal proceedings and are exempt from section 57.085." *Id.* at 537 (emphasis added).

In both *Schmidt* and *Cason*, the lawsuit challenged administrative action that resulted in the prisoner being required to serve a *greater* period of incarceration. *Schmidt* and *Cason*, unlike the instant action, did not involve prisoners who, 10 years after the challenged action occurred, decided to file a civil lawsuit challenging the legislature's compliance with constitutional prerequisites to enact a valid law. If the prisoners in *Schmidt* and *Cason* were successful, they would get back the gain-time they recently lost. Conversely, here, Appellant does not seek to get back what he lost. Instead, he seeks to receive what he never had.

The Florida Supreme Court's decision to expand the scope of section 57.081 in the context of a review of prison discipline cases can be understood. There are similarities between a collateral criminal claim and the challenge a prisoner would make to the loss of vested gain-time. In most claims for collateral relief or a disciplinary challenge, the prisoner must act within rigid time-frames or sacrifice any potential relief. The prisoner/plaintiff here faces no time constraints.

Moreover, in both collateral criminal claims and disciplinary challenges, each prisoner's case is based on a unique set of facts. Each prisoner claims that, based on the particular facts of his case, he was personally deprived of some right he previously possessed. The resolution of one prisoner's case does not resolve the issue for every other prisoner who may later file a similar case. These factors are not true here.

The majority's holding here dramatically expands *Schmidt*. Contrary to the opinion's implication, no logical analysis can limit the holding to cases involving gain-time. For example, why would the section 57.085 lien be applicable to a prisoner, who, a decade after he was sentenced, alleges a procedural defect by the legislature in the passage of a habitual offender statute, and argues he would serve less time in prison if the statute is stricken? Because the potential result is less time in prison, it would fit within the rubric of the majority's logic.

The majority's logic creates a test consisting of only a single element. That element is met by an allegation that, if the challenge were "successful the result would be that his time in prison would be 'directly affected,' i.e., significantly reduced." (Majority op. p. 3). This simplistic test merely requires the possibility that a prisoner would be released from prison sooner if successful in his challenge. This test can be met whether the prisoner challenges gain-time provisions, sentencing provisions, or even the procedures the legislature followed years previously in passing the statute that criminalized the conduct that resulted in the prisoner's incarceration.

Now, if technically possible that "time in prison would be 'directly affected,' i.e., significantly reduced," any of Florida's approximately 80,000 inmates can challenge the constitutionality of the procedures the legislature used to pass any statute. They can even file their challenge years after the legislature acted, and they can do so even if the same argument could have been made previously. Certainly, nothing in the test would prohibit a prisoner from bringing a challenge that another prisoner made previously. Indeed, no logical basis exists that would prevent the thousands of prisoners who were also denied automatic basic gain-time from the 1994 act from bringing the identical challenge now brought by Appellant.

The majority's logic would not even prevent repetitive filings by these thousands of inmates. In each of these cases, prisoners could file with impunity. None of them could be required to pay a filing fee or to sacrifice even the smallest purchase from his prison canteen fund. Unlike citizens who are not incarcerated, prisoners can utilize all of these judicial resources for free.

Florida law is clear. In civil cases, prisoners are required to pay a filing fee. The instant case is civil. Consequently, Appellant is required to pay a filing fee. Since he is indigent, the filing fee should be taken from a lien on his inmate trust account pursuant to section 57.085, Florida Statutes, as the legislature intended. Because the trial court properly imposed a lien on Appellant's inmate trust account to recover filing fees, I would affirm.

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[1]The contested amendment was part of the Safe Streets Initiative of 1994. This act was a comprehensive measure designed to address overcrowding in the state prison system. The many changes made by the act included: eliminating many mandatory sentences, re-writing the sentencing guidelines to alter the habitual sentencing prerequisites so fewer defendants qualify, removing the trial court's discretion to sentence all felony offenders to prison (22-month provision), changing the control release provisions, reducing the severity ranking for determining guideline sentences in some attempts, conspiracies, and solicitations, and prohibiting the legislature from creating new felony offenses or increasing the severity of any offense unless such action had a zero net impact on Florida's prison population, or the legislature identified a separate funding source to meet the estimated impact on the prison population. The changes in sentencing law were so numerous they consumed 63 pages in the Laws of Florida. Without knowing Appellant's complete criminal history, any assertion that he would spend less time in prison if the act were declared unconstitutional can only be speculative.

* * *

In addition to the majority of the *Cox* Court again questioning the Schmidt decision with its certified question, the *dissent* by Judge Hawkes is (with all due respect) disingenuous and factually wrong.

Judge Hawkes erroneously wrote that, "cost to the plaintiff is the only difference in the action filed by this prisoner, and an identical action filed by a citizen who remains at liberty. The citizen would have financial consequences [filing fees and costs] from which the majority, contrary to express statutory requirements [apparently § 57.085], chooses to exempt Florida's entire prison population." At another point Judge Hawke fudges the truth in the same vein, claiming that the majority of that court would allow prisoners to file without having to pay a filing fee, "[u]nlike citizens who are not incarcerated, prisoners can use all these judicial resources for free."

Actually, no free citizen could have standing to bring an "identical action" to the one brought by Cox, because they would not be affected by such gain time limiting statute. And at the time Cox filed his mandamus petition in the circuit court (which probably should have been a petition for declaratory judgment) *any indigent* citizen could have (unlike Cox) obtained a complete waiver of filing fees and costs to file *any* type of legal action in the state courts, even a civil lawsuit, pursuant to § 57.081, Fla. Stat. The rest of Judge Hawkes' rhetorical diatribe is simply illogical argument in support of some form of statute of limitations being placed on prisoners' collateral criminal proceedings, in addition to making them pay to file them. In other words, impede their access to court procedurally and financially.

Following the *Cason* and *Cox* decisions, a swarm of other appeal court decisions issued reversing the Second Judicial Circuit Court placing liens on prisoners' accounts or taking their money to file collateral criminal proceedings. *Gilliam v. McDonough*, 31 Fla.L.Weekly D1079 (Fla. 1st DCA 4/18/06); *Wagner v. McDonough*, 927 So.2d 216 (Fla. 1st DCA 5/2/06); *Yasir v. McDonough*, 31 Fla.L.Weekly D1459 (Fla. 1st DCA 5/25/06); *Vega v. Kilhefner*, 931 So.2d 223 (Fla. 1st DCA 6/14/06); *Babji v. Department of Corrections*, 31 Fla.L.Weekly D1699 (Fla. 1st DCA 6/22/06); *Flowers v. McDonough*, 31 Fla.L.Weekly D1808 (Fla. 1st DCA 7/3/06); *McCaskill v. McDonough*, 31 Fla.L.Weekly D1811 (Fla. 1st DCA 7/3/06); Lopez v. McDonough, 31 Fla.L.Weekly D1971 (Fla. 1st DCA 7/26/06). *See also*, *Muhammad v. Crosby*, 922 So.2d 236 (Fla. 1st DCA 11/7/05) and *Thomas v. State*, 904 So.2d 502 (Fla. 4th DCA 2005)(§57.085 does not apply to collateral criminal proceeding challenging parole statute).

However, although the First District Court of Appeal has been complying with *Schmidt*, the rhetoric in its decisions disapproving of *Schmidt* (in support of the circuit court) has been getting stronger. And as exhibited in the following two recent decision it appears that court is looking for what might be considered "borderline" cases to issue published opinions on in the attempt to sway the Supreme Court to receded from, or at least limit, *Schmidt*.

31 Fla. L. Weekly D2015

HOWARD McGEE, Appellant, v. STATE OF FLORIDA, FLORIDA DEPARTMENT OF CORRECTIONS, Appellee. 1st District. Case No. 1D04-4473. Opinion filed July 31, 2006. An appeal from a final order from the circuit court for Leon County. Charles A. Francis, Judge. Counsel: Howard McGee, pro se, Appellant. Rosa Carson, General Counsel; Judy Bone and Barbara Debelius-Enemark, Assistant General Counsels, Department of Corrections, Tallahassee, for Appellee.

(PER CURIAM.) This is an appeal from the circuit court's dismissal of Appellant's petition for writ of mandamus in which Appellant sought to reinstate his lost gain time. We deny on the merits Appellant's petition for reinstatement of his gain time, but we must reverse the circuit court's order imposing a lien on Appellant's prison account

based on the holding in *Schmidt v. Crusoe*, 878 So. 2d 361 (Fla. 2003). Under *Schmidt*, the circuit court erred when it ordered Appellant to pay filing fees and imposed a lien on his prison account. *See Cason v. Crosby*, 892 So. 2d 536, 537-38 (Fla. 1st DCA 2005).

We write only to address the impact of *Schmidt* on cases such as this. In *Schmidt*, the supreme court held that any action which could conceivably reduce a litigant's prison time, should the prisoner litigant prevail, is a collateral criminal proceeding; thus, the litigant is exempt from the filing fee requirement and lien provisions contained in section 57.085, Florida Statutes (2001).

After Appellant violated his parole, the Department of Corrections forfeited Appellant's gain time pursuant to section 944.28(1), Florida Statutes (2001), which authorizes gain time forfeiture for parole revocation, without notice or hearing. Despite the clear authority of the Department, Appellant filed this action below, alleging that the Department was without the authority to forfeit his previously earned gain time. Gain time is a matter of grace that an inmate does not have a vested right to receive without a legislative enactment. *See Waldrup v. Duggar*, 562 So. 2d 687, 694-95 (Fla. 1990). Appellant's argument is completely without merit as a matter of law and, in fact, is frivolous. Had Appellant made an argument such as this in a civil case, he could have been sanctioned under section 57.105, Florida Statutes (1999):

> Specifically, the 1999 version [of section 57.105] authorizes an award of attorney's fees "on any claim or defense at any time during a civil proceeding or action," if the claim "was not supported by the material facts necessary to establish the claim," or "would not be supported by the application of then-existing law to those material facts." . . . Significantly, the 1999 version of section 57.105, "applies to any claim or defense, and does not require that the entire action be frivolous."

Albritton v. Ferrera, 913 So. 2d 5, 8 (Fla. 1st DCA 2005) (citations and footnote omitted).

Before the enactment of section 57.085, Florida Statutes (2001), challenges to prisoner disciplinary actions were treated as civil petitions, not collateral criminal proceedings. Because Appellant's petition is now considered a collateral criminal proceeding under *Schmidt*, Appellant cannot be sanctioned under section 57.105 for filing a meritless claim. He is also not required to bear any of the costs imposed on the courts and the public for filing his action.

