FLORIDA PRISON LEGAL

Perspectives

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Aramark Bites the Dust

by Teresa Burns Posey

After almost seven years of bilking state taxpayers out of millions and millions of dollars by starving state prisoners with substandard food, on September 9, 2008, private food service vender Aramark announced that it will terminate its contract with the Florida Department of Corrections(FDOC) to provide food to Florida prisoners.

Aramark, one of the biggest names in the nation's privatized food-service industry, was given the contract in 2001 to feed state prisoners, replacing the FDOC's in-house food system, as one of several privatization ventures started while Jeb Bush was governor. Often criticized for cutting corners to maximize profits, and virtually hated by prisoners who were the victims of the cut corners, Aramark will stop serving meals in the prisons January 9.

The company noticed FDOC in September that it is invoking a 120-day termination clause in the contract, citing as the reasons "unprecedented" inflation in food costs and a poor working relationship with the department.

From the beginning of the contract, Aramark's relationship with the FDOC could only be described as rocky.

FDOC employees, use to supplementing their income with free food siphoned off of stock purchased to supposedly feed prisoners, were extremely resentful when Aramark locked down that decades-old bounty. Aramark also started making FDOC staff actually pay for meals they ate at the prisons, albeit at minimal cost. However, any cost was resented, for something that previously had been mostly free. And then there was the fact that Aramark personnel, outsiders, took over jobs previously held by FDOC staff.

During the first year after Aramark took over prison food service the animosity between its personnel and FDOC staff became palpable. At most prisons, FDOC staff began an organized campaign to run the company out, harassing its personnel and writing the company up for the slightest deviations in food service. That situation grew until orders came down from on high, perhaps from the governor's office, instructing FDOC staff to back off Aramark, or else. Which they did, but a level of resentment remained. "We have been unable to achieve the type of partnership consistent with our expectations for a positive long-term relationship," wrote Tim Campbell, president of Aramark Correctional Services, when informing the state that the company ws pulling out of the contract.

The relationship between Aramark and FDOC further deteriorated when the department replaced Aramark with Trinity Food Services, another private food vender, in Region II of the FDOC late last year. Trinity had been Aramark's main competition for Florida's prison food service. However, until last year, Aramark had kept Trinity confined to providing food at only a few prisons in South Florida under a separate contract, while Aramark served the majority of prisons. The Region II change-over

ON THE INSIDE

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on October 1, 2007, almost equally divided the privatized prison food system between Aramark and Trinity, and no doubt reduced Aramark's profits.

On top of having its business substantially reduced, during this year alone, the state fined Aramark $261,000 for contract violations, ranging from delays in feeding lines and excessive substitutions of menu items.

A review last year by the FDOC's inspector general "found" that Aramark earned "windfall" profits because it was allowed to serve cheaper ground turkey scraps instead of real beef as the set recipes called for and because Aramark was being paid based on the number of prisoners at a prison, not on the number of actual meals served. (Both situations which have existed since Aramark began feeding prisoners in 2001.) The inspector general recommended that the contract be rewrote or that food service return to an in-house, FDOC, operation.

Then in February of this year, the Campaign for Quality Services, a joint project of the Service Employees International Union and UNITE HERE, held a rally in Miami where labor, elected and community leaders, and prison activists, including representatives from Florida Prisoners' Leal Aid Organization, Inc., also called for a state investigation of Aramark's contract with the FDOC. (See: *FPLP*, Vol. 14, Iss. 2, "Union/Activists Call for Investigation of Aramark's Florida Prison Contract," pgs 5-6.)

For prison officials the issue isn't solely about stuffing prisoners' stomachs. Many correctional experts believe decent food is key to good security and avoiding lawsuits alleging inhumane treatment. "Food really becomes a security issue for us," said FDOC Secretary Walter McNeil recently. Under pressure by the Legislature to cut prison food costs by $9.3-million without sacrificing quality, in August McNeil invited other private venders to submit bids hoping to find a company to feed prisoners cheaper.

In reality, however, with Florida's newer generation of prisoners, the relationship between food and security is not as apparent as in the past. Aramark proved that Florida prisoners will essentially eat what people on the outside would consider garbage, without protest. Nasty looking and tasting ground turkey scraps in almost every meat dish; cabbage substituted for most other vegetable dishes; raw, uncooked beans, rice and potatoes; salmonella-laden uncooked chicken that regularly caused widespread food poisoning in the prisons; filthy trays and eating utensils, have all been common in most Florida prisons since 2001 under Aramark. Except in a very few incidents, prisoners largely accepted that situation, complaining among themselves while steadily gobbling down such swill. Afraid to file grievances or "stop the line," as prisoners use to regularly and effectively do to obtain better food, today's prisoners demonstrated that even for decent food they were unwilling to stand together, as if they gave up

every bit of pride and self-respect when they walked in the prison gates.

And to be fair, it didn't only start with Aramark. Many prisoners who have been in a while claim they wish FDOC would take back over food services, claiming it was better. Perhaps they have forgotten the frozen egg salad filled with egg shells, the purple and green slabs of slimy turkey corn "beef," the un-chewable "roast beef," the date-expired turkey burgers. Maybe it slips their memory when they were expecting to get roast turkey or ham for a holiday, only to learn the load of ham and turkeys went out the back gate and were later distributed to staff. And maybe they don't remember that with the FDOC they never got fresh salad, fruits, or fruit juice.

The contract with Aramark was deliberately written to allow the company to make "windfall" profits, at the expense of taxpayers' pockets and prisoners' health. It took seven years and a tightening of the state budget before it was decided that Aramark had done enough damage.

Whether what comes next is any better (or worse) remains to be seen. It may be that Trinity will take over food service for the entire FDOC, which is a step up from Aramark. If other companies get involved, underbidding to be the cheapest, things may go further downhill. In that case, unless prisoners work together (as they use to do) to ensure decent food for all, it may be another seven years before FDOC says, "Oh, we just found out that this isn't right."

■

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New Prison to Prepare Prisoners for Re-entry

A juvenile correctional facility in Polk County was closed earlier this year and turned over to the Florida Department of Corrections to become a state prison meant to prepare adult state prisoners for successful re-entry into society.

The former Polk Juvenile Correctional Facility will reopen before the end of this year as the Demilley Correctional Institute. It will serve as Florida's first prison specifically designed with the goal of reducing Florida's almost 50 percent recidivism rate since the 1970s.

"Investing money into programs of this type will enable us to avoid the tremendous costs associated with building more prisons," said FDOC Secretary Walter McNeil. The politically popular "lock 'em up and throw away the key" approach to crime is not being tough on law and order, its being financially irresponsible, McNeil, a former police chief and head of the Department of Juvenile Justice, said earlier this year. He also said that it has been proven that the "lock 'em up..." policy doesn't work that it only increases crime and increases the burden on taxpayers.

Demilley CI will house close to 400 prisoners once it is fully up and operational. It will only take prisoners who are within three years of release and who, before they will be sent to the prison, have proven they are willing to reform.

Once prisoners go to Demilley, some will be able to take part in work release. All of them will also be offered drug and alcohol rehabilitation, education and job training, and counseling.

"We have devised a plan, and we are supervising the building and the re-building of these individuals," said Franchetta Barber, a top FDOC administrator.

"We believe this is a get smart opportunity for the state of Florida," McNeil said.

State prison officials have said that, over the next five years, Florida plans to spend more than $2-billion, to build new prisons. McNeil just doesn't believe Floridians can afford to do that. Agreeing with his predecessor as head of the FDOC, Jim McDonough, McNeil replaced earlier this year, McNeil has called for major budgeting for mental health, job training, drug programs and increased basic education in the state's prisons, he is hoping that if the Demilley facility is successful, that some of the new prisons to built will be modeled after it.

[Sources: Bay News Ch. 9; Fox 13, Tampa Bay.] ■

Hepatitis C

by Mark V. Miller

The latest estimate is that 40% of the prison population is infected with the Hepatitis C virus. Unless you specifically ask to be tested for Hepatitis C virus, the FDOC will not include that test in any routine blood work.

There are no outwardly apparent symptoms of this disease until it is virtually too late to treat. The death from this disease is lingering and horrible. The liver stops filtering because of cirrhosis (scar tissue) and the normally eliminated toxins leak out of the liver. These fluids begin collecting in your abdomen. Your body then begins to shut down and it becomes a slow poisoning of your system.

If you have ever shared a needle, had tattoos done in prison, or shared a straw or similar object snorting drugs, you may have been exposed. Unless you are tested the FDOC is under no obligation to diagnose or treat this disease. The treatment is very expensive and with everything being based on money, budget cuts, and cost efficiency—it is cheaper to bury you.

