FLORIDA PRISON LEGAL

Perspectives

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A CALL FOR ACTION
Your Help is Needed Now to Reduce Prison Phone Rates

by Bob and Teresa Burns Posey

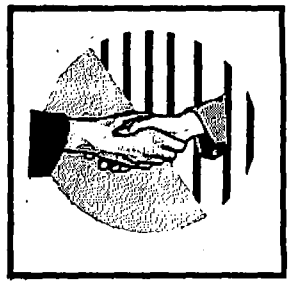
During the past year Florida Prisoners' Legal Aid Organization (FPLAO) has escalated its efforts in the work to obtain lower collect-call telephone rates for the families and friends of Florida state prisoners. Under a contract entered into by the Florida Department of Corrections (FDOC) and telecommunication's badboy MCI, the families and friends of state prisoners are being charged outrageously excessive collect-call rates for every phone call they accept from their incarcerated loved ones. Without proper or required regulation by the Florida Public Service Commission, the FDOC is being allowed to operate the prison phone system as a monopoly and give the system-wide phone contract to the company that guarantees to give the FDOC the largest kickback commission on the rates charged, resulting in families and friends being gouged to maintain their relationships with those in prison.

Under the FDOC's prison collect-call phone monopoly, prisoners may only make collect calls to an approved list of up to 10 family members or friends. Such calls can normally be made everyday, but each call is automatically limited to only 15 minutes. Capitalizing on the need of families and friends to maintain their relationships with those in prison, the FDOC for almost 15 years now has structured its phone contracts so that prisoners' families and friends are actually subsidizing prisons. In those 15 years the FDOC has collected tens of millions of dollars in commissions off the inflated rates the phone companies are forced to charge to get the prison phone contract and pay the FDOC's extortionist commission. Currently, the FDOC is requiring MCI to give it a commission of 53% of every dollar charged. In order to do that, MCI is charging prisoners' families and friends the highest rates allowed by law to accepted calls from their loved ones.

Currently, in-state long distance calls of only 15-minutes are costing prisoners' families and friends more than $5 for each call. When prisoners call home out-of-state the rates are much higher: a 15-minute long distance out-of-state call costs the families and friends almost $20 per call. This past fiscal year, 2002-03, the FDOC alone collected almost $17 million ($16.64 m) on commissions from MCI, and turned a blind eye on the burden such exorbitant gouging causes families struggling to hold on to their families.

FAIR Campaign

For several years FPLAO has worked to try to bring attention to and get a reduction in the collect-call rates being charged prisoners' families and friends. The Florida Public Service Commission, which has exclusive authority and responsibility to regulate phone services in Florida, is aware of the FDOC's rate gouging, but is apparently reluctant to interfere since it is a fellow state agency that is doing it. In 2000 a bill was introduced in



ON THE INSIDE

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FPLP is a non-profit publication focusing on the Florida prison and criminal justice systems. FPLP provides a vehicle for news, information, and resources affecting prisoners, their families, friends, loved ones and the general public of Florida.

Reduction of crime and recidivism, maintenance of family ties, civil rights, improving conditions of confinement, promoting skilled court access for prisoners, and promoting accountability of prison officials are all issues FPLP is designed to address.

FPLP's non-attorney volunteer staff cannot respond to requests for legal advice. Due to the volume of mail that is received and volunteer staff limitations, all correspondence that is received cannot be responded to, but all mail does receive individual attention.

FPLP is automatically sent to all members of FPLAO, Inc., as a membership benefit. Membership dues for FPLAO, Inc., operate yearly and are $9 for prisoners; $15 for family members/individuals; $30 for attorneys; and $60 for agencies, libraries, and institutions. Family members or loved ones of prisoners who are unable to afford the basic membership dues may receive membership for any size donation they can afford.

Prisoners may pay membership dues with new unused postage stamps. Prisoners on death row or CM who cannot afford membership dues may request a waiver of dues, which will be granted as finances permit.

the Florida House of Representatives (HB-1975) that would have made it law that the FDOC give the prison phone contract to the company guaranteeing the lowest rates to families, instead of the largest commission to the FDOC. But, because enough families didn't lobby their legislators to support that bill it died without being passed into law.

A little over a year ago we here at FPLAO decided to make it a major goal of the organization to push the issue for a reduction in the prison phone rates. We initiated the Families Against Inflated Rates, or FAIR, Campaign. With funding from a grant and member donations we have prepared, printed and distributed several thousand FAIR Campaign action packets to prisoners' families and friends. Those packets detail how the FDOC is gouging people on the phone rates and provides information for contacting state legislators with the facts of the situation and provides complaint forms to file with the Public Service Commission (PSC) and state Consumer Services (CS) office.

The PSC and CS office has been responding to the complaints by claiming they can't do anything to help and wasting people's time by directing them to complain to the FDOC and MCI – to co-conspirators in the gouging.

Until recently, state legislators have also turned a deaf ear to their constituent's complaints about the prison phone rates, but that is changing. Four state legislators are currently investigating the FDOC's phone rate monopoly. There is a real possibility that one or more bills will be introduced during the legislative session that starts in March 2004 to again attempt passage of law to stop the FDOC's gouging of families. However, it is not enough just to get a bill introduced, there must be support from other legislators to get a law passed – which only comes if enough people call on their legislators to support such a bill.

Call For Action

Your help is needed *right now*. We here at FPLAO who have been working on the FAIR Campaign are calling on every prisoner in the FDOC to contact your families and friends here in Florida and have them contact their local state representatives and senators asking them to personally introduce or support introduced legislation to significantly reduce the prison collect-call phone rates. Please do that today, don't delay. We're also asking that you share this with other prisoners and get them to have their families and friends contact their legislators about the phone rates.

To those reading this who are not prisoners, please contact your legislators by phone, mail, or email asking them to introduce or support legislation requiring the FDOC to only award the prison phone contract to the company giving the lowest reasonable collect-call rates to the families and friends of prisoners.

Please do not put this off. Legislators need to be contacted preferably before the 2004 Regular Session starts in early March, or during the early part of the session which runs for 60 days.

Below you will find information about how to obtain contact information for your local representatives and senators, a brief outline of how to effectively lobby legislators, and where to find more information about the FAIR Campaign and FDOC Telephone Monopoly on the Internet.

Let's all work together and get this done.

Contacting Legislators

If you don't already know, its easy to find out who your local state representative or senator is and how to contact them.

Your local public library is one easy source of information about state legislators and how to contact them.

You can also obtain the information for state representatives from the Clerk of the House of Representatives at 850/488-1157, or about local state senators from the Secretary of the Florida Senate at 850/487-5270.

If you have access to the internet, there is a complete directory of all state representatives and senators, including their local and Tallahassee addresses, phone numbers, email addresses and what district they serve located on the Legislature's website at www.leg.state.fl.us

Prisoners: The Florida Bar Journal in your institution's law library also contains a directory for legislators.