The legislature passed section 57.085, Florida Statutes (2001), the Prisoner Indigency Statute, to reduce frivolous prisoner litigation. The preamble to Florida's Prisoner Indigency Statute does not cite any specific examples of civil inmate lawsuits to which it applies, only that the law is enacted because

> frivolous inmate lawsuits congest civil court dockets and delay the administration of justice for all litigants, and . . . each year self-represented indigent inmates in Florida's jails and prisons file an ever-increasing number of frivolous lawsuits at public expense against public officers and employees, ...

Ch. 96-106, preamble, Laws of Fla. Although the legislature has not chosen to clarify its intent in passing the Prisoner Indigency Statute or to address the supreme court's decision in *Schmidt*, it is clear that since this decision, frivolous actions such as Appellant's continue to consume precious judicial resources. Here, a circuit judge was required to review Appellant's frivolous claim. In addition, three judges of this court were required to consider Appellant's claim. Public taxpayers must solely bear the costs of these actions.

This court has previously expressed its concern with *Schmidt* by certifying several questions to the supreme court. *Burgess v. Crosby*, 870 So. 2d 217, 218-19 (Fla. 1st DCA 2004); *Cox v. Crosby*, 31 Fla. L. Weekly D310 (Fla. 1st DCA Jan. 26, 2006), *rev. granted sub nom. McDonough v. Cox*, 924 So. 2d 809 (Fla. 2006); *Gillam v. McDonough*, 31 Fla. L. Weekly D1079 (Fla. 1st DCA Apr. 18, 2006); *Yasir v. McDonough*, 31 Fla. L. Weekly D1459 (Fla. 1st DCA May 25, 2006). To certify another question here would neither facilitate finality nor be a wise use of limited judicial resources. We do however recommend that the supreme court recede from its holding in *Schmidt* due to its unintended fiscal consequences on the courts and the public. *See Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (explaining that district courts may state their reasons for advocating change but are "bound to follow the case law set forth by this Court.").

Accordingly, Appellant's petition is DENIED as to the challenge to the order by which the trial court denied mandamus, but is GRANTED as to the challenge to the lien orders, and those orders are hereby QUASHED. (HAWKES and THOMAS, JJ., CONCUR; VAN NORTWICK, J., CONCURS IN RESULT ONLY.)

* * *

31 Fla. L. Weekly D2299

Criminal law—Mandamus—Error to impose lien against inmate trust account for costs incurred in filing of mandamus petition challenging disciplinary proceeding which resulted in 15-day period of confinement during which petitioner was unable to earn gain-time—Question certified: Does the holding in *Schmidt v. Crusoe*, 878 So. 2d 361 (Fla. 2003), extend to all actions, regardless of their nature, in which, if successful, the complaining party's claim would directly affect his or her time in prison, so to preclude imposition of a lien on the inmate's trust account to recover applicable filing fees

JOHNNY B. JACKSON, Appellant, v. JAMES R. MCDONOUGH, Secretary, Florida Department of Corrections, Appellee. 1st District. Case No. 1D05-4527. Opinion filed September 5, 2006. An appeal from the Circuit Court for Leon County. Thomas H. Bateman, III, Judge. Counsel: Johnny B. Jackson, pro se, Appellant. Charlie Crist, Attorney General, and Linda Horton Dodson, Assistant Attorney General, Tallahassee, for Appellee.

(VAN NORTWICK, J.) Johnny B. Jackson, an inmate in the custody of the Department of Corrections (DOC), appeals an order denying his request to be relieved of a lien imposed against inmate trust account for costs incurred in the filing of a mandamus petition. We reverse on the authority of *Cox v. Crosby*, __ So. 2d __, 31 Fla. L. Weekly D310 (Fla. 1st DCA Jan. 26, 2006), and *Yasir v. McDonough*, __ So. 2d __, 31 Fla. L. Weekly D1459 (Fla. 1st DCA May 25, 2006), cases decided after the entry of the order on appeal, and certify a question of great public importance.

Jackson filed a petition for a writ of mandamus in the circuit court by which he challenged a disciplinary proceeding. Jackson had been charged with an unauthorized absence, and a disciplinary hearing team found Jackson was guilty of the infraction; Jackson was sentenced to 15 days of disciplinary confinement. During this period, Jackson was unable to earn gain-time.

The trial court denied mandamus relief. Further, the trial court entered an order directing the DOC to place a lien against Jackson's prison trust account for the court costs associated with the filing of the mandamus petition. Jackson thereafter moved to be relieved of this order on the authority of *Schmidt v. Crusoe*, 878 So. 2d 361 (Fla. 2003), and *Cason v. Crosby*, 892 So. 2d 536 (Fla. 1st DCA 2005). The trial court denied relief, finding *Schmidt* to be distinguishable since that case considered the loss of earned gain-time, whereas Jackson had not lost any earned gain-time as a result of the disciplinary action taken against him. The trial court did not address *Cason*.

Pursuant to the Florida Prisoner Indigency Statute, section 57.085, Florida Statutes (2005), an inmate who brings a civil action may be subject to the placement of a lien on his or her trust account for the court costs accrued by the filing of the action. The Prisoner Indigency Statute, however, specifically exempts "criminal" and "collateral criminal" proceedings from its provisions. The term "collateral criminal proceedings" is not defined in the statute.

In *Schmidt*, the Florida Supreme Court examined the legislative history of the statute and determined that, while the purpose of section 57.085 is to discourage the filing of frivolous civil lawsuits, the statute is not intended to prevent the filing of claims contesting a criminal sentence. The prisoner in *Schmidt* had challenged a disciplinary

action by the DOC which resulted in the loss of gain time thereby lengthening the prisoner's sentence. Therefore, the court concluded that the proceeding challenging such a disciplinary action was a "collateral criminal proceeding" for the purposes of section 57.085. *Schmidt*, 878 So. 2d at 367. The Court explained that "a gain time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding because the end result is the same—the inmate's time in prison is directly affected." *Id.*

In *Cox v. Crosby*, __ So. 2d __, 31 Fla. L. Weekly D310 (Fla. 1st DCA Jan. 26, 2006), an inmate challenged, by a petition for a writ of mandamus, a statute which precluded the inmate from earning basic gain-time. The inmate was denied mandamus relief and was assessed court costs pursuant to section 57.085. This court reversed the assessment of court costs on the authority of *Schmidt*. The *Cox* panel observed that, if the inmate's challenge had been successful, then his sentence would be "directly affected" and thus, court costs could not be assessed under the reasoning of *Schmidt*. The *Cox* court, though, certified as a matter of great public importance the question of whether the *Schmidt* holding extends to all actions which, if successful, would directly affect the time spent in prison by the party bringing the action. The supreme court has accepted review of *Cox*. *McDonough v. Cox*, 924 So. 2d 809 (Fla. 2006).

In *Yasir v. McDonough*, __ So. 2d __, 31 Fla. L. Weekly D1459 (Fla. 1st DCA May 25, 2006), this court quashed an order imposing a lien on an inmate trust account for filing fees incurred in the filing of a petition for a writ of mandamus. By this petition, the inmate had challenged a "satisfactory" work evaluation, contending that he should have received an "above-satisfactory" rating. He alleged that, had he received an "above-satisfactory" rating, he would have received more gain-time. The *Yasir* panel observed that the inmate's sentence would have been shortened by several days and, thus, his sentence would have been "directly affected" had he been successful in his challenge of the work evaluation. As in *Cox*, this court held that a mandamus petition was a collateral criminal proceeding which was not subject to the imposition of a lien for filing costs under section 57.085. *Id.* The *Yasir* court also certified the question certified in *Cox*.

Based upon the authority of *Cox* and *Yasir*, we hold that the imposition of a lien in the instant case was error. Had Jackson been successful in his challenge of disciplinary confinement, he would have had the ability to have earned additional gain-time. Thus, as we found in *Yasir*, his sentence would have been "directly affected." We note that the trial court did not have the advantage of our *Cox* and *Yasir* decisions, because the trial court entered the order on appeal before those cases were decided.

Accordingly, the order denying relief from the order directing the imposition of a lien on Jackson's inmate trust account is VACATED, and the cause is REMANDED for entry of an order directing the reimbursement of Jackson of those funds withdrawn from his account pursuant to the lien.

As we did in *Cox* and *Yasir*, we certify the following question as one of great public importance:

> DOES THE HOLDING IN *SCHMIDT V. CRUSOE*, 878 So. 2d 361 (Fla. 2003), EXTEND TO ALL ACTIONS, REGARDLESS OF THEIR NATURE, IN WHICH, IF SUCCESSFUL, THE COMPLAINING PARTY'S CLAIM WOULD DIRECTLY AFFECT HIS OR HER TIME IN PRISON, SO TO PRECLUDE IMPOSITION OF A LIEN ON THE INMATE'S TRUST ACCOUNT TO RECOVER APPLICABLE FILING FEES?

(BARFIELD AND LEWIS, JJ., CONCUR.)

* * *

Although the appeal court has consistently been reversing the circuit court on the § 57.085 filing fee/lien issue and ordering reimbursement, the Second Judicial Circuit Court, clerk and judges, are still imposing the liens and taking prisoners' money illegally.

It is important to note a few other situations here that are related.

The First District Court of Appeal has recently held that when a prisoner wishes to seek appeal court review of the circuit court's *improper imposition of a § 57.085 lien for filing a collateral criminal proceeding in the circuit court*, the lien issue cannot be raised on interlocutory appeal, but may be raised on any appellate review sought after a final order is issued by the circuit court on the writ petition. *See, Banks v. State*, 916 So.2d 35 (Fla. 1st DCA 2005); *Quilling v. McDonough*, 31 Fla.L.Weekly D1831 (Fla. 1st DCA 7/6/06); and *Ressler v. McDonough*, 31 Fla.L.Weekly D1915 (Fla. 1st DCA 7/18/06). But the appeal court has also held that if review is sought of the circuit court's *improper imposition of a § 57.085 lien for filing an appeal or petition seeking certiorari review of the circuit court's action* (as to whether appeal or certiorari is the proper review vehicle, *see, Sheley v. Department of Corrections*, 703 So.2d 1202 (Fla. 1st DCA 1997)) then a prisoner may obtain review of that improper lien with a Rule 9.430(a), Fla.R.App.P., motion filed in the appeal court. *See, Wagner v. McDonough*, 927 So.2d 216 (Fla. 1st DCA 5/2/06).

Additionally, during 2005 the Legislature amended § 57.081 so that indigents no longer receive a *waiver* of filing fees and costs under that statute but instead can only receive a *deferral* of same. At the same time, § 57.082, Fla. Stat., was enacted to provide a procedure to implement §57.081 indigency deferrals through a monthly payment plan system based on the amount of income. Neither the Second Judicial Circuit Court nor the First District Court of Appeal want prisoners to come under those provisions.