The treatment is generally 48 weeks with weekly injections of pegylated interferon and twice daily capsules of Ribavirin. Many stop treatment due to side effects. They are very similar to having a severe flu: aches, pains, fatigue, nausea, weakness, headaches, temporary hair loss and anemia. The treatment is serious for a serious disease. The treatment's side effects are nothing compared to the effects of the disease and liver failure. The treatment lasts about a year but the horrors of the disease sometimes takes several years before you are finally confined to the hospital bed dependent on others for *all* your needs. Not a picturesque way to free up a bed for the DOC. Once you reach the terminal stage there is no more money to be spent on your health care.

Scary? You bet! I've watched many friends lose the battle because they did not learn of the disease until it was too late to effectively treat. Ask around, read up on it, become informed. Get tested. Be persistent with following up on test results. Ask to see the lab results. Once diagnosed your liver enzyme levels must be monitored. These tests indicate the rate at which your liver is dealing with the disease. Numbers should be below 50-double or triple that shows damage is going on and it only progressively worsens.

Proactive is a great word. Unless you do something for yourself no one else will. Don't wait until you are dying to wonder why. Get tested - get treated... your choice. The earlier you are treated the better your odds of recovery. The FDOC policy is to "monitor" you. This only allows the disease to worsen and decreases your chances of recovery. Get tested—get treated. ■

Conditional Release An Infinite Web

by Dana Meranda

The Conditional Release Program Act was created in 1988. See Ch. 88-122 § 19, Laws of Florida.

Conditional Release is a creature of statute. Section 947.1405(2), Florida Statutes (1988) (Supp), provides in pertinent part, Conditional Release applies to:

(2)(a) Any inmate who is convicted of a crime committed on or after October 1, 1988, which crime is contained in Category 1, 2, 3, or 4 of Rule 3.701 and Rule 3.988 Fla.R Crim.P. (1993), and who has served at least one prior felony commitment at a State or Federal Correctional Institution;

(b) Is sentenced as a Habitual or Violent Habitual Offender or a Violent Career Criminal pursuant to *§ 775.084* or;

(c) Is found to be a sexual predator under § 775.021 or former § 775.23...

shall, upon reaching the tentative release date or provisional release date, whichever is earlier, as established by the Dept. of Corrections, be released under supervision pursuant to § 948.09, Florida Statutes. *Gove v. F.P.C.*, 816 So.2d 1150, 1152 (Fla. 1st DCA 2002).

Under the specific authority of §§ 947.07 and 947.20, Fla. Stat. (2006), the Parole Commission's own rules concerning Conditional Release are contained in Ch. 23-23, Fla. Admin. Code.

As stated in *Evans v. Singletary*, 737 So.2d 505, 507 (Fla. 1999), "Conditional Release (as opposed to Control Release, Provisional Credits, and Administrative Gain-Time), is not an early release program. Conditional Release is an extra post-prison, probation-type program. In other words, when an inmate is released due to gain-time from a sentence that is eligible for Conditional Release, instead of going free as other offenders would do (unless they have probation or some other supervision to follow) these offenders are placed on supervision for the amount of time equal to the gain-time they have accrued."

According to FDOC Annual Report, FY 2005-2006, (Prison Admission/Intakes) there were 2,153 Conditional Releases returned to prison on technical violations alone.

Conditional Release applies to all qualified offenses committed on or after October 1, 1988. *Westlund v. F.P.C.*, 637 So.2d 52, 53 (Fla. 1st DCA 1994).

Section 947.1405(2), Fla. Stat. (1989), provides that, "if an inmate has received (imposed by the court) a term of probation or community control supervision to be served after release from incarceration, the period of probation or community control must be substituted for the Conditional Release supervision." *Jefferson v. State*, 937 So.2d 833, 834 (Fla. 4th DCA 2006), *but see*: Ch. 2001-124, § 5, Laws of Florida (Amended), Effective July 1, 2001.

The DOC and the Commission each have responsibilities under the Conditional Release Program Act. Broadly speaking, the Parole Commission's functions are discretionary and quasi-judicial. As an inmate of DOC approaches his release date, the Commission determines whether to place the inmate on Conditional Release, as well as the conditions thereof. To aid the Commission in this function, the DOC is charged with interviewing the inmate, compiling relevant records, and making recommendations that the Commission is free to accept or reject. Once the Commission makes its determinations, the DOC is charged with explaining the conditions to the inmate and supervising him or her during the period of Conditional Release. § 944.09(4)(h), Fla. Stat.; Fla. Admin. Code, Chap. 33-302.109. Probation and Parole Field Services is the DOC entity responsible for supervising offenders on Conditional Release. See: *DOC v. Williams*, 901 So.2d 169, 170 (Fla. 2nd DCA 2005).

Similarly, Chap. 33-302.111, Fla. Admin. Code and F.D.O.C. Procedure 302.325(2), outlines the criteria for early termination of supervision.

The Commission is authorized to establish the length and conditions of the supervision, as long as the length does not exceed the maximum penalty imposed by the sentencing court. *Crosby v. Bolden*, 867 So.2d 373, 374 (Fla. 2004).

The Commission may impose any special conditions it considers warranted from its review of the release plan and recommendation. § 947.1405(6), Fla. Stat. (2006).

If the Conditional Release is revoked and the releasee is returned to prison, the DOC may declare a forfeiture of all gain-time earned up to the date of release. *Frederick v. McDonough*, 931 So.2d 1005 (Fla. 3rd DCA 2006); *Duncan v. Moore*, 754 So.2d 708, 710 (Fla. 2000). see: § 944.28(1), Fla. Stat. (Gain-Time Forfeiture Statute), provided in subsection (1) for Conditional Release. See: Ch. 88-122, § 9 Laws of Florida (effective July 1, 1988). West F.S.A. § 944.28, Historical and Statutory notes.

Acceptance of Conditional Release *did not* constitute a waiver of his rights to object to the impropriety of applying the provisions of § 947.1405 (Conditional Release Program Act) to him. *Gove v. F.P.C.*, 816 So.2d 1150, 1153 (Fla. 1st DCA 2002).

To be entitled to relief when the Parole Commission fails to conduct a conditional release revocation hearing within the statutorily mandated time period (45 days), the releasee *must* show that he was prejudiced by the alleged delay in addition to showing the statutory violation. *Gillard v. State*, 827 So.2d 316, 317 (Fla. 1st DCA 2002).

The Parole Commission has the authority to either grant or deny a Releasee credit for the time spent on Conditional Release when that release is revoked due to a violation of the terms and conditions of release. *Rivera v.*

Singletary, 707 So.2d 326 (Fla. 1998); *Gay v. Singletary*, 700 So.2d 1220-21 (Fla. 1997).

Parolees do not have an automatic right to counsel in revocation proceedings. *Mattern v. F.P.C.*, 707 So.2d 806, 808 (Fla. 4th DCA 1998).

Only a willful violation of a substantial condition of parole or probation, which involves a factual finding, *Mathis v. F.P.C.*, 944 So.2d 1182-83 (Fla. 1st DCA 2006); *Williams v. F.P.C.*, 949 So.2d 1180-81 (Fla. 1st DCA 2007).

Hearsay alone is not sufficient to sustain the revocation of parole. West F.S.A. § 120.57(1)(c). *Merritt v. Crosby*, 893 So.2d 589, 599 (Fla. 1st DCA 2005).

The Parole Commission *is not* at liberty to reweigh the evidence considered by the hearing examiner in order to find a violation where the examiner's finding to the contrary is supported by "competent substantial evidence." *Merritt v. Crosby*, 893 So.2d 598-99 (Fla. 1st DCA 2005); *Tedder v. F.P.C.*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003).

Neither the Florida Statutes nor Florida Administrative Code provide for administrative review or appeal of the Parole Commission's action. *Williams v. F.P.C.*, 718 So.2d 331, 332 (Fla. 2nd DCA 1998); *Ramos v. State*, 834 So.2d 257 (Fla. 2nd DCA 2002).

Section 120.81 (3)(A), Fla. Stat. (2006), precludes parolees from seeking review by appeal of orders of the Parole Commission that rescinds or revokes parole. *Mabre v. F.P.C.*, 858 So.2d 1176, 1181 (Fla. 2nd DCA 2003). See also: *Sheley v. F.P.C.* 703 So.2d 1202, 1205 (Fla. 1st DCA 1997), approved 720 So.2d 216 (Fla. 1998).