Communicating With Lawmakers

Many people think that an ordinary citizen has little chance of influencing lawmakers. That simply is not true. What is true, however, is that if you don't speak up and have your voice heard your local legislators may never even know a problem exists. Once a problem is brought to their attention, most legislators will at least look into the problem and try to help you; after all, they want every vote they can get when election time rolls around.

A face-to-face meeting with your local legislators (or their aides) is usually the most effective way of delivering your message to them. All state legislators have offices in their local areas and in Tallahassee where you can make an appointment to meet and talk with them or their aides. A face-to-face meeting is an excellent way to make your views known and help our lawmakers or their aides understand the effect the FDOC's prison collect-call phone monopoly is having on families.

Writing letters is also an excellent way to educate our lawmakers about the excessive and burdensome rates attached to the FDOC's phone rate monopoly. In a letter you can state your position briefly, but usually, in more detail than in a phone call or an email. Some tips for writing legislators are: Be brief, try to keep your letter to one page. Be neat and proofread your letter for errors. Use your own words and explain the impact the high collect-call rates have on your family and relationship with your incarcerated loved one. Be respectful and ask for a response. If the response is unsatisfactory, be persistent, write back politely but firmly requesting a more specific answer.

Calling your legislators is also another important way of voicing your opinion. You'll probably speak with the lawmakers aide, but be assured your message will be passed on to the legislator.

E-mailing is a fast and easy way to communicate with legislators. You can find all Florida legislators' email addresses on the Legislature's website (address noted above).

Presenting testimony at a public forum is very effective in having your voice heard on an issue. Regular public meetings are held around Florida for Legislative Delegations where local lawmakers can hear from citizens. You can contact the below offices to find out when delegation meetings are scheduled and to arrange for you to speak at them:

Brevard Delegation, Ph# 321/637-5407
Broward Delegation, Ph# 954/357-6555
Website: www.broward.org/legislative
Duval Delegation, Ph# 904/630-1680
Website:
www.coj.net/Departments/Duval+Legislative+Delegation
Hillsborough Delegation, Ph# 813/272-5865
Website: www.hillsboroughcounty.org/legdel
Miami-Dade Delegation, Ph# 305/375-4088
Orange Delegation, Ph# 407/836-7395
Palm Beach Delegation, Ph# 561/355-2406
Website: www.pbcgov.com/pubinf/legdel
Pinellas Delegation, Ph# 727/464-3592

(Note: The public delegation meetings may be suspended until after the Regular Session that runs through March and April, but if we do not get legislation passed this year in the regular session, people should then attend the delegation meetings and call for reform of the FDOC's prison phone rate monopoly so lawmakers are informed that the problem exists.)

Let's Reduce The Rates

Prisoners' family members and friends in several other states where the prison system had similar phone rate gouging going on have been successful in obtaining lower rates. (You can obtain more info about that on the Internet at: www.cure.org). If we all work together, we can do the same here in Florida. Because of the interest already being shown by some legislators and other recent events (see next article) we here at FPLAO working on the FAIR Campaign believe there is a very good chance to get the phone rates reduced this year – if we all do our part. Please contact your state legislators as soon as possible.

"Never doubt that a small group of thoughtful citizens can change the world; indeed it's the only thing that ever has."
- Margaret Mead ■

Lawsuit Filed Against FDOC Over Censorship of Phone Rate Reduction Advertisements

by Bob Posey

On January 12, 2004, *Prison Legal News*, which is based in Seattle, WA, and reports on prison issues nationwide, filed a federal lawsuit against the Florida Department of Corrections for banning that magazine from state prisons because it carries ads for discount telephone services that help prisoners' families and friends obtain lower collect-call phone rates. (See: *FPLP*, Vol. 9, Iss. 3, May/June 2003).

The FDOC started banning *Prison Legal News* last year obstensibly to protect its prison phone monopoly that generates upwards of $20 million for the FDOC each year through commissions from MCI, the prison system's contracted phone carrier. The reason given by the FDOC for banning *Prison Legal News* is because it contains "advertisements that encourage inmates to use phone companies other than those assigned to the institution by giving them lower rates...It also violates the security of the institutional phone systems."

In the lawsuit filed by *Prison Legal News* it's claimed that the FDOC's "reasons" for banning the magazine is essentially nonsense since the controversial advertisements are directed at prisoners' families, not prisoners themselves, since it is the families who pay for the collect calls made by prisoners and who are the only ones who can establish an alternative lower cost rate deal with the companies listed in the advertisements. Further, the lawsuit notes that such alternative lower rate setups are perfectly legal, when done correctly violate no rules of the FDOC, and do not violate the security of the FDOC's phone system. The lower rate calls still are subject to all of the security features of the FDOC / MCI phone system – just at a lower commission for the FDOC and less profit for MCI.

Without the lower collect-calling rate setup, MCI is charging Florida prisoners' families more than $5.00 for in-state calls of only 15-minutes and almost $20.00 for 15-minutes out-of-state calls. The FDOC only gives the prison phone contract to the company that guarantees it the highest commission back, currently 53% of every dollar charged by MCI. That results in MCI charging families the highest rates allowed to accept prisoners' collect calls to cover what many see as an outrageous commission.

FDOC spokesman Sterling Ivey said he had not seen the lawsuit, but he defended FDOC's monopoly arrangement with MCI. "It's a revenue-generating contract," Ivey said. "We chose MCI because we got the greatest return." This past fiscal year that return was almost $17 million, all paid by prisoner's families and friends.

"Banning *Prison Legal News* from Florida correctional institutions is the kind of censorship you'd expect in Cuba or Iraqi but not in America," said Randall Berg, an attorney with the Miami-based Florida Justice Institute, which is helping represent the magazine in the lawsuit.

Mickey Gendler, *Prison Legal News'* attorney in Seattle, said the lower rate services advertised in the magazine are, "A perfectly legal way to help prisoners' families avoid being gouged with unconscionable long-distance rates."

In addition to challenging the censorship of *Prison Legal News* because of the ads it carries the lawsuit is also challenging a recently enacted rule of the FDOC that prohibits prisoners from receiving compensation by magazines for articles they may write. That challenge was included because last year the FDOC placed Florida prisoner David Reutter in confinement after learning he was receiving a small compensation from *Prison Legal News* for writing articles for the magazine. The FDOC claimed Reutter violated a rule against prisoners operating or conducting a business, and especially prohibits writing for publication that may generate revenue for the prisoner.

The *Prison Legal News* lawsuit, which names FDOC Secretary James Crosby, Union Corr. Inst. Warden Paul Decker, Fla. State Prison Warden Joseph Thompson, and Charlotte Corr. Inst. Warden Chester Lambdin as defendants, alleges that the prohibition on writing compensation constitutes a prior restraint on the press and is a violation of free speech, free press, and association protected by the First Amendment.

The lawsuit also asserts an additional claim, that the FDOC failed to notify *Prison Legal News* the publication was being censored, failed to respond to the

magazine's appeal of the censorship and, perhaps most importantly, failed to notify the magazine's publisher of *each* impoundment it made of the magazine from each Florida prisoner subscriber. The lawsuit alleges such failures violated rights protected under the Fifth and Fourteenth Amendments.