Conclusion

Obviously it is going to take the Florida Supreme Court to straighten out this situation. There have been two cases pending in that court for a while now that concern relevant issues. *Schmidt v. McDonough*, Case No. SC01-2252 and *Bush v. State*, et al., Case No. SC04-2306. What the Supreme Court should not do is give in to the improper and illegal pressure and tactics of the Second Judicial Circuit Court to recede in any way from the *Schmidt* decision, which, except for footnote 7, is sound law.

One solution that Court should consider that would alleviate the Second Judicial Circuit Court's caseload and possibly solve the whole problem is with venue. While the proper venue and jurisdiction should not be with the sentencing court to hear the type collateral criminal issues being raised in these cases where gain time or subsequent actions affecting the duration of the criminal sentence are involved, that often arise years after the sentence is imposed, such venue and jurisdiction would be proper in the circuit court where the cause of action occurred. For example, when in-prison disciplinary actions are judicially challenged by prisoners as collateral

criminal proceedings, they could and should be brought in the circuit where the prison is located and the disciplinary action involving gain time was taken. That way one circuit court would not bear the burden of handling those type cases, and the counties where prisons are located, which benefit financially from the prisons' presence, can share the workload and any expense. Same with the appeal courts.

[FPLP Editor Bob Posey assisted with this article.] ■

Shake Up at Florida's Women's Prison

by Sherri Johnson

LOWELL- Citing long-term festering problems at Florida's largest prison for women, Department of Corrections Secretary Jim McDonough took steps earlier this year to correct those problems after an independent company's audit of the entire prison system singled out Lowell Correctional Institution as needing particular attention.

Exhibiting the seriousness of the problems, in late June Laura Bedard, the deputy secretary of the Department of Corrections, volunteered to take over as interim warden at Lowell. Bedard, a former Florida State University professor, reportedly was given the job by Secretary McDonough so that she could implement a fresh approach and her theories on corrections. With McDonough's mandate behind her, Bedard has certainly made some changes at the prison.

In mid-October McDonough praised the work that Bedard has done at Lowell, saying that she has done a magnificent job and has set "a shining example of leadership from the front."

So far Bedard has fired 63 employees, over half for conduct unbecoming a corrections officer, started additional staff training that focuses on handling female prisoners, repainted the entire prison, and has been adding new programs to benefit the women prisoners at little or no cost to taxpayers and that in instances may actually reduce costs.

Lowell CI is Florida's oldest and most well known women's prison in the state. There are a total of almost 2,400 beds and 700 employees at the institution, which includes the 803-bed maximum-security main unit and three work camps. One warden is responsible for it all.

Secretary McDonough was prompted to make changes at Lowell when MGT of America Inc. conducted an operational audit of the prison system and found that Lowell had significant staffing problems, needed immediate work on two old buildings, and needed serious attention on ways to better manage female prisoners in terms of how staff deal with them and in how they spend their time. Bedard said those problems are being addressed "all at the same time." "We know that 80 to 85 percent of the women in prison come from abusive backgrounds and more than half are arrested with a male counterpart. Many of them have no self esteem and go along with the pack because they are incapable of standing up for themselves," said Bedard. "We have added training on how to deal with the unique issues that women bring with them to prison."

In addition to providing staff training, new programs have been started at the prison to help the women learn how to cope with stress, conflict and difficult choices.

One thing Bedard won't put up with is staff barking or yelling at women prisoners.

Noting that prisoners were having to stand in long lines to purchase commissary items, Bedard added two more canteen windows. She says she also tries to spend about two hours a day outside of her office walking the compound, taking notes, talking and listening to the women and addressing their problems.

Mental health is one area where Behard believes costs can be cut big time and in a long-term way. The MGT analysis and Behard's own research suggest that way too many female prisoners were being administered psychiatric medications. About 41 percent of the women at Lowell were being medicated, way above the 20 to 25 percent average nationwide.

Bedard said those prisoners being given anti-anxiety and anti-depressant medications are now being offered therapeutic programs, if they will forego the medications, and good results are being reported.

Bedard had never served as a warden before going to Lowell, but says she enjoys and gets great satisfaction from the job. However, eventually she will go back to her deputy secretary job in Tallahassee, something guaranteed when she agreed to take over at Lowell to shape it up. But, before she leaves Bedard said she intends to have a 10-year plan in place at Lowell for long-term maintenance and a master plan for growth. She pointed out that women are the fastest growing prison population and that the FDOC needs to be ready for that.

[Source: *Gainesville Sun*, 10/23/06] ■

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ABA Study Finds Serious Problems With Fla. Death Penalty

The American Bar Association (ABA) released a report on the application of the death penalty in Florida on September 17, 2006, that details serious problems with fairness and accuracy in the process.

The voluminous 454-page report was prepared by a panel of influential Florida lawyers that include both supporters and opponents of the death penalty. The report, while not calling for a moratorium on executions, does recommend a wide range of what are presented as critical changes that need to be made, in addition to calling for further study of racial disparity in who is sentenced to death and for the creation of two independent commissions to investigate wrongful convictions and claims of innocence.

On the racial disparity issue, "It appears that those convicted of killing white victims are far more likely to receive a death sentence and be executed," according to the report.

On the wrongful convictions and claims of innocence issues, Florida has the highest number of death penalty exonerations in the United States, 22 of them since 1973 when the death penalty was reinstated. Florida has executed 60 people during that same time. That's "over one exoneration for every three executions," notes the report.

The study was conducted by eight lawyers, including both known supporters and opponents. It did not address the morality of the death penalty nor did it express support or opposition to it.

One of those who signed off on the report is an ardent supporter of executions and has said he hopes it will not be used to abolish the death penalty in Florida but hopes it will improve the process.

That supporter is Harry Shorstein, chief prosecutor in the Jacksonville area. Shortstein said that at one time he sought the death penalty more often than any other state prosecutor. Now, however, he says he believes it has not been fairly applied throughout the state.

"Whether liberal or conservative, I don't think anyone can say it has worked well," said Shorstein. "We should have a fair and equitable death penalty or not at all; that's the bottom line."

The ABA report was two years in the making and was also highly critical of the secretive clemency process in Florida. That procedure allows those convicted of felonies or sentenced to death to ask for forgiveness or mercy from the clemency commission made up of the governor and his Cabinet. They have the authority to commute death sentences to life in prison. In Florida, the governor can deny clemency for any reason, at any time, and without even holding a hearing.

The problem is, clemency has not been granted to anyone sentenced to death in 23 years. Its full and proper use, however, is essential to guaranteeing fairness in application of capital punishment, according to the ABA's report.

An attorney for Gov. Jeb Bush did respond to that finding in the report, saying the practice of confidentiality in the process allows clemency board members to search their personal consciences for what mercy required.

Another of the report's authors, Mark Schlakman of Florida State University, said the ABA's review of the state's death penalty practices was not intended to address the morality of the process. Instead, he said, it was to identify problems within that process that Florida officials and lawmakers should address to minimize the risk of executing innocent people. It is a process "fraught with problems," according to Schlakman.

Perhaps the most urgent problem he said, is Florida's failure to provide those sentenced to death with adequately paid attorneys. Another top problem is the vast inconsistency in seeking death around the state. "You can have 20 different state attorneys and conceivably have 20 different criteria," Schlakman said.

The extensive report also recommends that jurors, not judges, be the ones to sentence people to death and only by a unanimous verdict. Florida is one of the lone holdout states that does not require a unanimous jury verdict. Last year the Florida Supreme Court urged state lawmakers to consider changing that as recent US Supreme Court cases have cast doubt on its constitutionality. See, *FPLP*, Vol. 11, Iss. 5 & 6, pgs. 7-8.

Presently in Florida, judges are allowed to decide whether to adopt a jury recommendation that a person lives or dies. Judges rarely override such recommendations, and courts have debated for decades on whether judges are allowed to do so. That's one of the inconsistencies that prosecutor Shorstein finds problematic.

Opponents of the death penalty welcomed the ABA report and its findings and recommendations. Mark Elliot of Floridians for Alternatives to the Death Penalty was disappointed, however, that there is no call for a moratorium on executions. He points to the governor of Illinois' moratorium six years ago after a series of wrongful convictions were overturned. Illinois is second only to Florida in total number of death penalty exonerations, Elliot noted.

"In Illinois, the governor declared this was proof of the catastrophic failure of the death penalty system and commuted the sentences of everyone. In Florida, it's business as usual," Elliot said.

[Source: *Palm Beach Post*]. ■

POST CONVICTION CORNER

by
Loren D. Rhoton

The Florida Legislature has provided numerous ways for the State to seek enhanced penalties against criminal defendants such as imposition of habitual felony offender, habitual violent felony offender, or prison releasee reoffender sentencing. While these and other sentence enhancements can be legitimate methods for increasing sentences, it is not uncommon for enhanced sentences to be imposed in non-qualifying cases or for such sentences to be imposed in an improper manner. For example, it improper for a court to impose consecutive enhanced sentences for charges arising out of a single criminal episode. Hale v. State, 630 So.2d 521, 524 (Fla. 1993). The instant article, although it may address habitual offender sentencing specifically, applies generally to most sentence enhancements which arise in the context of a single criminal episode. It is well-settled that sentences imposed under a sentencing enhancement statute may not run consecutively if the offenses occurred during a single criminal episode. Staley v. State, 829 So.2d 400, 401 (Fla. 2nd DCA 2002); *see also* Boler v. State, 678 So.2d 319, 322 (Fla.1996) ("We have held that enhancement sentences arising out of a single criminal episode may not be imposed consecutively").

Under Florida Statute §775.084, the Florida Legislature intended to lengthen the duration of incarceration for individuals found by a sentencing court to be repeat felony offenders. *See* Daniels v. State, 595 So.2d 952, 954 (Fla. 1992). The Daniels Court, however, held that increased incarceration may only be realized through enhancement of the maximum allowable sentence when a defendant is found to be an habitual felon, not through imposition of consecutive sentences. Id. at 952. One year later, the Florida Supreme Court further clarified its position by specifically holding that increased incarceration could not be achieved by running multiple sentences consecutively when those sentences are derived from a single criminal episode and have already been enhanced under the habitual felony offender statutes. Hale v. State, 630 So.2d 521, 524 (Fla. 1993). Moreover, enhancement, coupled with sentencing of consecutive terms of incarceration, is not authorized under Florida law. Id. at 524 ("We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.").