In the absence of a statutory right to an appeal, however, review of a Parole Commission order remains available by Mandamus or Habeas Corpus. *Griffith v. F.P.P.C.*, 485 So.2d 818, 820 (Fla. 1986); *Richardson v. F.P.C.*, 924 So.2d 908 (Fla. 1st DCA 2006).

The filing of a Petition for Writ of Habeas Corpus (*claiming entitlement to immediate release*) is the proper method of challenging the revocation of an inmate's Conditional Release supervision. See generally: § 79.01 Fla. Stat./Art. v. Sec. 5(b), Fla. Const. *Knowles v. F.P.C.*, 846 So.2d 1246 (Fla. 1st DCA 2003); *Martin v. F.P.C.*, 951 So.2d 84, 85 (Fla. 1st DCA 2007).

An inmate's Petition for Writ of Habeas Corpus must be filed in the Circuit Court of the county in which the inmate is incarcerated. *Heard v. F.P.C.*, 811 So.2d 808 (Fla. 1st DCA 2002).

The question of timelines must be raised by the affirmative defense of laches. *Spaziano v. F.P.C.*, 31 FLW D15976, ____So.2d____(Fla. 1st DCA 6/9/2006), citing *Johnson v. F.P.C.*, 841 So.2d 615, 617 (Fla. 1st DCA 2003). See also: *Martin, supra*, certifying conflict with *Cooper* to the extent *Cooper* holds that Rule 9.100(2)(c), Fla.R.App.P. and § 95.11(5)(f), Fla. Stat., may operate to bar a Habeas Corpus proceeding challenging a prisoner's continued confinement pursuant to the revocation of post-release supervision by the Parole Commission. Cf. *Cooper v. F.P.C.*, 924 So.2d 966 (Fla. 4th DCA 2006), review pending, No. SC06-1236 (Fla. June 21, 2006).

A petition for Writ of Habeas Corpus is constitutionally exempt form all court costs and filing fees. *Stanley v. Moore*, 744 So.2d 1160, 1161 (Fla. 1st DCA 1999).

"Once the inmate has had a full review on 'the merits' of a Parole Commission order in the Circuit Court.... Review of Trial Court's order is by Petition for Writ of Certiorari to the District Court of Appeal." *Sheley, Id.* at 217. But see: *Green v. Moore*, 777 So.2d 425, 426 (Fla. 1st DCA 2000), and *Mora v. McDonough*, 32 FLW D1296, 956 So.2d 1203 (Fla. 1st DCA 5/17/07)(appeal *rather than* certiorari was the proper method to review the Circuit Court's decision where proceeding was concluded on grounds *other* than the merits).

Under Rule 9.100(c)(1), Fla.R.App.P., a Petition for Writ of Certiorari is required to be filed within 30 days of the rendition of the order to be reviewed.

The scope of review on a Petition for "second-tier" Certiorari is limited to determining whether the Circuit Court: (1) afforded procedural due process and (2) applied the correct law. This second-tier certiorari review is simply another way of deciding whether the lower court "departed from the essential requirements of law."

The District Court may not review the record to determine whether the underlying agency decision is supported by competent, substantial evidence. *Mabrey, Id.* at 1181.

Although the foregoing discussion covers some of the main points of Conditional Release, it is by no means exhaustive. Offense dates and statutory history are important. Therefore, the best practice to achieve a just and deserved result is to research on a case-by-case basis.

END NOTE

**Deason v. State*, 688 So.2d 988 (Fla. 1st DCA 1997), approved 705 So.2d 1374 (Fla. 1998), Conditional Release Statute provided for habitualized sentencing as separate independent criterion for Conditional Release and did not additionally require conviction sentencing guidelines. ■

Obtaining Records From Counsel

by Melvin Pérez

Often a prisoner will write to his or her former counsel and request pertinent records for the preparation of post-conviction pleadings. At times, for whatever reason, counsel is reluctant to provide such records. With statutes of limitations running and misadvice by incompetent law clerks, the prisoner is unaware of the proper remedy to seek. With this said, I write to explain the remedy a prisoner can pursue should this problem arise.

However, before I go into the remedy the prisoner may seek, it's important to know the different principles of law that apply to a public defender, an appointed private attorney, and a retained attorney.

For purposes of this article, the main focus will be on public defenders and court-appointed private attorneys.

Public Defender

The law is clear that an indigent defendant is entitled to his criminal trial transcripts, including depositions, prepared at public expense and that a writ of mandamus is a proper means to compel a public defender to furnish a defendant with such transcripts. See: *Pearce v. Sheffey*, 647 So.2d 333 (Fla. 2nd DCA 1994).

Court-Appointed Private Attorney

Florida courts have explained, via decisional law, that private counsel who is appointed to act as a special public defender is an agent of the state and is required to turn over to his client depositions and other documents produced at public expense. See: *Colon v. Irwin*, 732 So.2d 428 (Fla. 5th DCA 1999) and *Smith v. State*, 889 So.2d 1009, 1010 (Fla. 3rd DCA 2004).

Moreover, again mandamus is the appropriate remedy since it is used to compel an official to perform lawful duties. Thus, a court-appointed lawyer is an "official." See: *Pearce, supra* at 333.

Private Attorney

Florida Bar Rules of Professional Conduct, Rule 4-1.16 (d), requires attorneys to surrender all papers upon termination of representation.

However, for mandamus purposes, Florida Courts have ruled that there is no duty upon a private attorney to give any of his files to a client free of charge.

Exceptions to this are documents which are solely those of the client and held by the lawyer. See: *Donahue v. Vaughn*, 721 So.2d 356 (Fla. 5th DCA 1998).

Similarly, pleadings, investigative reports, subpoena copies, reports and other case preparation documents are property of the lawyer. He is not required to give that material to the client or make copies free of charge. *Id.* at 356-357.

Further, mandamus does not lie to require a private citizen to perform a ministerial duty required by law. *Id.* In fact, one court stated that the appropriate remedy in this instance, is an action for replevin. See: *Puckett v. Gentry*, 577 So.2d 965 (Fla. 5th DCA 1991).

Puckett had argued that his private attorney, who represented him on appeal, failed to turn over transcripts he paid for. *Id.*

Alternatively, the prisoner can file a complaint with the Florida Bar before resorting to the replevin action.

Documents Not Free of Charge

Files prepared and maintained by an attorney for the purpose of representing a client are the attorney's personal property; these are not free of charge. See: *Long v. Dillinger*, 701 So. 2d 1168, 1169 (Fla. 1997). See also: *Sanford v. Black*, 782 So.2d 548, 549 n.2 (Fla. 5th DCA 2001) (noting that the client must compensate his specially-appointed public defender for a copy of a lab report that was the attorney's work product).

Furthermore, arguments that the Public Records Act, Ch. 119, Florida Statutes, entitles a defendant to free copies of all records generated in the case have been held to be without merit. See: *Woodson v. Durocher*, 588 So.2d 644 (Fla. 5th DCA 1991), and *Potts v. State*, 869 So.2d 1223, 1225 (Fla. 2nd DCA 2004).

Identifying The Records

A request for records must specifically identify the records that the prisoner seeks which were produced at public expense.

Nevertheless, if any records were already sent to the prisoner, he must identify the records he claims were not turned over.

Additionally, should the prisoner fail to meet these requirements, and then seeks mandamus relief (not for private counsel), the court will not compel the attorney to produce these records. See: *Rioux v. State*, 949 So.2d 355, 356 (Fla. 4th DCA 2007), and *Thompson v. Unterberger*, 577 So.2d 684 (Fla. 2nd DCA 1991).

Filing The Petition

The petition for writ of mandamus must be filed under Florida Rules of Civil Procedure 1.630(b) in the circuit court. This applies whether the records sought are from trial or appellate counsel. See: *Thompson, supra.*

Under this rule the initial pleading shall be a complaint and shall contain the following in order to be facially sufficient:

(1) the facts on which the plaintiff relies for relief;
(2) a request for the relief sought; and,
(3) if desired, argument in support of the petition with citations of authority.

The caption shall show the action filed in the name of the plaintiff in all cases and not on the relation of the state. *Id.*

Likewise, the petition should include as exhibits all the requests for documents made to counsel that are at issue and any responses provided by counsel.

Rule 1.630(c) states that a complaint shall be filed within the time provided by law, except that a complaint for common law certiorari shall be filed within 30 days of rendition of the matter sought to be reviewed.

Under Ch. 95.11(5)(f), Florida Statutes, there is a one-year statute of limitations to file such action.