The lawsuit is asking for a preliminary and permanent injuction from the federal court prohibiting the FDOC from refusing to deliver Prison Legal News to Florida prisoners and ordering the FDOC to deliver all withheld issues of the magazine to prisoners, prohibiting the FDOC from punishing prisoners who write articles for publication and who receive compensation for same, and requiring the FDOC to provide notice and an appeal procedure for each impoundment, rejection or other refusal to deliver *Prison Legal News*' mail to Florida prisoners.

The lawsuit also seeks declarations from the court that the phone service ads in *Prison Legal News* do not violate any prison rules, that FDOC's prohibition on prisoners writing for compensation is unconstitutional, and that the FDOC's failure to provide notice to the publisher of magazine impoundments, rejections. and refusals to deliver violates Due Process and is unconstitutional. The lawsuit also seeks attorney fees and costs.

[**Note:** In the last issue of *FPLP* it was noted that the rejections of *Prison Legal News* had been overturned in October 2003. That was true. However, just days after the last issue of *FPLP* went to the printer, the FDOC suddenly reversed course and on Dec. 30, 2003, again reviewed *Prison Legal News* and reimplemented the rejection of all past and future issues carrying the phone service ads.

It was also noted in the last *FPLP* that Vol. 9, Iss. 3 of *FPLP* that first reported on the *PLN* rejections, rerun the *PLN* phone service ads, and informed prisoners' families how to set up their own alternative lower collect-call rate system, had also been rejected by the FDOC at several prisons, but was being re-reviewed by the FDOC. Info received by *FPLP* indicates the rejection of Vol. 9, Iss. 3 was overturned. All prisoners who had that issue of *FPLP* impounded should have received it by now, if not, please write us and let us know. Direct such mail to FPLP, Attn: Vol. 9, Iss. 3, P.O. Box 660-387, Chuluota, FL 32766.] ■

Ex-Felon Voting Rights

by Richard Geffken

In a classy class action suit, *Johnson v. Governor of the State of Florida, et al,* 17 FLW Fed. C138(11th Cir. 12/15/03), has ruled in favor of restoring the right to vote to Florida ex-felons. If the reasoning stands firm, this is a landmark decision which can restore voting to ex-felons in all seven states presently discriminating against them.

Compliments for the solidarity and courage of the eight ex-felons bringing the suit are deserved from a grateful nation. They are Thomas Johnson, Eric Robinson, Omali Yeshitela, Adam Hernandez, Kathryn Williams-Carpenter, Jau'dohn Hicks, and John Hanes. Mr. Yeshitela was dismissed earlier as a plaintiff when his civil rights were restored for being one of the hundreds of thousands who were innocent all along.

Summary Judgment had been granted to Gov. Jeb Bush by the U.S. District Court for the Southern District, and plaintiff's appealed.

The Eleventh Circuit held summary judgment improper. The facts demonstrate violation of the 1st, 14th, 15th, and 24th Amendments, and the Voting Rights Act of 1965, section 2, (42 USC s. 1973) as amended, opined the court.

The Court discussed the history of the disenfranchisement in considerable detail. In 1868 it was adopted into the Fla. Constitution to disenfranchise freed slaves together with a legislative apportionment scheme designed to diminish representation from black communities. When re-enacted in 1968, blacks were more than twice as likely to be barred from the vote on account of a prior felony than non-African Americans. This disparity was found far more disproportionate today, just 36 yrs. later. Today, Fla. currently disenfranchises 613,000 men and women because of a prior conviction. This is more than enough to impact an election, and more people than in many major cities. Of these 167,000 are African Americans of voting age.

Put another way, 10.5% of all African Americans cannot vote, as compared to 4.4% of non-African Americans. Or, in terms of the black male population, one in six cannot vote in Florida because of a prior felony conviction. It was described as a tainted policy. More explicitly, the Court concluded, "[U]nder the totality of the circumstances test, this evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement as well as a nexus between disenfranchisement and racial bias in other areas, such as the criminal justice system, in violation of the Voting Rights Act. For the foregoing reasons, summary judgment should not have been granted...".

Therefore, the case was retuned to the lower court, where, in light of this opinion, contradiction with the 11th Circuit's careful reasoning should not be expected, or prove likely to survive appellate review if it does.

If the lower court acts quickly enough, ex-felons could vote as early as this November's Presidential Election, but continued Bush opposition and obstruction is to be expected. Using such disenfranchisement excuse to disqualify voters who had committed no felony at all was the most significant trick employed to give the state's electoral vote to the Governor's brother in 2000.

As for the remaining six states, the *Johnson* approach to the problem appears to be worth following. ■

Florida Constitutional Amendment Sought to Restore Vote to Ex-felons

Ten days after the federal appeals court in Atlanta ruled that the right to vote should be restored to ex-felons in Florida (See above article, "Ex-felon Voting Rights"), volunteers from churches, civil-rights groups and other community organizations started working to get an amendment made to Florida's Constitution to permanently restore the right to vote to ex-felons.

The citizen initiative is being encouraged by state Senator Mandy Dawson, D-Fort Lauderdale, who has spent 10 futile years asking her colleagues in the state legislature to put such an amendment on the ballot themselves. Again, this year, Dawson has already introduced bills for the 2004 legislative session asking lawmakers to support the amendment, but expecting the same resistance she has also formed the Committee to Restore Dignity to collect the nearly 500,000 signatures needed to get it on the ballot despite what the legislature does.

Florida is one of only seven states that do not automatically restore the right of ex-felons to vote once they have completed their sentences. Under Florida law, ex-felons can only have such right restored through a complicated and arduous application and hearing process involving the governor and state Cabinet, sitting as the clemency board.

Just how many Floridians have had their voting rights taken is in dispute. A 2002 study published in the *American Sociological Review* concluded that 613,514 ex-felons, of whom 167,413 are black, cannot vote in Florida. However, the Florida Department of Corrections claimed in 2001 the number was only 417,898 and did not break it down by race.

Whatever the number, its too high for opponents to Florida's ex-felon disenfranchisement law who in December 2003 won the right to pursue a class action lawsuit challenging the constitutionality of Florida's voting rights ban in the *Johnson v. Governor of State of Florida* case. U.S. District Court Judge Lawrence King had dismissed the case last year, saying there was no evidence of discrimination when the state re-adopted a similar voting prohibition in 1968 – the same one that exists today. However, the federal appeals court has now overruled King and sent the case back to the district court for a nonjury trial.

Lawyers with the Brennan Center for Justice contend the voting ban is a discriminatory vestige of the post-Civil War time. They have pointed out that a version of the law was adopted when the Florida legislature was forced to enfranchise newly freed slaves as a condition of readmission to the union.

Governor Jeb Bush opposes automatic restoration of voting rights to former felons. His spokeswoman, Alia Faraj, said, "The governor absolutely supports the process we have in place."