Thus, the legislative intent to increase incarceration for habitual felony offenders is satisfied via the habitual offender enhancement. Hale at 524. No statutory authority grants a sentencing court the power to both enhance *and* order each individual sentence to run consecutively. Id. Should a sentencing court decline to designate the accused a habitual felony offender, then consecutive sentences are available, as no enhancement has occurred. Id. In summary, a sentencing court's options are twofold: (1) designate the accused an habitual felony offender, enhance each sentence, and, run those enhanced sentences concurrently; or (2) decline to designate the accused an habitual felony offender, and potentially retain the option to run those sentences consecutively.

At this time, there is no bright line rule for denominating a criminal episode 'single' or 'separate.' Echelmeier v. State, 662 So.2d 994, 995 (Fla. 2nd DCA 1995). Because such a determination is fact intensive, the focus must be placed on the facts of each individual case. Id. (citing Parker v. State, 633 So.2d 72 (Fla. 1st DCA), *review denied*, 639 So.2d 980 (Fla. 1994). Courts, however, have provided guiding principles to assist in making this determination.

In determining whether multiple offenses occurred during a single criminal episode for purposes of double jeopardy, Florida Courts look to several factors, including whether: there are multiple victims; multiple locations for the offenses; and any temporal break between offenses. State v. Paul, 934 So.2d 1167 (Fla. 2006) (quoting Murray v. State, 890 So.2d 451, 453 (Fla. 2d DCA 2004). While the question here is not one of double jeopardy, the analysis in determining the existence of a single criminal episode under an enhancement statute, such as the habitual felony offender statute, is identical. *See* Staley 829 So.2d at 401.

Challenges to consecutive habitual felon sentences under Hale are not pure questions of law, Burgess v. State, 831 So.2d 137, 140 (Fla. 2002), and should generally be presented in a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Valdes v. State, 765 So.2d 774, 776 (Fla. 1st DCA 2000). Due to the fact intensive nature of determining whether the offenses in question arose from a single criminal episode, and the often resulting need for evidentiary hearings, Burgess, 831 So.2d at 140, the Florida Supreme Court has found that Hale claims are generally "not suited for resolution in rule 3.800(a) motions. Id., *citing* State v. Callaway, 658 So.2d 983 (Fla. 1995). Thus, if at all possible, it is best to raise a Hale issue in a Rule 3.850 motion. However, a Hale claim can also be raised pursuant to Rule 3.800 when it is apparent from the face of the record that the enhanced consecutive sentences arose from a single criminal episode. Jackson v. State, 803 So.2d 842, 844 (Fla. 1st DCA 2001) ("an evolving body of case law . . . recognizes there may be instances where a Hale claim can be resolved from the face of 'the record' without the need of an evidentiary hearing.").

Florida Rule of Criminal Procedure 3.800 motions to correct illegal sentences may be filed at any time after the imposition of a sentence, so long as the illegality of the sentence can be proven on the face of the record. Valdes, 765 So.2d at 776; West v. State, 790 So.2d 513 (Fla. 5th DCA 2001) [the primary

rationale for disfavoring rule 3.800 motions is the absence of a time limitation on its application. However, when time is not a factor, such as when the determination can be made on the face of the record, rule 3.800 motions are proper]. Often, as the Callaway Court held, facts necessary to support Hale claims cannot be determined on the face of the record. Callaway, 658 So.2d at 988. However, such a holding does not preclude a court from *ever* finding facts sufficient upon the face of the record to establish the offenses derived from a single criminal episode. Valdes, 765 So.2d at 776. The Second District Court of Appeal also recognized this proposition by stating that Callaway does not "irretrievably foreclose relief from consecutively imposed habitual offender sentences growing out of the same criminal episode by means of a rule 3.800." Adams v. State, 755 So.2d 678 (Fla. 2nd DCA 1999). In Adams it was noted that a Hale claim may possibly be proper under Rule 3.800 if the necessary facts "may be determined without resort to extra-record facts . . . ." Adams, 755 So.2d at 680.

The need for rule 3.850 motions in these situations are dispensed with when such a determination can be made from the face of the record without resort to extra-record facts. *See* Clark v. State, 826 So.2d 368, 369 (Fla. 2nd DCA 2002) [trial court erred in denying petitioner's 3.800 motion because consecutively run sentences can be challenged under rule 3.800 motions if the offenses arise from a single criminal episode and such determination can be made without need for extra-record facts]; Johnson v. State, 809 So.2d 892, 892 (Fla. 2nd DCA 2002) [rule 3.800 claim *facially sufficient* to challenge illegality of sentence when information charged that offenses occurred on the same date]; Downs v. State, 870 So.2d 46 (Fla. 2nd DCA 2003) [remanded based on Burgess and Adams which allows movant to assert Hale claims pursuant to rule 3.800 if supporting facts evident on face of the record].

Thus, if it is evident on the face of the record (through the charging information, depositions, trial testimony or otherwise) it is conceivable that a court would consider a Hale claim in a Rule 3.800 motion. As has already been mentioned, it is preferable to present such a claim in a Rule 3.850 motion. Nevertheless, if a 3.850 motion is out of the question due to expiration of the two year period of limitations or for any other reason, it may be advisable to pursue a Hale claim via a 3.800 motion if a valid argument can be made that the merit can be determined on the face of the record. Whether pursued by way of a 3.850 motion for postconviction relief or a 3.800 motion to correct illegal sentence, a Hale claim may be an important postconviction attack worth considering if one is sentenced to consecutive habitual offender sentences.

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.

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.

DISTRICT COURTS OF APPEAL

Walters v. State, 31 Fla.L.Weekly D1932 (Fla. 3d DCA 7/19/06)

Martin Walters appealed his convictions for attempted second degree murder with a firearm, aggravated assault with a firearm, and possession of a firearm by a convicted felon.

In relevant part of this case, the trial court had bifurcated (separated into two parts) the trial jury proceedings. In the first phase the jury found Walters guilty of the attempted murder and aggravated battery charges. Afterward, without reconvening the jury and over Walters' objection, the trial court adjudicated Walters guilty of the possession of a firearm by a convicted felon charge in a second phase proceeding.

The appellate court opined that the trial court erred in its bifurcated procedure. Walters case was a jury trial case. *See*, Fla.R.Crim.P. 3.251, 3.260. The factual determinations of guilt or innocence needed to be made by the jury. "The defendant declined to stipulate that the trial judge could determine the existence of the prior convictions, so the defendant was entitled to have a jury determination that he was a convicted felon." *See*, *Jackson v. State*, 881 So.2d 711, 716 (Fla. 3d DCA 2004). Although Walters was found to possess a firearm due to the jury convictions in the first phase of proceedings, it was not the jury in the second phase that made a finding that Walters was a convicted felon.

Due to the findings written here in relevant part and other errors the trial court had made in the first phase of the trial jury proceeding, Walters' case was reversed and remanded for a new trial.

Mora v. McDonough, 31 Fla.L.Weekly D 1937 (1st DCA 7/20/06)

In Julio Mora's case, the Leon County Circuit Court dismissed Mora's petition for writ of mandamus that sought relief from a disciplinary action from the Department of Corrections (DOC) that resulted in the loss of gain time, because it reasoned it did not have jurisdiction to review the case.

Apparently "misunderstanding" the ruling in *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), the case relied on in the dismissal of Mora's petition, it was reasoned that a challenge to the loss of gain time is analogous to a collateral challenge to a sentence in a criminal proceeding because it directly affects the inmate's time in prison. Thus, in citing *Schmidt*, the circuit court found that Mora's case was a collateral criminal proceeding to the judgment and sentence that resulted in Mora's incarceration. As such, because a circuit court does not have the authority to review the legality of a ruling from another circuit court, the circuit court dismissed Mora's petition without prejudice to allow Mora to seek relief in his sentencing court.

In *Schmidt*, it was held that an action challenging the forfeiture of a portion of a prisoner's previously earned gain time constitutes a collateral criminal proceeding, to which section 57.085, Florida Statutes (Florida's Prisoner Indigency Statute), does not apply, reasoning that such an action directly affects the time an inmate spends in prison. Subsequently, the First District Court of Appeals in *Burgess v. Crosby*, 870 So.2d 217, 218-19 (Fla. 1st DCA 2004), had explained that the opinion in Schmidt intended to limit the application of its holding to the question of the applicability of section 57.085 in determining a prisoner's indigency in such actions. It was concluded that such actions are not collateral criminal proceedings for the purpose of determining venue. Thus, it was decided that the circuit court for Leon County, where the DOC is headquartered, has subject matter jurisdiction over claims challenging a disciplinary action of the DOC resulting in a loss of gain time and Leon County is the proper venue for such claims. As such, the Leon Court had jurisdiction to rule on Mora's petition, according to the appeal court.

The order that dismissed Mora's petition was reversed and the case was remanded to the trial court to address the petition on the merits.

Cole v. State, 31 Fla.L.Weekly D1975 (Fla. 3d DCA 7/26/06)

John Archie Cole's case on appeal involved a denial of a motion for transcripts he had filed in the lower court.

Cole was sentenced after entering a guilty plea in January 1996. He was apparently attempting to file a rule 3.850 motion in the lower court where he had the belief, that in order to build his motion, it

was necessary to obtain the transcripts of the lower court's proceedings.

The appeal court cited to their opinion in *Baldwin v. State*, 743 So.2d 78 (Fla. 3d DCA 1999), where it was explained that transcripts are not a necessary tool for the preparation of a legally sufficient rule 3.850 motion. It was opined that one must first file a 3.850 motion setting forth his alleged grounds for relief in order to secure a copy of portions of his trial record. And, one must rely on his best recollection of the court proceedings in preparing his motion. *See also*, *McFadden v. State*, 711 So.2d 1350 (Fla. 1st DCA 1998).

Consequently, the denial of Cole's motion for transcripts was affirmed and it was noted that he may either attempt to obtain the documents he sought from his former counsel, or reapply to the trial court after a motion for post conviction relief had been filed.

Grier v. State, 31 Fla.L.Weekly D2045 (Fla. 4th DCA 8/2/06)

Jewel Grier appealed a trial court's denial of his motion for mistrial that was filed after comments were made during his trial regarding his right to remain silent.

During Grier's trial, a police officer testified that Grier refused to have his statements, where he allegedly admitted to aspects of the charged crimes against him, recorded. The police officer further testified that Grier requested an attorney to be present when he refused the recording of those alleged statements.

Grier's defense counsel had objected to the police officer's comments and motioned the trial court for a mistrial. The trial court denied the motion and, subsequently, the trial jury found Grier guilty of the charged crimes against him.