The writ shall be served in the manner prescribed by law, except the summons in certiorari shall be served as provided in Rule 1.080(b). See: Rule 1.630(d).

The original complaint is filed with the court either before service on opposing counsel or immediately thereafter. Which most likely will be the same attorney who failed to provide the documents requested. See: Rule 1.080(d).

When the trial court receives a petition for writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. See: *Holcomb v. FDOC*, 609 So.2d 751 (Fla. 1st DCA 1992).

If it is not facially sufficient, the court may dismiss the petition. *Id.* Otherwise, if the petition states a legally sufficient claim, the court must issue an alternative writ of mandamus ordering the respondent to show cause why the writ should not be granted. See: Rule 1.630(d)(3) and *Holcomb, supra* at 753.

This show cause order will set forth a date for respondent to file a response. This response must comply with Rule 1.140. The show cause order should give the petitioner a set amount of days to reply. If no time is set by the court for a reply, the petitioner should file a reply within 20 calendar days from the service of the response. See: Rule 1.140. However, a reply is optional.

The petitioner should also keep in mind that in civil law, when a party is ordered to respond within the designated date, anything filed pursuant to such an order must be filed by designated date. Five days rule provided for service by mail for civil cases does not apply. See: *Chiapelli v. Atkins*, 429 So.2d 852 (Fla. 4th DCA 1983).

Therefore, a party can move for an application for default under Florida Rule of Civil Procedure 1.500(b), if a response is not filed within the time set by the court order. This motion is served as any other motion.

After the response and reply are filed or the time for filing expires, the court will issue a ruling. If the court denies the petition there are several options the prisoner can pursue.

Motion For Rehearing

One option available is to file a motion for rehearing. Such remedy is sought via Rule 1.530(b) and must be served within 10 days after the filing of the denial. The service of this motion will stay execution on the judgment under Rule 1.550(a).

A motion for rehearing is often used to point out a material mistake in fact or law upon which the denial relies.

Furthermore, a motion for rehearing may be necessary to get any objections into the record when the court dismisses the case. For instance, if the court dismissed your case before you had the opportunity to be heard in opposition to a motion to dismiss.

Appealing The Denial

An appeal in this type of case is governed by Florida Rules of Appellate Procedure 9.110. Jurisdiction of the court under this rule shall be invoked by filing two copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed. See: Rule 9.110(b).

If the prisoner is proceeding insolvent, he must file a motion for insolvency and attach a six-month bank statement. Some courts may also require this when filing the initial petition in the trial court. To request this printout, the prisoner must fill out and affidavit of insolvency, attach it to an Inmate Request form, and address it to the Inmate Trust Fund.

The notice of appeal shall be substantially in the form prescribed by Rule 9.900(a). The caption shall contain the name of the lower tribunal, the name and designation of at least one party on each side, and the case number in the lower tribunal.

Further, the notice shall contain the name of the court to which the appeal is taken, the date of rendition, and the nature of the order to be reviewed. See: Rule 9.110(d).

Moreover, this rule provides that in criminal cases, a conformed copy of the order or orders designated in the notice of appeal shall be attached to the notice together with any order entered on a timely motion

postponing rendition of the order or orders appealed. *Id.*

Within 50 days of filing the notice, the clerk shall prepare the record prescribed by Rule 9.200 and serve copies of the index on all parties. Within 110 days of filing the notice, the clerk shall transmit the record to the court. See: Rule 9.110(e).

The initial brief shall be served within 70 days of filing the notice. The prisoner shall file the original and three copies with the DCA and a copy to the opposing party. Additional briefs shall be served as prescribed by Rule 9.210. See: Rule 9.110(f).

Rule 9.210(f) requires the appellee/respondent to serve an answer brief within 20 days after service of the initial brief; the reply brief, if any, shall be served within 20 days after service of the answer brief. Again the reply brief is optional. Thereafter, the DCA will issue a ruling.

I hope this article has provided useful information to those who find themselves in this predicament. ■

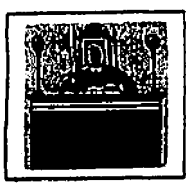
LETTERS

Dear FPLP: I am currently serving a 15 year sentence for an alleged "Sale or Delivery of Cocaine". I have a couple of issues to inform you about that I believe would be of extreme interest to your readers, particularly those who've been sentenced to prison by the City of Jacksonville. Fist, section 944.17 (5) Florida Statutes, commands and authorizes the DOC to refuse to admit a person (or prisoner) into the State Correctional system unless the commitment form, judgment and sentence forms, are "complete." In literally hundreds (and more likely thousands) of cases, the DOC has ignored this pertinent statute, and have allowed persons into the state prison systems on uniform Commitment to Custody forms that have not been signed by the Sentencing Judge nor the Clerk of Court, and nether bears the official seal of the Circuit Court or that of the clerk. See section 28.071 Fla. Stat., and *Sykes v. State,* 947 So.2d 1133 (Fla. 1st DCA 2008) . As such, we prisoners are being illegally detained, and through chapter 33 F.A.C., are being forced into labor and deprived of other Constitution Liberties without lawful process. Per the 1st DCA's ruling in *Sykes,* and the Florida Supreme Courts' rejection of jurisdiction to review that decision, I am currently awaiting the DOC's response to the 9th Judicial Circuit Courts' order to the DOC to "Show Cause" why relief should not be granted. Their response was due by July 7th, 2008, however, as of the end of July, DOC has yet to respond. As an advocate for prisoner's rights, the *FPLP* should be interested in the outcome of this case (case # 02-2008-CA-000083, *Tony Howard v. Melody L. Flores, Warden, Baker CI*). State agencies must obey the legislated laws and Constitutions of the United States and Florida, and their own Rules. See section 603.002 (2)(c),Chapter 33 F.A.C.. Another matter of grave importance is the fact that many prisoners have been indicted or had information's signed by bogus and unregistered employees of respective State Attorney's Offices, and had the cases prosecuted by them to trials and plea bargains). Not only have these attorneys failed to take and file oaths of loyalty, but they have no written Constitutional oaths of office, written appointments by the State Attorney, and no sworn designations to file or sign information's registered or transmitted to the office of the Secretary of State, as required by Section 27.181 (1) and (2) Florida Statutes. TH BCI

Dear FPLP: I am handicapped and serving time in Florida. I have prostrate cancer and Hepatitis C and haven't had any medical treatment yet. They have known for over a year but have not done anything. I'm a disabled Vet with no prior record I have been trying to get transferred to work release so I can be furlough to the VA. We are not fed the right diet for diabetics; they say they don't have the money. It won't cost DOC anything to let me go to the VA. I was moved back to WCI in September, they drug me out of my wheel chair and drug me up a set of steel steps on my back to a prison bus because they said they didn't have a handicapped van. ML WCI

Dear FPLP: Thank you for replying about the property room holding on to my issues until I am finished with disciplinary confinement. The only reason I received the Mar/Apr issue was that the legal mail lady directly delivered it to me. Although the property personnel state I am not allowed magazines in disciplinary confinement, I am going to start the grievance process because although they consider it a magazine, I consider it a legal guide and publication, and under chapter 33-602.222, I am allowed legal material, this is just another tactic they use to keep me blinded from what is going on with DOC. Keep up the Great Work! I never lay down, I put pen to paper. Now even the courts are trying to ban me from filing mandamus to challenge DR's under the Vexacious Litigant filing law; people filing in the Second Judicial Circuit which is bias toward inmate grievance appeals should file in the third Circuit or other Circuit. Once again keep up the Great Work! WM CCCI

Letters to the Editor from FPLAO members may be printed in this section. The identity of letter writers will be by abbreviation, unless otherwise specified by the writer, for protection against possible retaliation and to encourage freedom of speech. All letters printed are subject to editing for clarity and length. All letters cannot be printed but are invited. Address letters to: Editors, FPLP, P.O. Box 1069, Marion, NC 28752. If your letter also concerns membership, membership renewal, address change, etc., please address that matter at the beginning of the letter to assist staff in processing your mail.



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.

Supreme Court of Florida

Lescher v. Fla. Dep't of Highway Safety and Motor Vehicles, 33 Fla. L. Weekly S434 (Fla. 7/3/08)

In this case, the Florida Supreme Court has opined that the amendment to section 322.271 (4), Fla. Stat., which eliminated hardship driver's licenses that went into effect July 1, 2003, does not violate the prohibition against ex post facto laws as to persons who could have applied for such licenses before the amendment became effective.