To get the citizen initiative on the ballot for citizens to vote on several groups including the NAACP, churches, community organizations and unions, working as the Florida Rights Restoration Coalition, are helping to collect the initial 50,000 signatures needed to trigger a required state Supreme Court review of the proposed ballot initiative. Pamela Burch Fort, a political strategist in Tallahassee, is organizing the coalition's signature-collection efforts. "We have quite a few petitions that have been distributed, and they're coming in at a very healthy clip," Burch Fort said. "I'm quite encouraged."

Senator Dawson said she welcomes the ruling by the federal appeals court, saying it reinforces rather than eliminates the need for the petition drive. "I'm certainly glad it got kicked back for a [trial], it appears Lady Justice may be paying attention to what's fair, but I think the issue will ultimately be decided by the public," Dawson said.

[Editor's Note: The Sentencing Project has recently released a new report documenting the reform of felon disenfranchisement laws in recent years. The report, "Legislative Changes on Felony Disenfranchisement: 1996 – 2003," notes that eight states have removed barriers to voting for persons with felony convictions. The report is available on the Internet at: www.sentencingproject.org/pdfs/legchanges-report.pdf] ■

Orange County to Pay $2.5 Million in Jail Death

Orange County has agreed to pay $2.5 million to settle a lawsuit over the death of a county jail inmate. The agreement was reached with the family of Karen Johnson who suffered a heart attack and lapsed into a coma in June 2001, four days after being jailed for a traffic infraction and not being allowed to take daily, prescribed doses of methadone.

The payout comes five years after Orange County taxpayers paid a record $3 million to settle a lawsuit in a similar death forcing a jail inmate to quit methadone cold turkey.

In May 2002, a Jail Oversight Commission made up of 27 community leaders appointed by County Chairman Rich Crotty released a highly critical report and recommended 200 changes.

Florida Parole

Parole Releases vs. Parole Revocations

During the past several years there has been a dramatic decrease in the number of parole-eligible prisoners being granted parole in Florida. Curiously, the number of parolees who have their paroles revoked and who have been returned to prison has closely paralleled the number of paroles granted. The chart below is based on the fiscal periods shown.

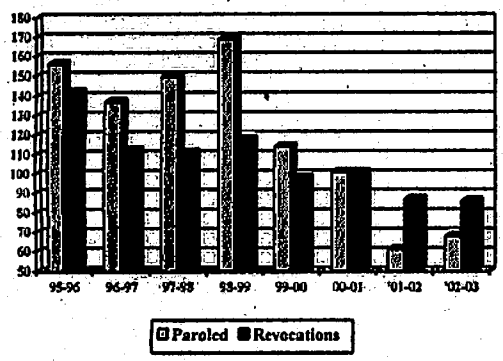


Chart Values

Fiscal Year	Paroled	Revoked
95-96	156	142
96-97	137	112
97-98	150	111
98-99	169	118
99-00	114	98
00-01	101	101
01-02	61	87
02-03	68	86

Prepared by the FPLAO Parole Project

Large Number of School Dropouts Have Prison Records

A new report release this past fall by the Justice Policy Institute finds that an alarmingly high number of high school dropouts end up in prison. By 1999, more than half (52 percent) of black male high school dropouts and one in ten of white male dropouts had prison records by the time they reached their early 30s, according to the report. Additionally, the report notes, black males in their early 30s are almost twice as likely to have prison records (22 percent) than have a bachelor's degree (12 percent).

"The findings of the Justice Policy Institute demonstrate that we clearly need education, not incarceration, if we are to ensure that the American dream becomes a reality for many – not just some," said Reg Weaver, president of the National Education Association. "Education can be the key that unlocks closed opportunities, but all too often we find that the key to a quality education – adequate and equitable resources and funding – is not within grasp. The unfortunate result is that we are more willing to build prisons than schools – less willing to educate than incarcerate."

Based upon data from the U.S. Department of Justice, the report found that two-thirds of prisoners had not received a high school diploma.

The full JPI report, "Education and Incarceration," can be found at www.justicepolicy.org. ■

Florida First With Faith-based Prison

On Dec. 24, 2003, opening ceremonies were held at Lawtey Correctional Institution to convert the entire prison into one where the entire prison population will participate in what is termed faith-based programming.

FDOC Secretary James Crosby, Jr., directed his staff in Sept. to begin the transition of Lawtey CI from a regular prison in to Florida's only prison focused entirely on religious programming. Since that time prisoners not willing to participate in such program have been being transferred from Lawtey. Participation in the program is voluntary and available only to prisoners with a medium or minimum security rating.

Lawtey CI is one of Florida's smaller main institutions, only housing almost 800 prisoners. Most of Florida's main prisons, of which there are 52, house approximately 1300 prisoners.

The expansion of the faith-based programming at Lawtey CI will be phased in through March 2004 and is expected to be fully implemented by April of this year. The FDOC claims Lawtey CI will be the largest faith-based prison in the country when the transition is completed. ■

Prison Impact on Families

With incarceration rates in the US at an all time high, a new study has been done on the effect incarceration has on families. During October 2003 the Justice Policy Center at the Urban Institute in Washington, D.C., released a new report entitled "Families Left Behind: The Hidden Costs of Incarceration and Reentry." Some findings in the report are that:

- More than 1.5 million children have a parent in state or federal prison and an additional 5.8 million children have a parent in jail, on probation, or on parole.
- Of the 1.4 million adult prisoners in the US, 750,000 are parents of minor children (55 percent of state prisoners and 6 percent of federal prisoners).
- Women in prisons are an average of 160 miles from where their children live, while men in

prison are, on average, 100 miles away from their children.

- More than half of incarcerated parents never receive a personal visit from their children. ■

Florida Prisoner Receives Kosher Food

Hollywood, Fla. – A legal battle to secure kosher meals for an observant Jewish Florida state prisoner serving a life sentence has been won, but activists say the war on the issue is not over.

In October the Florida Department of Corrections (FDOC) agreed to settle a federal lawsuit with Alan Cotton, the Florida prisoner, which Cotton had filed last year seeking to force the FDOC to provide him with kosher meals compliant with his religious requirements. The settlement required that Cotton will receive kosher food, but does not require that other Jewish state prisoners will receive such food. The FDOC estimates there are approximately 600 other Jews incarcerated in the state's prison system.

Cotton's case brought together the Becket Fund for Religious Liberty, a Washington D.C.-based conservative legal action foundation, and the Aleph Institute, a Miami-based nonprofit that advises prisons and military systems on how to accommodate Jewish religious practices. in addition to providing support to Jewish prisoners and their families.

"I wasn't so happy they settled," said Rabbi Menachem Katz, director of prison and military programs at the Aleph Institute, whose organization sets the number of "authentic" Jews in Florida prisons closer to 300. "But the settlement is like getting your foot in the door. We can use this to help other prisoners. If it went to trial, who knows what would have happened."

"It was a smart move on the state of Florida's part," said Derek Gaubatz, an official at the Becket Fund. "But it was ultimately the client's choice."

Kosher food is now available in all federal prisons, as well as in Miami-Dade, Broward and Palm Beach county jails in Florida. But some state prison systems, including Florida, Georgia, Virginia and Maryland, have refused to make kosher food available to Jewish prisoners.