On appeal, the appellate court opined that *any* comment that is "fairly susceptible" of being interpreted as a comment on defendant's right to remain silent will be treated as such. Such comments regarding silence are high risk errors because there is a substantial likelihood that such comments will vitiate the right to a fair trial. *See*, *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). But, *also see*, *Brack v. State*, 919 So.2d 578, 580 (Fla. 4th DCA 2006); and *Fernandez v. State*, 786 So.2d 38, 40 (Fla. 3d DCA 2006).

In *Fernandez*, it was opined that a defendant who has declined to have his statement recorded, after he waived his *Miranda* rights and made a full statement, comments made regarding silence is then not impermissible.

More on point with Grier's case however, and what Grier relied heavily on, is *Kiner v. State*, 824 So.2d 271 (Fla. 4th DCA 2002), where it has been opined that such comments made on silence as occurred in Grier's case were found to be impermissible and causes a reversible error.

Accordingly, Grier's convictions were reversed and the case was remanded for a new trial.

Terry v. McDonough, 31 Fla.L.Weekly D2048 (Fla. 1st DCA 8/4/06)

A petition for writ of certiorari was filed by James Terry in this case, addressing an Order Denying Petitioner's Complaint for Writ of Mandamus and an Order Denying Supplement Petition for Modification of clerk's Certificate of Indigence, where he sought removal of a lien placed on his inmate trust account.

In *Schmidt v. Crusoe*, 878 So.2d 361 (Fla. 2003), the Florida Supreme Court held that a challenge, as was the issue in Terry's case, to a disciplinary report which results in the loss of gain time is a "collat ral criminal proceeding" and is exclu d from the prisoner indigency statut (section 57.085, Florida Statutes). *See*, *Id.* at 367. Further, the First District Court of Appeals, in *Cason v. Crosby*, 892 So.2d 536 (Fla. 1st DCA 2005), has explained that, as a consequence, no lien is authorized on an inmate's account when the action involves the loss of gain time. *See*, *Id.* at 537. The Florida Department of Correction argued that, due to changes that have occurred to sections 28.246(4) and 57.082(5), Florida Statues, liens on inmate accounts are authorized. That argument was rejected however, in *Wagner v. McDonough*, 927 So.2d 216, 217 (Fla. 1st DCA 2006).

Consequently, the order Terry challenged, in regard to the one that upheld the lien against his inmate account, was quashed, and the case was remanded with directions for the trial court to order the Department of Corrections to dissolve the lien and direct reimbursement of any funds that were withdrawn due to that lien.

A reference notation was included within Terry's case regarding the appellate court's jurisdiction to review the challenge: "Review of the indigency order by certiorari is proper because the whole case is before the court on review of a final order of the lower tribunal. See, *Flowers v. McDonough*, 31 Fla.L.Weekly D1808 (Fla. 1st DCA 7/3/06) (reviewing by certiorari a final order of the trial court denying petition for writ of mandamus on the merits and removing a lien imposed on the petitioner's inmate account); *McCaskill v. McDonough*, 31 Fla.L.Weekly D1811 (Fla. 1st DCA 7/3/06) (same). However, when the case concludes in the lower tribunal on grounds other than the merits, review is proper by appeal of the order concluding the case. *See*, *Lopez v. McDonough*, 31 Fla.L.Weekly D1971 (Fla. 1st DCA 7/26/06) (explaining that when the lower court dismissed the petitioner's petition for writ of mandamus because the issue was moot, review of an indigency order in the case was properly obtained by appealing the order dismissing the petitioner's mandamus petition); *see also*, *Green*

v. Moore, 777 So.2d 425, 426 (Fla. 1st DCA 2000) (explaining that 'review of a circuit court order regarding a prisoner disciplinary matter [i]s properly by certiorari;' however, when 'the circuit court proceeding is concluded on grounds other than the merits,' 'the proper method to review the circuit court's decision' is by appeal, rather than certiorari)."

Woodfaulk v. State, 31 Fla.L.Weekly D2125 (Fla. 5th DCA 8/11/06)

Gregory Woodfaulk's case revolved around the non-compliance of a public records request, and the denial of his petition in a lower court for an accelerated hearing and immediate compliance with the public records request from the state attorney's office pursuant to section 119.11, Florida Statutes (2005).

In relevant part, Woodfaulk alleged in his petition for an accelerated hearing that he received no response to two separate public records requests from the state attorney's office. He also alleged that he made no copies of those requests, but stated in an attached affidavit, that was unsigned and unnotarized, that he offered to pay for the duplication cost of the records. The lower court denied Woodfaulk's petition, ruling that he was not being denied his records, but that he was not entitled to state-funded copies to assist him in preparing any collateral motions or for any other reason.

On appeal, it was noted that Woodfaulk was not requesting a free copy of the documents, as shown by the affidavit, although unsworn and unsigned, that was part of his petition filed with the lower court.

The appellate court opined however, Woodfaulk was not being deprived of any constitutional right. *See, Roesch v. State*, 633 So.2d 1, 3 (Fla. 1993). It was noted that Florida though, has a strong public policy in favor of open government as expressed in *Salvador v. Fennelly*, 593 So.2d 1091, 1094 (Fla. 4th DCA 1992), stating: "That policy has received clear recognition in both the legislature and the courts. The legislature has also recognized that time can sometimes be an important element in the right of access to public records. Hence, the provision for early hearings on public records cases."

"Whenever an action is filed to enforce the provisions of this chapter [119, Florida Statutes], the court shall set an immediate hearing, giving the case priority over other pending cases." See, section 119.11(1), Florida Statues.

Accordingly, Woodfaulk's case was reversed and remanded with instructions to the trial court to schedule a hearing on the petition.

[Note: Although Chapter 119, Florida Statutes, does not require that a petitioner of an accelerated hearing and immediate compliance with public records request attach copies of any requests sent to the custodian of records, where copies of records are sought, as explained in a prior *FPLP* it would be beneficial to retain copies of such in the event proof will accelerate compliance of the records request.]

Ward v. State, 31 Fla.L.Weekly D2160 (Fla. 3d DCA 8/16/06)

Michael Ward's case presented the appellate court with an issue of whether the State has authorization under the Jimmy Ryce Act to seek to involuntarily commit to the Department of Children and Families for care and treatment a person who has been convicted of a sexually violent crime in the past (prior to The Act's enactment) and who is brought into "total confinement" after the Act's effective date, for any crime, sexual or non-sexual in nature.

The appellate court, after a very lengthy discussion, opined that the State is authorized to involuntarily commit one under the above circumstances. However, because the appellate court considered this case would have significant statewide impact, it certified the following question to the Florida Supreme Court as one of great public importance: "*Whether a person who was not in custody on January 1, 1999 (the effective date of The Act), is eligible for civil commitment under the Act if that person was sentenced to total confinement after January 1, 1999, but the qualifying conviction occurred before January 1, 1999.*"

Ward was denied relief, with an affirmative answer to the issue presented.

Reed v. State, 31 Fla.L.Weekly D2169 (Fla. 4th DCA 8/16/06)

Lawrence Reed appealed a denial of his motion to suppress evidence found as a consequence of a police officer entering his motel room, where Reed was lying on a bed asleep, due to being "concerned by Reed's unresponsiveness" after calling out to him a few times from the doorway.

In relevant part, the background of this case began when an unidentified man told a police officer that a couple of "crackheads" were in a motel room smoking crack. The tipster further informed the officer that the man in the room had stolen his own mother's car, cash, and jewelry.

After verifying who was registered to the room indicated by the tipster, the officer went to the room, knocked on the door, and a woman opened the door. From the doorway the officer was able to see Reed lying on a bed and after calling out the Reed a few times, with no response from him, entered the motel room. After shaking Reed awake, the officer asked for his ID and Reed provided his driver's license. It was then discovered that Reed's license was suspended and that Reed was on felony probation. Reed was placed under arrest for "possession of a suspended driver's license" and violation of probation.

Thereafter, the officer contacted Reed's mother, who came to the scene, identified her car, and indicated that she did not want to press charges against her son. Then, as a result of either Reed or his mother giving permission for the car to be searched, a "very small amount of cocaine" was discovered in the car's ashtray. Consequently, Reed was further charged with possession of cocaine.

The appellate court, after quoting and citing to both the Fourth Amendment and Article I, Section 12 of the Florida Constitution, opined that Reed's case presented two Fourth Amendment challenges: The tip received by the officer; and the officer's entry and stay in Reed's motel room. Because it was opined that the officer's stay in the room was dispositive of the case, the appellate court declined to address the challenge to the tip.

The basic principle of Fourth Amendment law is that searches and seizures inside a home without a warrant are presumptively unreasonable. *See*, *Anderson v. State*, 665 So.2d 281, 283 (Fla. 5th DCA 1995). Also, for purposes of 4th Amendment, a motel room is considered a private dwelling when the occupant is legally there, has paid for the room, and has not been asked to leave. *See*, *Gilbert v. State*, 789 So.2d 426, 428 (Fla. 4th DCA 2001). Noted in *Gnann v. State*, 662 So.2d 406 (Fla. 2d DCA 1995), the state has the burden of showing that a warrantless search comes within one of five established exceptions: (1) consent; (2) incident to a lawful arrest; (3) with probable cause to search but with exigent circumstances; (4) in hot pursuit; and (5) stop and frisk.

Reed's case centered on the exigent circumstances exception. Exigent circumstances are those characterized by "grave emergency", imperativeness for safety, and compelling need for action, as judged by the totality of the circumstances. Feared medical emergencies are included in the scope of exigent circumstances and permit law enforcement to enter and investigate a home or motel room without a warrant, *as long as law enforcement does not "enter with an accompanying intent either to arrest or search."* Such medical emergencies can include reports of an individual suffering from a drug overdose. *See*, *State v. Moses*, 480 So.2d 146 (Fla. 2d DCA 1985). However, an entry based on an exigency must be limited in scope to its purpose. Thus, an officer *may not continue his or her search once it has been* determined that no exigency exists. *See*, *Riggs*, *Id.*, at 279.

It was concluded that whether or not the officer's concern for Reed's health was legitimate and supported by the totality of the circumstances known to the officer, once the officer confirmed that Reed had not overdosed, he was required to leave the motel room because the exigency dissipated and no criminal activity was apparent within the scope of the exigent circumstances exception to the warrant requirement and constituted an unreasonable search and seizure violative of the Fourth Amendment. Consequently, the lower court erred by denying Reed's motion to suppress that was made preceding his plea of nolo contendere to both of his charges.

Accordingly, Reed's case was reversed and remanded for Reed to be discharged.

Figueroa v. McDonough, 31 Fla.L.Weekly D2202 (Fla. 1st DCA 8/22/06)

Domingo Figueroa sought a writ of mandamus in the appellate court to compel the lower court to issue a ruling on his motion to dismiss court imposed lien.