Wyche v. State, 33 Fla. L. Weekly S509 (Fla. 7/10/08)

The Florida Supreme Court in Earl Wyche's case has determined that when a defendant is told by authorities that the DNA saliva swabs, that's being attempted to be taken from defendant, are to be used in an investigation of some fictitious crime named, [intentional deception to obtain the DNA] does not make the defendant's consent to the swabs coerced....

This review was brought due to the conflicting opinions between *Wyche v. State*, 906 So.2d 1142 (Fla. 1st DCA 2005) and *State v. McCord*, 833 So.2d 828 (Fla. 4th DCA 2002). The review approved the First District's opinion in *Wyche* that affirmed the denial of Wyche's motion to suppress swabs taken by deception, and it showed the Fourth District's decision in *McCord* to be distinguished where the granting of a motion to suppress swabs taken by deception was affirmed.

[**NOTE:** Although Justice J. Bell concurred with the majority opinion, he stated that it was with serious reservations because he was disturbed by the level of intentional police misrepresentation. (Why concur then?) His "hope is that law enforcement will resist the temptation to interpret the decision as an endorsement of such deception as acceptable." (...?) However, Justices J. Anstead, Pariente, and JJ. Lewis dissented with very lengthy opinions (which should be reviewed) and concurred with each others dissenting opinion]

District Courts of Appeal

Soto v. State, 33 Fla. L. Weekly D1526 (Fla. 4th DCA 6/11/08)

Reinaldo Soto appealed a lower court's denial of his motion to dismiss charges based on the expiration of the statute of limitations.

Information was filed by the state Dec. 6, 1996, that charged Soto with a third degree felony of aggravated assault, which allegedly occurred Nov. 15, 1996. Subsequent Soto's arrest and release, a notice of arraignment was sent to him by mail. Soto, however, failed to appear and capias was issued that same day, Jan. 16, 1997. Soto was arrested later in Texas in 2006 and brought to Florida on the outstanding 1997 warrant. In October of 2006, Soto was arraigned for the 1996 offense. Subsequent Soto's motion to dismiss on the ground that the three-year limitations period had run and the state had exercised an unreasonable delay in executing the capias, the lower court denied the motion.

Applicable statute of limitations is that which was in effect at the time of the incident giving rise to the criminal charges. See: *State v. Mack*, 637 So.2d 18, 19 (Fla. 4th DCA 1994). The 1996 statute of limitations that pertain to Soto's case requires prosecution to commence within three years after the felony was committed. See section 775.15 (2)(b), Florida Statutes (Supp. 1996). That section defines commencement of prosecution when either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered.

It was opined by the appellate court that the state in Soto's case did not make diligent efforts to locate Soto and the capias was not executed without unreasonable delay. Because the state did not offer any evidence that attempts were made to locate Soto and execute the capias, it failed to meet its burden under former section 775.15 (5). See: *Mack, Id.*, at 19-20.

Soto's case was reversed and remanded with directions that the charge be dismissed and the sentence to be vacated.

[**NOTE:** The legislature subsequently amended section 775.15 (5), so that a "[p]rosecution on a charge on which the defendant

has previously been arrested or served with a summons is commenced by the filing of an indictment, information, or other charging document." See: Ch. 97-90, section 1, at 514, Laws of Florida.]

Nunes v. State, 33 Fla. L. Weekly D1503 (Fla. 2d DCA 6/11/08)

The appellate court in Garrett Nunes' case opined that the trial court erred in denying Nunes' motion to suppress statements Nunes made to detectives and assistant state attorney during plea negotiations.

It was opined on appeal that Nunes' statements were inadmissible as statements made during plea negotiations because Nunes made the statements with subjective expectation to negotiate a plea and he reasonably expected that those statements were the beginning of a plea bargaining process, given the totality of objective circumstances in the case.

It was further noted that neither Crim. Procedure Rule 3 .172 (i), nor section 90.410, Florida Statutes, require that a plea bargin be completed or that a written agreement be signed before negotiations can be excluded from evidence.

Nunes' case was reversed and remanded for further proceedings.

Monnar v. State, 33 Fla. L. Weekly D1575 (Fla. 1st DCA 6/16/08)

The First District Court of Appeal in Maynor E. Monnar's case, upon remand from the Florida Supreme Court, noted that while Monnar's case was being reviewed by the higher court regarding issues concerning the *Apprendi/Blakely* *decisions, the Fla. Supreme Court did not supersede or disprove the First District's decision it held in *Isaac v. State*, 911 So.2d 813 (Fla. 1st DCA 2005).

In Isaac, the appellate court opined that although *Apprendi/Blakely* was decided after Isaac's conviction and original sentence were final, *Apprendi/Blakely* would apply to any *re-sentencing* that took place after *Apprendi* came down, even re-sentencings that took place before *Blakely* was decided.

It was opined, regarding the notation made in Monnar's case about the Isaac decision not being superseded or disproved by the Florida Supreme Court, Isaac still controls, not as law of the case, but as governing precedent within the First District.

[**Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004).]

Burks v. McNeil, 33 Fla. L. Weekly D1576 (Fla. 1st DCA 6/16/08)

Reginald Burks sought an appeal of an order that denied his habeas petition that challenged D.O.C.'s calculation of his sentence.

In the lower court, Burks contended that D.O.C. violated the *ex post facto* clause when it applied the 1983 version of section 944.275, Florida Statutes, to his offense committed in 1981. D.O.C.'s use of that statute version resulted in a greater penalty upon Burks' revocation of parole.

On appeal, it was noted that the appellate court has previously held that the use of the revised 1983 version of section 944.275 for an earlier offense date is disadvantageous to the prisoner which violated the ex post fact clause. The gain-time statute in effect at the time of Burks' offense provided for basic gain-time to be earned under the 3-6-9 formula on a monthly basis, rather than the 10 days a month under the 1983 version. It was further noted that a review of the rule in effect on the date of offense, Florida Administrative Code Rule 33-11.045, indicated that gain-time was to be awarded or withheld monthly, rather than the lump sum award under the current version of the rule.

Accordingly, Burks' petition was granted and the case was remanded for determination of basic gain-time forfeited up to the point of Burks' release to parole under the formula in effect in 1981.

Barrett v. State, 33 Fla. L. Weekly D1657 (Fla. 4th DCA 6/25/08)

The appellate court had previously granted Ricky Barrett's motion for clarification in its original opinion at 33 Fla. L. Weekly D1126a, and then substituted a corrected opinion for that original one.

Barrett was convicted of armed burglary however, in the appellate court's corrected opinion, it opined the evidence against him did not support a finding that he was armed while committing the burglary. It was found that the evidence only showed that Barrett broke into a structure for the purpose of taking something of value, where he found a safe, loaded it into his vehicle, and hauled it away from the scene. It was only after Barrett opened the safe with a crowbar did he find a loaded gun inside of it.

It was noted that it has been established in Florida law that felony crimes of possession of forbidden substances or things require proof of guilty knowledge of the defendant that he is in possession of such items. See: *Washington v. State*, 813 So.2d 59 (Fla. 2002); *Scott v. State*, 808 So.2d 166 (Fla. 2002); *Chicone v. State*, 684 So.2d 736 (Fla. 1996); and *Reynolds v. State*, 111 So.2d 285 (Fla. 1926). Furthermore, nothing in section 810.02 (2)(b), Florida Statutes, suggests that the Legislature meant to dispense with the presumptive element of knowledge.

There was no evidence presented in Barrett's case that indicated he became aware of the presence of a gun on the premises where the burglary was committed.

Accordingly, Barrett's case was reversed and remanded for the trial court to reduce his conviction for armed burglary to burglary of a structure.

Balmori v. State, 33 Fla. L. Weekly D1669 (Fla. 2d DCA 6/21/08)

Jose Balmori appealed the denial, in part, and summary denial, in part, of his rule 3.850 motion that raised ten claims of ineffective assistance of counsel.

The appellate court affirmed the denial of the eight claims Balmori was given an evidentiary hearing, however, it reviewed and addressed the summary denial of the two remaining claims of ineffective assistance of counsel.

Balmori had been convicted of attempted trafficking in heroin. His only defense was not knowing the drugs were in his vehicle until he was arrested and his vehicle was searched. Balmori was the only witness in his defense. In pertinent part of the summarily denied claims, Balmori claimed he had informed his counsel that because of the items in his vehicle, that were there on a daily basis (what the appellate court called a "messy car defense"), he had no knowledge of the drugs in the car. Balmori further explained to counsel that his car had sat at a automobile repair shop for a week prior to his trip to Miami and subsequent arrest on his return. Counsel was informed of witnesses at the repair shop that could have testified that his car was there and numerous individuals, including an informant that worked at the shop, had access to the car. Balmori gave a work order form to his counsel that showed dates and times during which his car was at the shop, and explained that the employees around that shop, including the confidential informant, could have placed or thrown the heroin in his car without his knowledge.