Florida prison officials have cited several reasons for refusing to make kosher food available to Florida prisoners, chief among them is the cost. "A true kosher meal costs much more," said FDOC spokesman Sterling Ivey. According to prison officials, it costs $12 a day to provide kosher meals to a prisoner, compared to $2.45 a day for regular meals.

Prison officials also claim that if they supply kosher food to Jewish prisoners, then other prisoners may convert to Judaism and demand the special meals, which are considered healthier than the standard prison food. Additionally, officials claim they are concerned prisoners who receive kosher food may sell the food to other prisoners.

Typically, when faced with a potentially losing case and to avoid precedent-setting prisoner-favorable case law if the case goes to trial, the FDOC agreed to settle with Cotton, 58, rather than suffer a potential defeat in court. "As a result of recent federal rulings on this subject, we felt we wouldn't have a strong case at trial," Ivey said.

The settlement calls for Cotton to be supplied with kosher food at Everglades Corr. Inst., but says nothing about the rights of other Jewish prisoners in Florida. Officials at the Aleph Institute say they are optimistic that kosher meals will soon be provided to all Jewish prisoners in the state. They have obtained the support of some state legislators who have begun to pressure the FDOC on the issue.

Cotton, who is serving a life sentence for murder, began receiving his kosher meals in October 2003. ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Once a motion for postconviction relief is filed with a trial court, the movant can typically count on a lengthy wait before he or she will hear anything back from the court. While some of the circuit courts have postconviction divisions and move their cases along at a reasonable speed, it is more often the case that a postconviction motion will progress through the court system at a snail's pace. Unfortunately, the courts do not have speedy trial concerns on postconviction cases. As a result, such cases are often put on the back burner by the courts while more pressing matters are addressed in other cases.

It is not unusual for a postconviction motion to languish for over a year before the trial court even issues an order to show cause to the State. Unfortunately, due to the low priority often given to such motions by the courts this is a commonplace occurrence. If a court takes too long to issue any rulings on a postconviction motion, the movant does have recourse. Florida Rule of Judicial Administration 2.050(f) provides that "[e]very judge has a duty to rule upon and announce an order or judgment on every matter submitted to that judge within a reasonable time." While the *reasonable time* standard is somewhat vague, it does still place the burden on the court to deal with any motions presented.

If a trial judge fails to rule on a motion within a reasonable time, mandamus is the proper remedy. Mason v. Circuit Court, 603 So.2d 94 (Fla. 5th DCA 1992) Matthews v. Circuit Court, 515 So.2d 1065 (Fla. 5th DCA 1987); See also Berens v. Cobb, 539 So.2d 24 (Fla. 2nd DCA 1989) [mandamus was proper remedy where judge refused to rule on a motion]. A trial court has a legal duty to rule on a postconviction motion. In the absence of a timely ruling on a postconviction motion, the trial court can be compelled, via a writ of mandamus from the appellate court, to issue a ruling on the motion. Matthews v. Circuit Court, 515 So.2d 1065 (Fla. 5th DCA 1987)

As with any motion or petition, it is wise to evaluate whether the petition for a writ of mandamus should be filed. As a general rule of thumb, it is safe to say that one should wait at least six months before attempting to compel the trial court to rule on a postconviction motion via a mandamus petition. Thereafter, if the court has not dealt with the postconviction motion, it may be time to pursue mandamus to obtain a ruling on the motion.

Prior to filing for a writ of mandamus, the movant should first request action from the trial court. A brief motion requesting that the trial court rule on the postconviction motion should suffice. It is wise to note in such a motion how long the postconviction motion has been pending. Such a motion may, in and of itself, spur the trial court into action. If the trial court still refuses to rule on the postconviction motion, then it may be time to file for mandamus with the appellate court.

If the postconviction motion is filed with a circuit court (as will most likely be the case), then the Petition for Writ of Mandamus should be filed with the applicable appellate court pursuant to Florida Rule of Appellate Procedure 9.100. The nature of the relief sought in the petition should be to compel the trial court to rule on the pending postconviction motion. The following should be noted in the petition:

1. The name of the court to which the writ of mandamus should be issued;

2. The trial court case number;

3. The date that the postconviction motion was filed with the trial court;

4. The fact that action on the postconviction motion has already been requested; and,

5. The fact that the trial court has not issued any ruling on the postconviction motion.

Often the mere act of filing a mandamus petition with the district court will prompt the trial court to take action on a postconviction motion. If

the trial court does not issue a ruling after the mandamus petition is filed, it is likely that the district court will direct the trial court to explain the lack of action on the case. If there is not a reasonable explanation for the delay, the district court will likely issue a writ of mandamus directing the lower court to rule on the postconviction motion.

Mandamus can be a useful tool for obtaining a ruling from a trial court. Nevertheless, I recommend that it be used sparingly. One must always keep in mind that filing a petition for writ of mandamus with the higher court may offend the trial court. And, if the writ of mandamus is issued, the case will be going right back before the judge who has been ordered to take action. Therefore, I recommend that anybody who is considering pursuing mandamus relief weigh their need for a prompt ruling against the possibility of offending the trial court and, thus, making it more difficult to convince the trial court to grant relief. Each case is different. Sometimes it is worth it to pursue mandamus relief. Sometimes it is better to wait and let the case work itself through the system. As was noted, a mandamus petition should probably not be filed until the postconviction motion has been pending for at least six months. Additionally, I would recommend that, in most cases, that mandamus relief not be pursued until the case has been pending for at least one year with no action from the court. This is especially so for inmates with lengthy sentences. Sometimes it is just better to let the court take its time without being pressured to rule. Nevertheless, mandamus is always an option to be considered and can be helpful in some cases.

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. ■

Is it not possible that an individual may be right and a government wrong? Are laws to be enforced simply because they are made? Or declared by any number of men to be good, if they are *not* good?

Henry David Thoreau 1859

Arrest Everyone, Sort Them Out Later

On Dec. 15, 2003, the U.S. Supreme Court held that when police find drugs in a car and no one claims them, it is "reasonable" to arrest everyone in the car because everyone could be involved in a crime.

Now some criminal justice experts say the high court's ruling gives approval to police dragnets that could snare innocent people with the guilty. Tracey Maclin, a Boston University law professor who wrote a brief for the National Association of Criminal Defense Lawyers in the case, said, "People get into cars all the time and have no idea what the driver or someone else may have put in the vehicle. This will apply to people like the coed who's at a party late at night and accepts a ride home from a group of friends. If that car is stopped and police find drugs, 10 out of 10 police officers will now arrest everyone to find out whose they are."

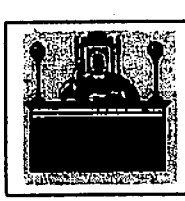
Of course there are those who differ. Charles Hobson, a lawyer for the ultra-conservative Criminal Justice Legal Foundation, said the court's decision strikes the right balance between police authority and civil liberties.