Originally, Figueroa had filed a petition for writ of mandamus in the lower court that challenged a disciplinary sanction imposed by the Department of Corrections. The lower court found Figueroa to be indigent but imposed a lien against his trust account for filing fees and costs. Figueroa then filed a motion to dismiss the lien. Subsequently, the lower court denied the mandamus petition on its merits but, claimed Figueroa, failed to issue an order on his motion to dismiss the lien.

Here, the appeal court opined that Figueroa failed to recognize that when a final order has issued and relief sought by motion has not been affirmatively granted, the motion *has been* denied. To support this opinion, the appeal court cited to *Griffin v. Workman*, 73 So.2d 844 (Fla. 1954); *Kaplan v. Morse*, 870 So.2d 934 (Fla. 5th DCA 2004); and *Quinn v. Millard*, 358 So.2d 1378 (Fla. 3rd DCA 1978). Consequently, the appellate court opined that a review of the order that imposed the lien could have been obtained by raising it as an issue in a challenge to denial of the underlying mandamus petition by the lower court in accordance with *Sheley v. Florida Parole Comm'n*, 720 So.2d 216 (Fla. 1998). See; Banks v. State, 916 So.2d 35 (Fla. 1st DCA 2005). *See also*, *Terry v. McDonough*, in these Notable Cases.)

Figueroa's petition was denied because he had failed to identify any ministerial duty which the lower court failed to perform. ■

U.S. Supreme Court Asked to Apply *Blakely v. Washington* Retroactively

In 2004 the U.S. Supreme Court, in *Blakely v. Washington*, fairly rocked the criminal justice world when it ruled that judges cannot increase a defendant's sentence based on factors, such as injury or cruelty, that were not determined to be true and applicable by a jury. The Sixth Amendment right to trial by jury requires that any fact essential to the time that a defendant may be sentenced to prison for must be proved beyond a reasonable doubt to a jury, held the *Blakely* court. When that decision was first announced it was thought by many that thousands of defendants whose sentences had been enhanced by a judge based on factors not determined by a jury would have to be resentenced. However, it quickly became apparent that lower courts had no intention of affording defendants whose cases had become final, and even those that were still actively on appeal — or in the "pipeline" — any benefit from the *Blakely* decision. Where the Supreme Court had not said that *Blakely* was to be applied to cases retroactively, then most lower courts refused retroactive application. The Supreme Court is now considering whether the sentencing rule announced in *Blakely* should apply retroactively to pipeline cases.

On November 7, 2006, oral arguments were heard by the Supreme Court in a case expected to result in a decision answering the retroactivity question that was left open in *Blakely*: whether the *Blakely* rule should apply retroactively to defendants who were sentenced before 2004 but whose appeals were not yet over at the time *Blakely* was decided.

At the oral argument, the Justice Department urged the court not to apply the *Blakely* rule to past cases, arguing that the decision in that case merely changed criminal sentencing rules and is not itself a "watershed" rule affecting the fundamental fairness of a trial.

Stanford law professor Jeffrey Fisher argued that his client, Lonnie Lee Burton, should get the benefit of the *Blakely* rule. Burton had been found guilty of rape, robbery and burglary by a jury. The judge then sentenced Burton to 304 months for the rape, 153 months for the robbery, and 105 months for the burglary (almost 47 years) and then ordered the sentences to run consecutively, rather than the normal concurrently, based on Burton's criminal history and other factors that had not been decided by the jury.

The justices' questions focused on the intricacies of sentencing law, in addition to technical rules that would affect Burton's particular case. Justice John Roberts indicated that even if the rule announced in *Blakely* is a "watershed" rule, Burton might still be technically barred by other rules from receiving its benefit.

Justices Kennedy and Breyer noted in their comments that the court remains very divided over sentencing and that those justices who dissented in *Blakely* remain dissatisfied with the direction that has been taken in recent cases.

A decision is expected on Burton's case by the spring of 2007. A favorable decision could affect and benefit thousands of prisoners nationwide. ■

—US SUPREME COURT— Notable Cases on the 2006-07 Docket

The US Supreme Court started its annual term October 1. On the court's docket for the 2006-07 term is *Cunningham v. California*, a case presenting the question of whether California's sentencing law, that allows judges to increase sentences based on their factual determinations, rather than on a jury's determinations, violates defendants' 6th Amendment right to a jury trial and recent Supreme Court decisions that limit judges' discretion.

Also, in *Whorton v. Bockting* the high court will consider whether a 2004 Supreme Court decision barring the introduction at trial of certain out-of-court statements should apply retroactively to thousands of criminal cases that were in the pipeline at the time of that decision. ■

Confronting Confinement
A Report by the Commission on Safety and Abuse in America's Prisons, June 2006, 119 Pages

In June 2006, after conducting a 15 month study, the Commission on Safety and Abuse in America's Prisons released a major report entitled *Confronting Confinement*. The findings and conclusions of the report are a devastating indictment against America's jails and prisons.

It should be noted that this was not a commission of liberal "bleeding hearts," but was a blue ribbon panel co-chaired by John Gibbons, a former Chief Judge of the U.S. Court of Appeals for the Third Circuit, and Nicholas de B. Katzenbach, a former Attorney General of the United States.

The report's preeminent statement, and the reason it should be important to a wider audience than just prisoners and their families and advocates, is: "What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with correctional officers at the end of each day's shift. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all."

Most people feel that what happens in jails and prisons doesn't affect them and so they shouldn't care or be concerned about it. This report illuminates that attitude couldn't be more wrong. What happens in jails and prisons reflects on our society as a whole and it comes back into our communities with a vengeance, notes the report.

Every year, an astounding 13.5 million people spend time in jails or prisons, and 95 percent of them are eventually released back into society and our communities. Many reenter society worse than when they went in due to the conditions they are subjected to while incarcerated. Often they are more hardened felons, eager to commit new crimes, or mentally ill from abusive, damaging conditions of confinement or lack of treatment for a preexisting mental illness. Many are responsible for spreading infectious diseases back into society, such as hepatitis, tuberculosis, HIV, and deadly drug-resistant staph infections (MRSA), that were not treated while they were incarcerated.

Confronting Confinement notes that while Congress and states passed get-tough-on-crime laws and have went on prison- and jail-building binges to house the ever increasing number of people being incarcerated by those laws, they often did so without providing the necessary funding and resources to allow jails and prisons to adequately cope with the influx of prisoners. The result, this report points out scathingly and in much detail, is that too many of our jails and prisons are unsafe, unhealthy, and/or inhumane, and the effects are spilling over, right back into our communities.

The Commission divided its findings into broad categories followed by recommendations:

► Conditions of Confinement

• *Violence*: The report finds that while the level of violence in America's prisons and jails has decreased from that of a few decades ago, violence still remains a serious problem in many facilities to which many factors contribute. Overcrowding, idleness, lack of programs, and obstructing maintenance of family ties all contribute to violence inside prisons and jails. But violence and abuse are not inevitable and can be prevented by reducing crowding, promotion of productivity and rehabilitation, the use of objective classification and direct supervision, using force only as a last resort, better training of staff, employing surveillance technology, and supporting community and family bonds, notes the report.

• *Segregation*: The increased use of segregation, solitary confinement inside jails and prisons is often over done, unnecessary, often contributes to an increase in violence, is more costly, and actually threatens public safety where prisoners confined in such mentally-affecting confinement are often released from same directly back into society. The report recommends that segregation should be used only as a last resort, that time spent in segregation should be more productive through programming, and that prisoners should not be released directly from segregation to the streets without a transition period. Further recommendations are segregated prisoners should have regular and meaningful human contact to offset dangerous mental effects of sensory deprivation confinement and be free from extreme physical conditions that cause lasting harm. Additionally, mentally ill prisoners particularly vulnerable to debilitating effects of segregation should be screened and assessed to ensure proper treatment in secure therapeutic units instead of regular segregation.

► Labor and Leadership

The report posits that better safety inside prisons and jails depends on changing the institutional culture, which cannot be accomplished without enhancing the corrections profession at all levels. It recommends that a culture of mutual respect, grounded in an ethic of respectful behavior and interpersonal communication, benefits prisoners and staff alike; that the recruitment and retaining of a qualified, diverse workforce advances professionalism; and that only the most qualified leaders should be hired who will use their positions to promote safe and healthy prisons and jails, while the skills and

capacities of middle managers should be enhanced and developed.

► **Oversight and Accountability**

According to the report, most correctional facilities are walled off by more than physical walls; they are also walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions.

Where jails and prisons directly affect the health and safety of millions of people every year, accountability is essential. Independent inspection and monitoring is the most important mechanism for providing that accountability and should be implemented in every state. Further, federal courts have an important role to play in providing oversight and correction, yet their ability to do so has been severely curtailed by the misguided 1996 Prison Litigation Reform Act (PLRA) which should be rolled back, the report recommends. Professional standards should be strengthened; meaningful internal complaint systems should be developed; individual citizens and organized groups, including judges and lawmakers, should be encouraged to visit facilities, and media access to facilities, prisoners, and correctional data should be expanded.

► **Knowledge and Data**

The report also finds that uniform nationwide reporting on safety and abuse in jails and prisons is essential to improving the conditions in same. But that much of the data now available is incomplete and unreliable and actually hampers the ability of corrections leaders, legislators, and the public to make sound decisions about jails and prisons.

The report recommends that federal legislation should be enacted to support meaningful data collection; that the federal government and states should invest in developing knowledge about the link between safe, well-run correctional facilities and public safety; and that federal and state governments should mandate that an impact statement be required for all proposed legislation that would be required for all proposed legislation that would change the size, demographics, or other pertinent characteristics of prison and jail populations.

Summation

No doubt *Confronting Confinement* is destined to be viewed as an important report in the correctional field. But it will be equally valuable to anyone concerned about or involved with jails and prisons in this country, which should be everyone, as this report deftly points out in easily readable language. As the Commission Co-Chairs write in their introduction to *Confronting Confinement*:

Our nation has the talent and know-how to transform all of our correctional facilities into institutions that we can be proud of and rely on to serve the public's interests, institutions that we would trust to ensure the safety of someone we love, places of opportunity as well as punishment. We hope you will join us in this important work.