However, Balmori alleged that despite all the information he gave to his counsel, that would have bolstered his credibility and supported his claim of no knowledge of the heroin's presence, counsel failed to investigate any of that information for his defense.

Under Florida Rule of Criminal Procedure 3.850 (d), a defendant who alleges ineffective assistance of counsel is entitled to an evidentiary hearing on those specific claims and facts which are not conclusively rebutted by the record and which demonstrate a deficiency in trial counsel's performance that prejudiced the outcome of the trial. See: *Floyd v. State*, 808 So.2d 175, 182 (Fla. 2002).

The record that was before the appellate court in Balmori's case failed to rebut Balmori's two claims that were summarily denied. What was shown in the record was that Balmori was the only witness to testify in his defense. At trial, the state had to prove beyond a reasonable doubt that Balmori was "*knowingly* in actual or constructive possession" of the heroin found in his car. See: section 893.135 (1)(c)(1), Florida Statutes, (2002), (emphasis added). Because Balmori's knowledge of the heroin's presence was the primary disputed issue at trial, his credibility with the jury was essential to his defense.

The appellate court concluded that, taking Balmori's claims as true without any rebutting record, Balmori did demonstrate ineffective assistance of counsel.

Accordingly, the summarily denied claims of Balmori's rule 3.850 motion were reversed and remanded for the lower court to either attach record that conclusively refutes the claims, or if not, it shall hold an evidentiary hearing on those claims.

Hall v. Knight, 33 Fla. L. Weekly D1802 (Fla. 1st DCA 7/17/08)

Wendall Hall, a Florida State prisoner, appealed an order that dismissed his civil complaint against Captain Knight and Sergeant Ruddy, two correctional officers (Appellees), and that prohibited him from filing future *pro se* actions.

Hall argued on appeal that the Washington County Circuit Court erred in dismissing his complaint for the failure to state a cause of action against Appellees in their individual capacity. See: *Hall v. Officer Knipp, Fla. Dep't of Corr.*, 982 So.2d 1196 (Fla. 1st DCA 2008) (where a dismissal order was reversed as to the correctional officer because the appellant's allegation was sufficient to state cause of action against the officer in his individual capacity); *Medberry v. McCallister*, 937 So.2d 808, 814 (Fla. 1st DCA 2006) (where the dismissal order was reversed because the appellant's pleadings tracked all of the pertinent language in section 768.28 (9), Florida Statutes, allowing the appellees, two correctional officers, to be sued and held personally liable).

As a result, the appellate court agreed with Hall that the lower court erred in dismissing his civil complaint. It was also agreed that the lower court erred in prohibiting future filings of *pro se* actions without giving notice or issuing a show cause order. See: *Petty v. State*, 926 So.2d 445 (Fla. 1st DCA 2006); and *Jackson v. Parkhouse*, 826 So.2d 478, 479 (Fla. 1st DCA 2002).

Hall's case was reversed and remanded for further proceedings.

Antunes-Salgado v. State, 33 Fla. L. Weekly D1863 (Fla. 2d DCA 7/30/08)

Carlos Antunes-Salgado (Salgado) appealed his convictions of trafficking in cocaine and conspiracy to traffic in cocaine.

In the appellate court, Salgado argued that although the issue he brought forth was not preserved for appellate review, his defense counsel was ineffective for conceding the admissibility of his codefendants' statements, which were the sole evidence supporting the conspiracy charge.

At trial, although Salgado's codefendants were not present, the state sought to prove the existence of conspiracy through the post-arrest and post-Miranda statements of the codefendants as related by the police officer who took their statements. Salgado's counsel failed to object to

this admission and, in fact, counsel stated that he believed the statements were admissible under section 90.803 *(18)(e)*, Florida Statutes (2005).

Ineffective assistance of counsel is found when counsel's performance fall outside the range of reasonable professional assistance and when there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance. See: *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

Although such claims may not be raised on direct appeal, see, e.g., *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001), "appellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." *Corzo v. State*, 806 So.2d 642, 645 (Fla. 2d DCA 2002).

The appellate court found that, contrary to Salgado's defense counsel's belief, long standing Florida case law holds that statements made after the crime and do not "further" the conspiracy are *inadmissible* under section 90.803 (18)(e). See: *Brooks v. State*, 787 So.2d 765, 772 (Fla. 2001).

There was no question in Salgado's case that codefendants' statements occurred after the conspiracy was over and did nothing to "further" the conspiracy. Therefore, it was opined that defense counsel was ineffective for conceding admissibility on that basis, and it was apparent on the face of the appellate record. Further, it was opined that the statements were inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004) (where it prohibits the admission of "testimonial" hearsay because it violates the Confrontational Clause) *Id.* at 51.

It was also concluded that Salgado was prejudiced because the statements were the state's only evidence to the conspiracy charge. Also, there were no excuses of any conceivable tactical reason on part of the ineffective assistance of counsel presented.

Therefore, Salgado's case was reversed and remanded for a new trial on all charges.

Joseph v. State, 33 Fla. L. Weekly D1869 (Fla. 1st DCA 7/30/08)

The trial court in Ronald A. Joseph's case had sua sponte declared a mistrial without Joseph's consent and absent a manifest necessity.

The appellate court noted that when a jury has been discharged without consent of the defendant and without a manifest necessity, the discharge is the equivalent of an acquittal, and retrial is prohibited. See: *United States v. Jorn*, 400 U.S. 470 584 (1971). Also, defendant's silence or failure to object to an illegal discharge of a jury does not constitute consent to a declaration of mistrial and it does not waive a defendant's constitutional protection against double jeopardy. See: *Spaziano v. State*, 429 So.2d 1344, 1346 (Fla. 2d DCA 1983). Further, "Manifest necessity arises because of some misfortune which, although the fault of neither party, renders continuation of the trial impossible." *Cohens v. Elwell*, 600 So.2d 1224, 1225 (Fla. 1st DCA 1992).

It was opined in Joseph's appeal that the trial court could have considered continuing the original proceeding, or, possibly some other alternative, and to allow time for investigations to take place on behalf of Joseph's defense. See: *C.A.K. v. State*, 661 So.2d 365 (Fla. 2d DCA 1995). However, the trial court failed to reach such considerations. Thus, it was concluded that the mistrial was unwarranted and Joseph's subsequent retrial was barred.

Accordingly, Joseph's case was reversed and remanded with instructions to discharge Joseph from the charges.

Davalos v. State, 33 Fla. L. Weekly D1869 (Fla. 3d DCA 7/30/08)

George Davalos appealed the denial of his motion to withdraw his plea after sentencing, or, in the alternative, mitigate his sentence.

In the lower court, Davalos was offered a plea deal by the state, which he rejected and then entered an open plea of guilty. Subsequently, the sentencing judge sentenced Davalos to a sentence three times more than what the state had offered.

On appeal. Davalos argued that his sentence was a product of judicial vindictiveness. The state responded that vindictive "is a term of art which expresses the legal effect of a given course of action, and does not imply any personal or subjective animosity between the court and the defendant," as the state implied of Davalos argument. The state cited *Longley v. State*, 902 So.2d 925, 928 n. 5 (Fla. 5th DCA 2005), to support their response.

The appellate court however, opined that "a totality of circumstances' review [is] more appropriate to determine if the defendant's constitutional right to due process was violated by the imposition of an increased sentence after unsuccessful plea negotiations." *Id.* at 928. Also see, e.g., *Wilson v. State*, 845 So.2d 142, 155 (Fla. 2003).

It was concluded in Davalos' case that the trial court's denial of the motion to withdraw pleas constituted an abuse of its discretion and, in effect, violated Davalos' right to due process.

As a result, the order denying the plea withdraw motion was reversed and the case was remanded with instructions for Davalos to be given a new sentencing hearing before a different judge.

Michel v. State, 33 Fla. L. Weekly D1881 (Fla. 4th DCA 7/30/08)

Judith Michel was convicted of aggravated battery, after a jury trial, which arose out of a physical

altercation that occurred between her and the victim.

At trial, Mitchel testified that she believed the victim was going to use a knife on her during the altercation and, at which time, she grabbed an "eyebrow razor" and told the victim " you better let me go," then, subsequently, cut the victim.