In the case that lead to the ruling, *Maryland v. Pringle*, 124 S.Ct. 795(2003), Baltimore police found five bags of cocaine and $768 in Donte Partlow's care in 1999. None of the three men in the car would admit owning the drugs or money.

Hoping to get someone to admit ownership, the police arrested everyone in the car. Following which, whether they belonged to him or not, Joseph Pringle said the drugs and money were his. He was tried and convicted.

Pringle then challenged the admission of his confession in court, claiming is should not have been used against him because the police lacked probable cause to arrest him because he wasn't the owner of the car and wasn't driving. The Maryland Supreme Court agreed and overturned his conviction. Now, however, the U.S. Supreme Court has reversed the state court and handed police another victory in the war on civil rights.

[Editor's Note: The above noted decision came only days after the Supreme Court decided police have the authority to forcibly enter citizen's homes after knocking and then waiting only "15 to 20 seconds" before kicking the door in. See: *U.S. v. Banks* in this issue's "Notable Cases." The high court will also decide this term whether police can be sued for acting on inaccurate search warrants and whether "informational" roadblocks that lead to arrests are constitutional.] ■



NOTABLE CASES

BY OSCAR HANSON & ANTHONY STUART

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

UNITED STATE SUPREME COURT

U.S. v. Banks, 17 Fla.L.Weekly Fed. S7 (12/2/03)

The U.S. Supreme Court granted certiorari to consider how to go about applying the standard of reasonableness to the length of time police with a warrant must wait before entering a person's premises without permission after knocking and announcing their intent in a felony case.

This case established that many reasons may exist for entering a premises without permission when there is no timely response to a knock and announcement. In *U.S. v. Ramirez*, 523 U.S. 65 (1998). the Magistrate Judge found that the customary warning would raise an immediate risk that a wanted felon would elude capture or pose a threat to the officers. In this case against Lashawn Lowell Banks (Banks) the Government claimed that a risk of losing evidence arose 15 to 20 seconds after knocking and announcing.

Several federal courts of appeals have held similar wait times of 15 to 20 seconds to be reasonable in drug cases with similar facts including easily disposable evidence, some other courts have found even shorter ones to be reasonable enough. It was argued by Banks that 15 to 20 seconds was too short of time to get to the door after the knock and announcement. However, the courts have found that time will vary for the person within to get to the door depending on the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse. A pivotal question in this case against Banks rested on the opportunity to dispose of evidence, which for drug cases such as this was the strategic placement of the illicit drugs near commodes or kitchen sinks so disposal could occur within seconds.

Originally, the intent to make an officer knock and announce before fulfilling a warrant was to allow the person inside to open the door to prevent destruction of the door or establishment. In a case with no reason to suspect an immediate risk of frustration or futility in waiting at all, the reasonable wait time may well be longer when police make a forced entry, since they ought to be more certain the occupant has had time to answer the door. Suffice it to say that the need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open. Police seeking a stolen piano may be able to spend more time to make sure they really need the battering ram.

In essence, the Supreme Court has shown that a brightline standard cannot be applied because the analysis must be different in a case by case review. Attention to cocaine rocks and pianos tells a lot about the chances of their respective disposal and its bearing on reasonable time. Instructions couched in term like "significant amount of time" and "an even more substantial amount of time," tell very little. [as]

U.S. COURT OF APPEALS

Carter v. Galloway, 17 Fla.L.Weekly Fed. C112 (11th Cir. 12/15/03)

While serving a life sentence in Georgia's Hays Prison (Hays), Plaintiff John Carter was assaulted and stabbed by his cellmate, Termayne Barnes (Barnes). Plaintiff brought suit pursuant to 42 U.S.C. section 1983 against Defendants James Galloway, Deputy Warden of Security at Hays, and Steve Upton, Special Management Unit Manager of Hays, for their alleged deliberate indifference to a substantial risk of serious harm to Plaintiff in violation of the Eighth Amendment.

The U.S. District Court granted summary judgment for both Defendants and the Plaintiff appealed.

Upon review of this case, the Court noted the background events that took place before Plaintiff was assaulted and stabbed by Barnes. After the Plaintiff was placed in a double bunk cell with Barnes, Barnes informed Plaintiff of a plan to fake a hanging so Barnes would be transferred to a medical prison. The Plaintiff had refused to assist in this plan and Barnes made a statement that Plaintiff would help "one way or another." Plaintiff interpreted the statement as a verbal threat. Plaintiff had also noted how Barnes would pace the cell like "a caged animal" threatening correctional officers and orderlies.

Later, the Plaintiff notifies Galloway that Barnes was acting crazy and was planning a fake hanging and that

Plaintiff was told by Barnes he would help in the plan "one way or another." After being returned to the cell with Barnes, four days later Plaintiff seeks to be removed from the cell by telling Upton of the plans and the comment that plaintiff would help "one way or another." Upton told Plaintiff that no removal would be in order and placed Plaintiff back in the same cell.

Six days after speaking with Upton, Plaintiff was assaulted and stabbed in the stomach by Barnes with a "shank" (an inmate-made weapon).

It is axiomatic that a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment and they do have a duty to protect prisoners from violence at the hands of other prisoners. However, not every injury suffered by one inmate at the hands of another translates into a constitutional liability for prison officials responsible for the victim's safety.

An Eighth Amendment violation will occur when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk. At no time did the Plaintiff inform the Defendants that Barnes' statements constituted a threat nor did Plaintiff make a request for protective custody. The court did not view the record as supporting a contention that Defendants drew the inference or should have drawn the inference from Barnes' statement of "one way or another" as a serious threat, leaving Plaintiff exposed to any substantial risk of serious harm.

The Defendants arguably should have placed Plaintiff elsewhere but merely negligent failure to protect an inmate from attack does not justify liability under section 1983. Defendants only possessed an awareness of Barnes' propensity for being problematic; the court ruled to find the Defendants sufficiently culpable would unduly reduce awareness to a more objective standard, rather than the required subjective standard set by the Supreme Court. Such a generalized awareness of risk in these circumstances does not satisfy the subjective awareness requirement.

The Court even viewed the evidence most favorably toward the Plaintiff and a claim for deliberate indifference still could not be established, therefore the Court affirmed the district court's order. [as]

DISTRICT COURT OF APPEAL

Estevez v. Crosby, 28 Fla.L.Weekly D2534 (Fla.4th DCA 11/5/03)

George Estevez filed a petition alleging ineffective assistance appellate counsel based on his belief that the trial court committed a fundamental error when it instructed the jury that his use of force against the victim, in the aggravated battery charge, was not justifiable if it were to find that the defendant was "attempting to commit, committing or escaping after the commission of aggravated battery." Estevez's sole defense at trail was self-defense.

The above instruction is to be given when the accused is charged with at least two offenses, the one for which the accused claims self-defense as well as a separate forcibly felony. To instruct the jury that the accused was not entitled to use force if he was attempting to commit, committing, or escaping after committing the only crime charged is circular, confusing, and in essence negates the defense.

The DCA granted Estevez's petition and directed a belated appeal on whether the instruction given was indeed a fundamental error. The Court reasoned the fundamental nature of the error can only be determined upon a review of the full record.