To obtain a copy of *Confronting Confinement*, write to: Commission on Safety and Abuse in America's Prisons, 601 Thirteenth St., N.W., Suite 1150 South, Washington, DC 20005. Or it can be downloaded from the Commission's website at www.prisoncommission.org ■

FDOC's New Secretary: Not a Man to be Trifled With

Earlier this year, after a meeting with 400 of the state's top prison administrators, Florida's new prison's chief was flooded with anonymous emails and letters from people inside and outside of the system. Sometimes, more than 200 emails a day streamed into Secretary James McDonough's computer. Whistle blowing Department of Correction's employees cracked the department's notorious "code of silence" that has allowed corruption to flourish in the prison system for decades. Many told McDonough they feared for their careers, their families or their very lives, if they came forward with what they know.

Secretary McDonough could sympathize, he's received threats against his life since he took over the department after the former secretary, James Crosby, was ousted by the governor in February and then indicted on federal corruption charges.

Shortly after McDonough took over with a mandate to clean up the scandal-ridden prison system, he was warned, anonymously, not to visit certain prisons in the notorious "Iron Triangle" of North Central Florida maximum-security institutions.

But the West Point graduate and former Army commander doesn't see the punks and cowards who think they are tough because they have abused prisoners for years with impunity.

"It was apparent that you had elements of gansterism come into play here," McDonough said. "When the information was passed to me that there were certain places I better not go, that's where I went."

McDonough, who might be considered the real deal, is also a graduate of the Massachusetts Institute of Technology who served a full career in the U.S. Arm as an officer. During his active service he held many key assignments, including command at every level from platoon (in Vietnam) through brigade senior military assistant to the Supreme Allied Commander, Europe;

Director of the School of Advanced Military Studies; and was the principal author of the Army's central war fighting doctrine, Field Manual 100-5, Operations. He concluded his career in command of the Southern European Task Force Infantry Brigade (Airborne) with operational deployments to Africa (Rwanda, Zaire, Uganda) and the Balkans (Bosnia).

To the rats now laying low inside the prison system hoping that McDonough is replaced when a new governor is elected this year, he warned them, "I'm not a man to be trifled with."

Since taking over the nation's third largest prison system, with 27,000 employees and over 88,000 prisoners, McDonough has not hesitated to battle with corrupt bureaucrats and employees, upset labor unions and dodging lawmakers.

So far McDonough has fired dozens of administrators, wardens and middle managers. When he ordered random drug testing of all DOC employees earlier this year it sent a shock wave rippling through the ranks, with the union that represents correctional employees speaking out against the testing.

Eventually the Police Benevolent Association went along with the random testing, but it remains leery of McDonough. "I think it would be helpful if he realized this is not the military," said PBA executive director David Murrell.

"Morale has gone up, integrity has gone up, and professionalism has gone up. Most people are very proud of that," McDonough said. He has shown that he is not afraid to buck a culture that has thrived on corruption and where rural prisons spawn company towns where prison jobs are handed down generation to generation.

Under Pressure

During September McDonough was faced with a new challenge when a private company, Tennessee-based Prison Health Services, withdrew after completing just nine months on a 10-year contract to provide health care to 17,000 prisoners in 13 South Florida prisons. (See: *FPLP*, Vol. 12, Iss. 1, "Cheap Health Care for South Florida Prisoners," pgs. 1-3.)

After underbidding its nearest competitor by tens of millions of dollars to get the contract in January 2006, PHS said it had underestimated how many prisoners would require hospitalization.

McDonough, who defends privatization, directed that new bids be submitted for the $800 million contract, and said PHS could submit a new bid also. Some lawmakers weren't satisfied with that solution, saying PHS violated the original contract and must be fined for it.

"The DOC can allow PHS to re-bid for more money on a second contract, but the company first needs to be held accountable for any confirmed violations under the original contract," Sen. Dave Aronberg, D-Greenacres, wrote to McDonough in early October. "The terms of the original contract need to be enforced."

McDonough responded that he was still studying the PHS performance reviews and had not yet decided whether fines would be appropriate.

Rep. Mitch Needelman, R-Merritt Island, who sits on the subcommittee that oversees the DOC's budget, blames the prior DOC administration for not providing enough oversight. "The root of the problem probably comes from DOC not keeping track of the numbers. Is it on the right track now? We'll see," Needelman said.

PHS spokeswoman Martha Harbin said the company is expecting fines, which she says is just the cost of doing business with the state on a large scale.

No one seemed to have comments about what impact any contract violations had on prisoners' health care while PHS had the original contract or whether prisoners subjected to substandard care resulting in injury should be compensated, if they still live.

Forging Ahead

Despite some criticism, Jim McDonough is counting his successes and forging ahead. After witnessing first-hand the horrors of ethnic cleansing in Bosnia, the mass murder of Rwandans, and now widespread corruption spread throughout all levels of a state agency, he says he remains an optimist.

"You cannot be indifferent to the bad things that can happen, pretend that they don't exist. But you have to understand the importance of life, the beauty of it, the ability of just a few people to do much good," said McDonough. "I'm looking for leaders of character, and I think in this department, I'm doing very well."

[Sources: *Tallahassee Democrat*; FDOC records] ■

Sentencing Delayed for Former FDOC Secretary

JACKSONVILLE- Former Florida Department of Correction's Secretary James Crosby and his right-hand man, former Regional Director Allen Clark, pleaded guilty in July to federal corruption charges of having accepted $130,000 in kickbacks from a private subcontractor. As part of their plea deals, both men were suppose to cooperate with federal officials in a continuing investigation into corruption within the Florida prison system and be sentenced October 25. On October 11, however, U.S. District Judge Virginia M. Hernandez Covington rescheduled their sentencing for January 25, 2007. Both Crosby and Clark remain free on bond until the sentencing.

The decision to delay the sentencing was made in an order granting motions for a postponement made by both

the U.S. Attorney's Office and attorneys for Crosby and Clark. "As we have said in our motion, we need more time," said Steve Cole, a spokesman for federal prosecutors. "He (Crosby) is cooperating and we have an ongoing investigation and beyond that I can't say anything."

Sources in the know say that the continuing investigation more than likely means that others may still be implicated in criminal activity involving the Department of Corrections, but does not necessarily mean that Crosby and Clark will face more charges.

Apparently federal officials want more from Crosby and Clark before their sentences are handed down. In the feds motion to delay sentencing, Assistant U.S. Attorney Donald Pashayan wrote, "Cooperation is not yet complete in either case."

Steve Dobson of Tallahassee, Clark's attorney, said Clark's "cooperation is ongoing." Crosby's attorney, Steve Andrews, also from Tallahassee, said, "If the government thinks he (Crosby) is not done cooperating yet, then he will continue to cooperate. The government will decide when this is over."

Also as part of Crosby and Clark's plea deal, each was ordered to repay the full amount of the kickbacks that they had received from a Gainesville businessman and friend who had been given a subcontract to set up and sell canteen items to prisoners and their family visitors. That subcontractor was banned from the prisons after it was discovered that he was giving bribes to Crosby and Clark as part of the deal to net $1.5 million a year from the visiting park canteen contract.

Shortly after Crosby and Clark pleaded guilty to taking the bribes, state officials informed them that state laws allows their retirement benefits to be forfeited for committing specific crimes while working for the state.

Crosby was sent a letter by the Dept. of Management Services telling him he owes the state $236,602.51. That amount includes retirement benefits paid to Crosby through June in addition to a $215,236 lump sum payment made to Crosby in mid-March, one month after he was forced to resign by Governor Jeb Bush.

The amount owed by Clark was less clear. Clark had transferred his retirement pay to the state's investment system and the amount is not public record.

Clark's attorney, Steve Dobson, did say, "We have every reason to expect they will forfeit their retirement money."

In addition to his legal woes, Crosby also suffered a personal loss in July. Court records from Marion County show that a divorce filed by Crosby's wife became final July 7.

When he pleaded guilty, Crosby told the court that he was being treated for alcohol abuse, apparently hoping that will influence a lighter sentence, and that he had moved in with his elderly parents in rural Bradford County.

[Sources: *Gainesville Sun*, *Orlando Sentinel*, court records.] ■

Operational Audit Blames Centralization

Shortly after he took over the Florida Department of Corrections in Feb. '06, Secretary James McDonough contracted with the management consulting firm MGT of America, Inc., to conduct an operational audit of the department to identify problem areas that need correction. MGT's report found that a former FDOC secretary's (Michael Moore) dismantling of financial and personnel systems at individual prisons and moving those duties to four regional offices around the state created conditions that contributed to recent corruption cases within the department. The 200 page report by MGT contained 60 pages of recommendations addressing myriad issues, most of which could be traced back to an earlier push to centralize central office oversight of prisons. Three critical areas of concern cited are that: (1) prisons with annual budgets of $100 million had no fiscal staff on site to monitor transactions, (2) prisons were unable to provide basic human resource management and assistance to staff because there were no personnel staff on site, and (3) a lack of local purchasing staff meant repeated instances of shortages of vital supplies, equipment and materials. The MGT report was welcomed by Secretary McDonough. The report took about two months to complete and cost $751,039. Money well spent, according to McDonough, who said he will use the report to help him prepare the department's 2006-07 budget request for the Legislature.■

- NOTICE -

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

P.O. Box 1511
Christmas FL 32709-1511

First of all I will direct my remarks to President Bush, even in today's newspaper there are still pro and cons about the treatment of foreign prisoners in Guantanamo Bay it says a new army manual bans torture and degrading treatment of prisoners. Sir those are our enemies and so many people get so riled up over harsh treatment to them when our own loved ones in our prisons here in the great free? United States of America are tortured, beaten shackled and kicked every day of the year. You know what was so hilarious sir; the leader of that band of "heinous rogue" was a former guard of the Department of Corrections from Philadelphia. Therefore he had already been schooled on inhumane torture.

Second Gov. Bush you should know how hard it is for the families to see their loved ones locked up, although I'm sure your daughter never got the harsh treatment that our loved ones do. No one would dare to beat and torture her. But still I know how hard it was, especially to have your lives spread all over the front pages of every newspaper. I am so sorry. But because of this I know you know how far I will go to try to help and protect my only son.

Third Secretary McDonough, I thank God for you and how you have taken over the Florida D.O.C. and seem to have gotten a lot of things turned around for the better. I know that you cannot police every prison personally but there should be strict rules for the employee's as well as the inmates. Some of the guards perceive the "get tough" philosophy as a green light to act out their basic hostilities on prisoners. The inmates get shackled cursed, beaten and kicked for sometimes nothing more than asking a question. I think it would benefit the FDOC employees to attend the Rethinking Personal Choice and anger management training. In fact this training should be mandatory for all persons before hiring anyone to work for the FDOC. This training program was started at Florida State Prison for inmates and my son graduated in the first class, and it has served him well. He gets along well with others and knows well how to say "yes sir and no sir" even when he is being cussed out by those in charge. But that did not keep him from getting a DR two months after being transferred to Taylor CI. Taylor CI is well know for the brutality and for the cursing and harassment and it seems like the guard especially like using the F--- word and the N word. Inmates are routinely cursed, abused and given DR's and locked up for non-existent reasons. Recently this happened to an Inmate whose family had driven more than six hundred miles just to be turned away, all because of a false DR. Ms. Lee

Dear FPLP: I need to again express my appreciation to the esteemed Mark Osterback and his endeavors on our behalf and let the enclosed reflect that successful litigation is not in vain.