On appeal from her conviction, the appellate court determined that Michel's counsel was shown to be ineffective on the face of the appellate record for failing to request instructions on justifiable use of non-deadly force, where Michel's only defense was self-defense.

Accordingly, Michel's conviction was reversed and her case was remanded for a new trial. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

An important consideration for any person accused of a criminal offense is the question of whether or not to testify at trial. Frequently the accused must evaluate whether there are any facts which the state will be able to use to impeach him if he decides to testify at trial. One of the most common forms of impeachment for criminal defendants is if the defendant has previous convictions for either a felony or a crime involving dishonesty or false statement (even if it is a misdemeanor). It is not uncommon for an accused to forego the right to testify in order to avoid having the jury hear about prior convictions. But, if a defendant does decide to testify and let the jury hear about prior convictions, the exposure of said convictions should be limited to the purposes of impeachment. If defense counsel does not handle the impeachment process properly and allows the state to get into the specific facts of the prior convictions, this may properly be the basis of a claim of ineffective assistance of counsel.

Florida Statutes §90.610(1) provides that a party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment. If a criminal defendant's testimony is to be impeached with prior convictions, the proper procedure is for the prosecutor to ask whether the defendant has ever been convicted of felony or crime involving dishonesty or false statement and how many times the defendant has been so convicted. Jackson v. State, 570 So.2d 1388 (Fla. 1st DCA 1990). Unless the defendant's answers to those two questions are untruthful, no further inquiry may be made into the specifics of the convictions. McFadden v. State, 732 So.2d 412 (Fla. 3rd DCA 1999) [it is improper to introduce the specifics of the prior convictions]; Rodriguez v. State, 761 So.2d 381 (Fla. 2nd DCA 2000) [when the witness admits his convictions, the trial court errs by allowing the State to question the witness about the specific convictions]; Hicks v. State, 666 So.2d 1021 (Fla. 4th DCA 1996) [unless the witness lies about his background, the jury is not to be advised of the specific nature of the offense, only that it involved a felony or a crime involving dishonesty or false statement]. The failure of defense counsel to object to improper prosecutorial questions regarding prior convictions can amount to ineffective assistance of counsel which prejudices the defendant's right to a fair

trial. Rodriguez v. State, 761 So.2d 381 (Fla. 2nd DCA 2000).

In Rodriguez v. State, 761 So.2d 381 (Fla. 2nd DCA 2000), the defendant was convicted of robbery with a firearm and grand theft. At trial, the State introduced circumstantial evidence which allegedly identified Rodriguez as one of the individuals who robbed a jewelry store with two accomplices. Rodriguez testified in his own defense. Id. at 382. During his testimony, the prosecutor repeatedly and improperly cross-examined Rodriguez about the specifics of his prior convictions, thus informing the jury that Rodriguez had previously been convicted of grand theft auto and robbery with a firearm. Id. Rodriguez's trial attorney failed to object to the improper cross-examination regarding Rodriguez's prior convictions. Id.

On appeal, the Rodriguez Court ruled that defense counsel's failure to object to the improper questioning fell below any standard of reasonable professional assistance, and there is a reasonable probability that the results of the trial would have been different but for her inadequate performance. Id. In reaching its decision, the Rodriguez court provided: "[d]ue to the circumstantial nature of the case, which turned on the State's identification evidence and Rodriguez's credibility as a witness, we must reverse Rodriguez's convictions and remand this case for a new trial because of prosecutorial misconduct and ineffective assistance of counsel apparent on the face of the record." Id.

Similarly, in Wright v. State, 446 So.2d 208 (Fla. 3rd DCA, 1984), defense counsel, in an effort to preempt the State's cross examination of the defendant regarding prior convictions, asked his client if he had ever been convicted of "a crime." The defendant answered that he had been convicted of five crimes. Id. at 209. Wright's five convictions were all for misdemeanors which did not involve dishonesty or a false statement and thus, would not have been admissible in the first place. Id. The Wright Court found that defense counsel's "overt act of introducing the plainly harmful testimony was 'a serious and substantial deficiency measurably below that of competent counsel,'" Id. at 210, *quoting* Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). It was further found that Wright suffered significant prejudice as a result of counsel's deficiency in light of: "(a) the extremely prejudicial nature of this type of evidence, Roman v. State, 438 So.2d 487 (Fla. 3d DCA 1983); Cummings v. State, supra; Vazquez v. State, 405 So.2d 177 (Fla. 3d DCA 1981), approved in part, quashed in part, 419 So.2d 1088 (Fla.1982); (b) the strong and effective emphasis placed upon it by the state attorney in attacking the defendant's credibility in final argument; and (c) the closeness of the self-defense question..." Wright at 210. It was thus determined that there was a likelihood that the deficient conduct affected the outcome of the court proceedings. Wright at 210.

The right of an accused to testify at trial is one of the fundamental due process rights. The effect of an accused's right to testify should not be diminished by ineffectiveness on the part of defense counsel in allowing the jury to hear either improper impeachment with prior offenses which do not qualify for impeachment or by allowing the state to improperly cross-examine the accused about the specifics of prior convictions. If defense counsel is deficient in limiting the information the jury hears about prior convictions, it can be detrimental to the defense and may qualify as ineffectiveness of counsel sufficient to justify vacating the judgment.

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 currently is appointed by the Florida Supreme Court to the Florida Criminal Court Steering Committee, Subcommittee on Post-Conviction Relief. He has assisted hundreds of incarcerated persons with their cases and has numerous written appellate opinions. ☑

Florida Prison Legal Perspectives

D. R. GRIEVANCES / APPEALS AND JUDICIAL REMEDIES

By DANA MERANDA And HOWARD RICHMOND

Part Two Continued

THE DISCIPLINARY PROCESS

Disciplinary Team And Hearing Officer 33-601.306

The DR hearing must be conducted by impartial staff members. A person shall not serve as a hearing officer or as a member of the disciplinary team, or participate in the deliberation when they are;

(a) A witness or the person who wrote the DR;

(b) The investigating officer;

(c) The person charged with review of the results of the disciplinary hearing.

The **hearing officer** shall hear all DR's designated as **minor**. At any time before the plea the inmate may request the case be referred to the disciplinary team. (601.302 (12) defines minor violation).

The disciplinary **team** shall hear all disciplinary reports designated as **major.** (601.302 (11) defines major violation).

Due process is violated when any of the above described persons are also a member of the disciplinary team, this infringes upon an inmates entitlement to an impartial disciplinary fact-finder. Bitman v. FDOC, 662 So.2d 1030 (Fla. 1st DCA 1995). Mariah v. Moore, 765 So.2d 929 (Fla. 1st DCA 2000) (prejudging evidence). Some further examples of bias are recited in Wade v. Farley, 869 F. Supp 1365, 1376 (N.D. Ind. 1994).

Disciplinary Hearings 33-601.307

No hearing shall commence prior to 24 hours following the delivery of the charges except when the inmate's release date does not allow time for such notice or the inmate waives the 24-hour period. Previous F.D.O.C rules required that the disciplinary hearing be conducted within 7 days from when the report was written. That rule no longer exists, although Administrative Confinement Rule 33-602.220 (3) (a) states that when disciplinary charges are pending the length of time in AC **shall not** exceed 7 working days unless ICT authorizes an extension of 5 working days.

The disciplinary team or hearing officer shall provide an explanation in the basis of findings section of Form DC 6-112D (24 Hour/Refusal to Appear Waiver) whenever the waiver process is utilized.

The inmate charged shall be present at the disciplinary hearing unless a confirmed medical condition prevents the inmate from attending or the inmate demonstrates disruptive behavior. Battle v. Barton, 970 F.2d 779 (11th Cir. 1992) (right to attend a prison disciplinary hearing is one of the essential due process protections afforded by the Fourteenth Amendment).

When an inmate waives the right to be present or refuse to be present at the hearing, the inmate may not submit a written closing statement to the disciplinary team or hearing officer in place of the oral closing statement permitted by 33-601.307 (1) (g). The inmate may only make an oral closing statement concerning the infraction. It the inmate refused to plea, it shall be treated as a not guilty plea. A "no contest" plea shall be treated as a guilty plea.

The hearing officer or disciplinary team member shall read the charge, ask the inmate if the charge is understood, explain the range of penalties that could be imposed if there is a finding of guilt and ask whether staff assistance is required or needed for the hearing. The hearing officer or disciplinary team member shall read the statement of facts and the inmate shall be asked to plea.