[Note: For those interested in the procedural aspect of a grant on a petition alleging ineffective assistance of appellate counsel, the Court in this case ordered that the opinion in this case shall be filed with the lower tribunal by the clerk of the district court and shall be treated by the lower tribunal as the notice of belated appeal of the judgment and sentence. Upon receipt, the clerk of the lower court shall certify a copy of the DCA opinion to the DCA in accordance with Fla. R. App. P. 9.040(g). The appeal will proceed under a new case number, which shall be assigned upon receipt by the DCA of the certified opinion. All time requirements of the Florida Rules of Appellate Procedures shall run from the date of the opinion. oh]

Edwards v. State, 28 Fla.L.Weekly D2535 (Fla. 4th DCA 11/5/03)

The Fourth DCA has certified conflict with the Second DCA as to whether a facially sufficient claim that an attorney was ineffective for failing to call certain witnesses in a motion for post conviction relief must allege the witnesses were available to testify.

The Fourth DCA has aligned itself with the First, Third, and Fifth districts that have adopted a four-component test for determining the legal sufficiency of an ineffective assistance of trial counsel claim that counsel failed to call certain witnesses to testify on his behalf. The components are: (1) defendant must identify the witness; (2) state the substance of their testimony; (3) an explanation as to how the omission of the testimony prejudiced the outcome; and (4) that the witness was available to testify. The Second DCA requires only the first three components to state a legally sufficient claim. *See: Odom v. State*, 770 So.2d 195 (Fla. 2d DCA 2000). *Cf. Catis v. State*, 741 So.2d 1140 (Fla. 4th DCA 1998), rev. denied, 735 So.2d 1284 (Fla. 1999); *Nelson v. State*,

816 So.2d 694 (Fla. 5th DCA 2002); *Puig v. State*, 636 So.2d 121 (Fla. 3d DCA 1994); and *Highsmith v. State*, 617 So.2d 825 (Fla. 1st DCA 1993).

[Note: This issue is problematic for several reasons. Rule 3.850, which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion. Nothing under the rule requires a movant to allege the identities of witnesses, the nature of their testimony, or their availability to testify. As the Florida Supreme Court recognized in the case of *Gaskin v. State*, 737 So.2d 509 (Fla. 1999), it is during the evidentiary hearing a movant must come forward with witnesses to substantiate the allegations raised in the post conviction motion. In addition to this reasoning, it would be unfair to require a defendant to allege judicially crafted components not identified under a rule of procedure, which if not met will amount to a denial of their claim for a requirement they knew nothing about.

The most significant problem with this conflict between the districts is that there is no conflict at all. In Gaskin the Supreme Court made an express holding that it is error for a trial court to require a movant to plead identities of witnesses (as well as their testimony and availability to testify) in order to be entitled to a hearing. Yet mysteriously, no district seems to recognize the existence of the *Gaskin* opinion. oh]

Espindola v. State, 28 Fla.L.Weekly D2406 (Fla. 3d DCA 10/22/03)

In the appeal from a final order declaring Ferman Espindola a sexual predator in accordance with section 775.21, Fla. Stat. (1999), the Florida Sexual Predator Act ("FSPA").

Espindola plead guilty to an offense that under the FSPA required that he be designated a "sexual predator." However, he argued that the statute is violative of procedural due process and therefore unconstitutional.

As explained fully in the lengthy opinion, the Second DCA held the FSPA unconstitutional because it fails to provide minimal procedural due process. In sum, the automatic registration and notification requirements of FSPA without a hearing and the opportunity to be heard violates due process. Because the FSPA specifically provides that sexual predators present an extreme threat to the public safety, a finding as to the threat must be independently made, which implicates procedural due process.

O'Neal v. State, 28 Fla.L.Weekly D2668 (Fla. 2d DCA 11/19/03)

Florida prisoner Tyrone O'Neal attempted to have his felony habitual offender sentence vacated premised on a claim that the trial court did not expressly announce that he was being sentenced as a habitual offender. On appellate review the Second DCA rejected O'Neal's argument.

The DCA acknowledged in past cases that they have applied this rationale to reverse habitual offender sentences where the trial court found that a defendant qualified as a habitual offender but did not announce that it was going to impose a habitual offender sentence. However, the DCA ruled that it is no longer applying such rationale due to changes in the habitual felony offender statute.

Under the version of the statute applicable to O'Neal's offenses, the trial court must make specific written or oral findings if it is not going to impose a habitual offender sentence and, accordingly, it is not necessary for the trial court to specifically state that it is imposing a habitual offender sentence. This version of the statute applies to offenses committed after 1995.

Moore v. State, 28 Fla.L.Weekly D2729 (Fla. 1st DCA 11/26/03)

In this direct criminal appeal case, Moore sought review of sentences imposed following revocation of probation. Moore argued that, because she was originally sentenced on two counts in one case to concurrent 24-month prison terms to be followed by concurrent 5-year probationary terms on two counts of a second case, the decisions in *Tripp v. State*, 622 So.2d 941 (Fla. 1993), and its progeny mandated that she receive credit upon the revocation of her probation in the second case for the time she spent in prison on the sentences imposed in the first case.

The First DCA disagreed, holding that under the Criminal Punishment Code, *Tripp* and its progeny have no bearing on sentences such as Moore's imposed under the Code rather than its predecessor (the sentencing guidelines). The DCA drew a distinction between the sentencing guidelines (where Tripp and its progeny apply) and the Criminal Punishment Code (where the line of Tripp cases don't apply).

The DCA certified the following question to the Florida Supreme Court: when sentencing pursuant to the Criminal Punishment Code (section 921.002 – 921.0027, Fla. Stat. (1999) for a violation of a probationary term originally imposed to run consecutively to a prison term imposed for a different offense, do *Tripp v. State* and its progeny require the trial court to award credit for time previously served on the sentence imposed for the different offense?

[Note: The Second DCA has reached a contrary conclusion. See *Thomas v. State*, 805 So.2d 850 (Fla. 2d DCA 2001. oh] ■

DNA Testing Extension, Rule 3.853

by Gene Salser

Recently the Florida Supreme Court has suspended until further order of the Court the October 1, 2003 deadline for DNA testing found in Rule 3.853 (d)(1)(A), Fla. R. Crim. P.. See, Amendments To Florida Rule of Criminal Procedure 3.853 (d)(1)(A); Dean C. Wilson, et al., v. State of Florida, 28 Fla. L. Weekly S737 (Fla. Sept. 30, 2003). Further, the Court recognized operation of the same deadline in section 925.11 (1)(b) 1., Fla. Stat. (2002) may result in the non-preservation of physical evidence for DNA testing under section 925.11(4)(b). Because such a result would render these proceedings moot and in effect preclude the Court from the "complete exercise", [1] there of, the deadline in section 925.11 (1)(b) 1. was held in abeyance while the Court considers its jurisdiction. The Court expressed no opinion on the merits of the petition but ordered the evidence described in section 925.11(4)(a), "shall be maintained for at least the period of time" controlled by the abeyance.