Recently while enjoying a nine day sabbatical in administrative confinement, I was armed with my trusty *FPLP* and used Mark's above article and Chap.26 to file a DC 303: "Grievance of a Serious Health and Medical Nature because of the KNOWN and OBVIOUS massive infestation of rodents..... As the enclosed admin response indicates, the grievance was well received and favorably acted upon.

Please note that I have missed your "Razorwire" mail section and was GLAD to see "Mail Reader's Respond" which I enjoy and strongly believe is a very important part of your essential publication. SJ and her necklace letter about Broward CI was very disturbing and demonstrates that we still have a very difficult battle with the rampant apathy in the FDOC. And God help us with Charlie Christ being elected governor as Mr. Posey addressed in his perceptive poignant editorial. WGH MCI

Dear FPLP: I want to bring to your attention that there are a lot of assaults on inmates by staff here at Taylor CI. Staff beat inmates all the time and the inmates are afraid to report it for fear of retaliation and more abuse. Also if inmates file grievances they get bogus DR's written on them. I've been told by staff that the KKK runs this institution not DOC. This is a good old boy prison mostly family here. One inmate was told in the visiting park to keep those little monkeys off his grass talking about his kids. I pray that someone will check into this before an inmate is killed. AJ TCI

Dear FPLP: I am a Jewish inmate currently on CM 1 at Charlotte CI. The reason for this letter is under §761 Fla. St (2004) DOC must employ the least intrusive means to achieve its objectives with respect to religion; this means that because my religion requires my food to be kosher DOC's JDA programs place a substantial burden on the exercise of my

– Parole Project – Donations Needed

The FPLAO Parole Project continues to work to change the existing parole system and Parole Commission in Florida so that it actually works the way it should to give all parole-eligible prisoners a fair, unbiased, and objective opportunity to make parole. The last two issues of *FPLP* explained what is being done by the Project to force change to happen. The Project, however, is limited in what it can do by the amount of support it receives. Donations have been requested from parole-eligible prisoners to help fund the Project. As previously explained, if every parole-eligible prisoner, approximately 5,200 of them left, will donate just $5 a year to the Parole Project, there will be a substantial war chest for the Project to work from and to keep continuous pressure on the Parole Commission and legislators to abolish the current system in favor of one that works.

So far, a few hundred dollars in donations have been received, which certainly helps and is much appreciated, but more is needed. If you can't donate $5 at one time, donate what you can as you can. If you can donate more than $5, to help make up for those who have nothing, then please do so. Every penny donated to the Parole Project will go towards working to make parole more available to parole-eligible prisoners. Your donations are needed today. Send them to:

Florida Prisoners' Legal Aid Org., Inc.
Attn: Parole Project
P.O. Box 1511
Christmas, FL 32709-1511

FOR CLEMENCY ASSISTANCE INFO. WRITE TO:

NATIONAL CLEMENCY PROJECT
8624 CAMP COLUMBUS ROAD
HIXSON, TENNESSEE 37343

religion and the same goes for shaving: There are some Jews who shave and some who don't for/because of our religious beliefs; I'm one of the latter. I've exhausted the administrative process and have now sought Mandamus relief #06-2264; 2265; 2266; I'm aware that it'll take some time but because the language of the statute is clear and without ambiguity I know that I'll be successful. All Jewish (male/female) inmates need to be aware of these pending actions, so as to take full advantage of the Mandamus orders and finally once and for all force DOC to provide us with kosher foods and any and all other materials which our religion necessitate. Together we can prevail, but nothing will ever get done as long as we wait for someone else to fight our cause!!! JJ CCI

Dear FPLP: I had my first parole hearing in February in Tallahassee, I was given a date of 2061. I have never been in confinement; I worked professional jobs, for over 20 years and have completed many programs. What does the parole commission want with my life, after 25 years my health is growing poorer, high blood pressure, ect... I take 5 different medications and I know I won't see 20061 alive. The parole commission is a farce, if they parole us they will not have a job will they. I know many lifers who have perfect or near perfect records with 2020 to 2096 dates, their ages are from 50 to 80, so how could they ever make those dates. We surely need a system that works!!! RE GCI

Dear FPLP: I was in receipt of recent letter about the improperly collected copying service charges, from Fl. Justice Inst. Inc. In the letter it was stated: "If your claim is wholly or partially denied, you have thirty (30) days from the date of notification to file an action in circuit court or to appeal the denial to the district court of appeals pursuant to Chapter 86 and Section 120.68, Fla. Stat. respectively." Enclosed was a copy of the form which must be used to seek a refund. The form can be filed either with Chief Financial Officer of the State of Florida, who is Tom Gallagher, at Florida Department of Financial Services, 200 East Gaines St. Tallahassee Fl. 32399-0300, or to James R. McDonough, the Secretary of the FDOC. Enclosed was Form DFS-AA-4 Rev 12/02. The form title is: STATE OF FLORIDA FINANCIAL SERVICES APPLICATION FOR REFUND. Form DFS-AA-4 should be obtained from Department of Financial Services by written request address herein. JAF HCI

Dear Comrades; I received my copy of Perspectives much delayed today, not due to the malice of the mail room, but due to the onerous rules in close management. I came to where I am straight from the reception center. And having done 8 calendar years from '82 to '90, coming back, especially under these circumstances has been nothing short of shock trauma. Most of the shock is the completely apathetic attitude of the inmate population regarding our status, privileges and treatment. What happened in the 15 years I was free? While Perspectives is like a breath of fresh air for those of us who care about prison reform, judicial review and assistance in our cases, there's at least 73,000, or 85% of the total population, who are either happy to push Fred Flintstone mowers, eat crappy Aramark food, or too interested in cartoons to care. I agree with Bob when he said that most inmates only care about themselves. Not one of these sad sacks in my wing care about filing a grievance. But there have been a couple who came and went in the past 14 months. They are fighters like Bob Posey, Mark Osterback and others in the past (Costello, Jeff Raske) who fight the oppression. You know who you are: D.A., D.H. DMc and P.P. These guys impressed me with their attitudes as well as their ability to get into the F.A.C.'s case law and statutes and actually "put pen to paper" and fight for their rights and freedom. I just wanted to thank Bob & Teresa and all the others on the FPLP staff for their dedication and hard work, and I encourage all the other fighters out there to keep at 'Em, and never give up. From the Gulag..... Comrade T.C.

Letters sent to FPLP may be used in this section. All letters are subject to editing for length and content. Only initials will be used to identify senders and their location. Letters are welcome from all FPLP members. Address letters to: Editor, FPLP, P.O. Box 1511, Christmas, FL 32709.

IN THE COUNTY COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 2006 SC 0842

ELIJAH JACKSON, JR.,

Plaintiff,

vs

JAMES V. CROSBY,
FLORIDA DEPARTMENT OF CORRECTIONS,
JAMES R. McDONOUTH,

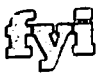
Defendants.
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court for Trial and both parties having presented testimony and argument, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Plaintiff recovers from the Defendants the sum of $ 750.00 Damages and $ 280.00 Court costs, plus interest of 9% from this date, for all of which let execution issue.

Plaintiff Pro Se Elijah Jackson, Jr., an incarcerated prisoner, commenced this action in the wake of Smith vs Department of Corrections, 920 So 2d 638, (Fla 1st DCA 2005) Rev. Den. 923 So 2d 1162 (2006). The Complaint alleges that the Plaintiff is an indigent prisoner whose inmate account was debited prior to January, 2006, to pay for the legal photocopies the Department of Corrections provided to him at his request, pursuant to Rule 33-501.302, Florida Administrative Code.



The Smith decision invalidates this foregoing Rule and on that ground, the Complainant asserts that the Plaintiff is entitled to a refund for deductions that were made from his prisoner account by the Defendant prior to the Smith decision. The First District Court of Appeal found that the cost and enforcement provisions of Rule 33-501.302, Florida Administrative Code, were invalid for want of specific statutory authority. The District Court in the Smith case expressed no opinion as to whether the appellant there was entitled to the relief requested within the petition. The Plaintiff in the Smith case, in fact, did not raise the issue of entitlement to damages.

This Court has concluded that since the Florida Department of Corrections was not entitled to charge the prisoner Plaintiff for the cost of copies and enforce liens for the copying costs because the Department of Corrections did not have a specific statutory authority any such amounts actually collected from the Plaintiff by the Florida Department of Corrections should be returned to the prisoner Plaintiff.

The Court has concluded that the facts at Trial were that the Department of Corrections, after January 27, 2006, did not collect any further copy costs from the Plaintiff. The Court also concluded that the liens that were assessed prior to January 27, 2006, that had not been paid by the Plaintiff prisoner had been discharged and not collected by the Florida Department of Corrections. The Florida Department of Corrections further did agree that some copying costs prior to January 27, 2006, had been collected by the Florida Department of Corrections from the Plaintiff prisoner and not repaid. The Defendant Florida Department of Corrections did not offer any further defense than to argue that the Smith case did not address the issue of damages.

For the foregoing reasons, this Court has entered a judgment in favor of the Plaintiff in the amount of copying costs that the Defendant Florida Department of Corrections had deducted from the prisoner's account and not repaid.

DONE AND ORDERED in Tallahassee, Leon County, Florida this October 4, 2006.

Don Modesitt

DON MODESITT
COUNTY JUDGE

Florida Prisoners' Legal Aid Organization Inc.

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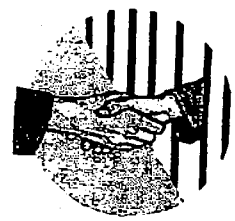

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3. Your Name and Address (PLEASE PRINT)

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Address

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☞ Please make all checks or money orders payable to Florida Prisoners' Legal Aid Org., Inc. Please complete the above form and send it along with the indicated membership dues to: FPLAO, Inc., P.O. Box 1511, Christmas FL 32709-1511. For family members or loved ones of Florida prisoners who are unable to afford the basic membership dues, any contribution is acceptable for membership. Memberships run one year. If you would like to make a donation to FPLAO, Inc., to help the organization continue its work for prisoners and their families, send donations in any amount to the same address. Thank You. All members receive *Florida Prison Legal Perspectives*.

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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.

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