If the inmate pleads "guilty" no further evidence needs to be heard. If the inmate pleads "not guilty" evidence is to be presented, including witness statement forms. If evidence is not revealed to the inmate, the reason(s) shall be documented in the comment sections of either the Witness Disposition Form, the Documentary/Physical Evidence Form or the Videotape/Audiotape Evidence Form. Osterback v. Singletary, 679 So.2d 43 (1st DCA 1996); Vaughan v. Singletary, 729 So.2d 411 (Fla. 1st DCA 1999).

The hearing officer or chairman of the disciplinary team has the authority to require that other supporting documents be presented; the employee who wrote the DR, the investigating officer, or any witnesses, appear at the hearing to clarify information or facts related to the DR; and that further investigation be conducted, or evidence presented, or statements presented of unavailable witnesses.

The testimony of witnesses requested by the charged inmate shall be presented at the hearing through the written witness statement.

Failure to sign and complete the witness disposition form during the investigation constitutes waiver to call witnesses either live or by written statement. Listing witnesses names on any other document will not result in their testimony being considered.

The inmate may request additional witnesses who were not listed on the witness request form at the hearing where the expected testimony proffered by the charged inmate indicates that the testimony is material, relevant, and non-repetitive and that extraordinary circumstances prevented naming the witness during the investigation. In no case shall a witness be called (live or written statement) if the testimony would be irrelevant, immaterial or repetitive.

Signed witness statements used as testimony shall be read at the hearing. Where a witness statement is not read the reason shall be recorded in the witness disposition form. Miriah v. Moore, 765 So.2d 929 (Fla. 1st DCA 2000).

The only persons present during team deliberations shall be the team, employees being trained, and others whom the warden, the chief of security, or the classification supervisor have authorized to be present and determined these persons will not disrupt the hearing and will benefit by observing the proceedings. Siebert v. Dugger, 595 So.2d 108.3 (Fla. 1st DCA 1992).

The original charge cannot be reduced by the disciplinary team to what might be termed a "lesser included offense." Up to the point of announcing a decision to the inmate, the team or hearing officer may postpone the hearing. The entire DR may be returned for further review, investigation or correction.

If further review suggests a different charge should have been indicated or that additions, deletions or changes should be made in the statement of facts then the originator shall rewrite the DR, a copy of the new or corrected DR shall be delivered to the inmate, and a new investigation conducted. The original DR shall not be processed. A notation of this occurrence shall be incorporated in the findings of the team or hearing officer.

The inmate shall be informed of the final decision of the team or hearing officer and the basis for that decision. Damyn v. Wainwright, 403 So.2d 569 (Fla. 1st DCA 1981); Strong v. Wainwright, 385 So.2d 169 (Fla. 1st DCA 1988). (entitled to be given a copy of the written statement of evidence relied upon and the reasons for disciplinary action against the inmate).

Disciplinary Team, Hearing Officer Findings and Action 33-601.308

The disciplinary team or hearing officer's findings shall enumerate the specific facts derived from the disciplinary report, the disciplinary investigative report or the witness statements and what specific evidence was used in the team's or hearing officer's conclusion;

The team or hearing officer shall make one of the following findings:

(a) Dismiss the charge. If the charged is dismissed the DR shall not be posted or placed in the inmate file. A dismissal may occur due to procedural errors, technical errors or duplication of charges. A dismissal is without prejudice and the DR may be rewritten and reprocessed.

(b) Find the inmate not guilty. When this occurs the disciplinary report shall not be posted or placed in the inmate file. The inmate shall be found not guilty when the facts do not support the charge. Stokes v. FDOC., 948 So.2d 75 (Fla. 1st DCA 2007) (Inmate successfully grieved issue of whether DOC. erred in not obtaining a determination by health care staff that conduct was not a suicide attempt as defined by Rule 33-601.314, F. A. C., s. 9-30 of penalty table sets forth criteria for self-mutilation.) Ironically, recent amendments to 33-601.314 (dated 5-18-08) repealed 9-30 altogether.

(c) Find the inmate guilty. If the inmate is found guilty the disciplinary team shall impose any or a combination of actions listed in 33-601.308 (a) – (j). Applying AC time to DC time is discretionary.

[Due process requires the DR worksheet (Form DC 6-112E) to reflect all penalties imposed as a result of the infraction especially where specific options are listed on the worksheet. See Sect. 944.28 (2) (c), Florida Statutes. In addition, for purposes of ex post facto see Britt v. Chiles, 704 So.2d 1046 (Fla. 1997). A timely challenge in either scenario could prevail.

Following the decision of the U.S. Supreme Court in Superintendent v. Hill, 472 U.S. 445, 457, 105 S.Ct. 2768 (1985), Florida Courts have adopted the "some evidence" standard regarding prison disciplinary proceedings. Newell v. Moore, 767 So.2d 1240 (Fla. 1st DCA 2000).

In other words, regardless of favorable or exculpatory evidence in the record, a decision that's supported by the existence of "some evidence" is sufficient to satisfy the standard. Williams v. Fountain, 77 F.3d 372, 375 (11th Cir. 1996). But see Walsh v. Finn, 865 F. Supp 126 (S. D. N. Y. 1994) (contrary evidence in the record undermined "some evidence"). and, Chavis v. Rowe, 643 F.2d 1287 (7th Cir. 1981).

With such a low standard (burden of proof) a guilty finding is imminent at the DR hearing stage. The courts however might take a different view if the record is unreliable as a whole.]

Forfeiture of unearned gain time shall be considered when the inmate has not accrued enough gain time to achiev the desired corrective results.

Penalties for multiple disciplinary actions should be clearly stated in the basis of findings as to the current or consecutive requirements.

Loss of gain time shall not be concurrent with any other loss of gain time and shall be cumulative.

Review and Final Action 33-601-309

The warden acts as the final reviewing and approving authority for all DR s in which the recommended penalty does not exceed a loss of more that 365 days loss of gain time.

The regional director acts as the final reviewing authority for all DR's in which the recommended penalty exceeds 365 days loss of gain time.

The Warden or regional director shall approve, modify downward or disapprove the recommended disciplinary action.

The warden or regional director shall approve, modify downward or disapprove the recommended disciplinary action.

The warden or regional director shall remand the DR to the hearing officer or disciplinary team for rehearing i new evidence or procedural error is discovered.

Rehearings. 33-601.310

If an error is discovered at any time after an inmate has been found guilty of a disciplinary infraction, the warden the facility administrator of a private facility, or the deputy director of institutions (classification) or designee is authorize to cause a rehearing to take place within 30 days of the discovery of the error or the receipt of a successful grievance o appeal. The specific reasons shall be noted on the disciplinary report. A rehearing shall not be held following a finding o "not guilty".

The new investigation may incorporate those portions of the previous investigation that are not affect by the nee for the rehearing. No inmate is authorized to request a rehearing.

Miscellaneous Provisions 33-601.311

This section pertains to Interstate Compact Cases, transfers and related matters that may be associated with th disciplinary action taken.

No inmate has the right to request the expungment of a DR in conjunction with this subsection. Henderson v Crosby, 891 So.2d 1180 (Fla. 2nd DCA 2005).

Rules 33-601.312, 33-601.313 and 33-601.314 concern telephonic or video disciplinary hearings, forms and Rul of Prohibited Conduct and Penalties for infractions respectively.

In Conclusion

The foregoing analysis mainly covers the high points of the disciplinary process. While keeping in mind a agency (F.D.O.C) must comply with its own rules, Buffa v. Singletary, 62 So.2d 885 (Fla. 1st DCA 1995), it is wel advised that anyone engaging the process should review 33-601.301 through 33-601.314 to gather a reasonabl understanding of what's involved and the requirements prison officials must follow throughout the process.

Most often prisoners facing disciplinary action are trying to defend themselves from a confinement cell, which i very difficult. And the time to do so is often very limited. In order to present the best defense and/or preserve issues tha may be critical in the administrative appeal or later in court it is essential that you know what the rules and laws are i connection with DR's so you can properly raise any violations of them. Most often, the best and most effective challenge to a DR involve challenges alleging that FDOC rules were not followed in the process and/or that established due proces was not afforded. Therefore, the charged prisoner should **immediately** contact the law library for a copy of the DR rule upon placement in confinement. Also useful is to request other source materials that help explain what "due process" required. When requesting a copy of the rules from the library (Rules 33-601.301 through 33-601.314) also request a cop of Rights of Prisoners, 3rd Ed. (Mushlin), Volume 2, Chapter 9, "Disciplinary Proceedings." Also a copy of Plymel v Moore, 770 So.2d 242 (Fla. 1st DCA 2000), which may be of great assistance in understanding the whole process o challenging disciplinary action. ◆

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