The divided Court ultimately turned to the issue of jurisdiction with the majority providing a well-reasoned logic for its actions. Id. at S728.

In the November 15, 2003, issue of the *Florida Bar News*, Gary Blankenship, Senior Editor, acknowledged the concerns of many for DNA testing.

On October 21, 2003, a joint meeting between the Judiciary and Criminal Justice committees, Senators got answers and asked questions on extending the deadline.

The rule and statute provided procedures giving inmates until October 1, 2003, to file to have DNA Evidence from their cases tested. In some instances the conviction pre-dated the availability of DNA testing, and in others older, less sophisticated DNA testing was used, leading to inconclusive results that more modern testing might resolve.

Two law school programs screening inmate requests said they didn't have enough time, and hundreds of cases still needed to be reviewed. The Supreme Court set oral arguments for Nov. 7, after staying the expiration of its rule.

Pioneered by Sen. Alex Villalobos, R-Miami, the committee heard from Catherine Arcabascio and Jennifer Greenberg who respectively run programs screening inmate requests for DNA testing at the Nova South-eastern and Florida State University Law schools, and Second Circuit State Attorney, Willie Meggs, as well as others.

Arcabascio and Greenberg said two years hadn't been enough time to review hundreds of requests from inmates with Greenberg noting the FSU effort began only in April with 400 cases.

Arcabascio could not give any specific date concerning the extension, said it can take months or years merely to collect the documents from cases, some decades old, to determine whether DNA testing is appropriate, and, if so, whether the biological evidence still exists.

"We owe it to everyone," said Ariabascio, a former prosecutor. "I do it because I believe it is the right thing to do, it is the fair thing to do, it is just the thing to do."

She and Greenberg estimated about 10 percent of the reviewed cases will qualify for DNA testing.

Greenberg stressed the importance of DNA review because new testing techniques are more sophisticated, and some earlier test have been discounted. She noted that several people were convicted in Florida several years ago based on microscopic hair comparisons, a technology that now has been discredited.

Greenberg further stated various studies estimate between 1 and 10 percent of incarcerated inmates are actually innocent. The 10 percent figure comes from a U.S. Department of Justice study. Relying on these numbers and given the Florida prison population of more than 79,000, that means that almost 8,000 men could be innocent.

Sen. Rod Smith. D-Gainsville, and Villalobos discussed the need for an extension relying on section 2, (rule 3.850) that allows testing after the deadline if new evidence is found.

Michelle Foutaine, a third year FSU law student who reviews the cases, said under existing rulings, "the Court is going to interpret those [section2] phrases very narrowly and usually in favor of the state, because of finality."

Mr. Meggs, president of the Florida Prosecuting Attorney's Association disagreed that an extension was necessary stating section 2 allows handling of new evidence or improved testing.

"State Attorneys of Florida have absolutely zero interest in seeing an innocent person staying in prison", he said. "State Attorneys will order DNA tests if someone comes to them with a good reason. That's what we do. That's the business we're in."

Other Topics Raised!

Sen. Evelyn Lynn, R-Ormond Beach, expressed concern that the law did not apply to those who had entered pleas, only those who had been found guilty. See, Smith v. State, 849 So. 2d 485 (Fla 2nd DCA, July 16, 2003). Arcabascio said that most other states with

similar DNA laws allow those who took plea bargains to seek the testing. [2]

Lynn also said she wanted to see more information from other states, including knowing how many had similar laws, how many set deadlines, and the rationale for setting specific deadlines or not having a set time. Fountaine said 16 of 22 states with DNA laws did not have a deadline.

John Booth, FDLE agent said the FDLE gets request for about 8,000 DNA tests per year. About 50 requests are pending on post-conviction cases, but was uncertain how many such requests the department gets annually and how many came about because of the DNA law.

[Source] The Florida Bar News, November 15, 2003. Gary Blankenship, Senior Editor.

1) The Court exercised its All Writs Jurisdiction to initiate jurisdiction consideration.

2) For those who entered pleas this should be of particular interest given the draconian sentencing schemes that have persuaded many to plea guilty for a lesser sentence, rather than face the blunt of Legislatures statutory maximums. You should contact your legislature's on this point. Stating why you should be entitled to DNA testing. □

ATTENTION ORANGE AND SEMINOLE COUNTY RESIDENTS

A faith based support group meets every second Monday of each month at 7:00 PM to provide information and fellowship support for grieving families of incarcerated loved ones. Everyone is encouraged and invited to attend:

1937 Lakeville Road
Apopka, Florida 32703
e-mail: prett.1@netzero.com
(Little house behind the church)

Prison Perspectives:

Busy Courts

These are the Florida counties that saw the greatest increase in the number of prison sentencings between July 1, 2002 and June, 2003.

County	Additional Inmates	Percentage Increase
Hillsborough	617	36.2%
Escambia	303	42.6%
Polk	240	17%
Volusia	207	22.9%
Leon	193	34%

The Importance of Filing Deadlines

According to popular television and conservative critics, prisoners have an unlimited ability to tie up the judicial system with frivolous and unproductive claims. Reality, however, reveals a much different picture. The ability of prisoners to attack a wrongfully obtained conviction or sentence is limited. Factors such as the type of argument that can be raised and the type of evidence that can be used limits a prisoner's ability to obtain relief. Most important, however, is that strict deadlines or periods of limitation serve to limit the opportunities of prisoners to obtain relief in a system that is hostile to the claims of individuals who have been convicted.

Generally, an individual convicted in state court has only two options to attack his or her conviction, a direct appeal and a motion of post conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. A notice of appeal must be filed within 30 days of the judgment of conviction, thereby signifying the intent of the individual to file a direct appeal. Following the end of the direct appeal process, the individual will have two years within which to file a motion for post conviction relief. However, if the individual raises a federal constitutional violation, he or she must be mindful of the one-year period of limitations for filing their federal claims in federal court. Thus, they must file their state post conviction motion within one-year, leaving sufficient cushion to file in the federal court if their efforts are unsuccessful in state court. In other words, if the individual anticipates going to federal court if unsuccessful in state court, he or she must be ready to file their pleadings (both state and federal) within one-year of their judgment of conviction becoming final. The state post conviction proceeding will toll or suspend the federal period of limitation. The clock will resume (not start over) once the state proceedings are complete.

Given the few avenues available to correct an erroneous conviction, it is vital that individuals file their legal pleadings in a timely manner. It is rare that any court will even listen to a legal proceeding following conviction if it is filed in an untimely manner. The courts have little tolerance for individuals who cannot follow the filing deadlines. While individuals have viable arguments, such arguments will often not even be heard if an action is not timely filed. ■

> The constitution was not made to fit us like a strait jacket. In its elasticity lies its chief greatness. Woodrow Wilson 1904

PRIDE Prison Industries Comes Under Scrutiny

An audit conducted by the Office of Program Policy Analysis and Government Accountability, a Legislative watchdog, revealed that Florida's prison-industries system let an affiliate run up nearly $10 million in debt with no documented repayment schedule. PRIDE - Prison Rehabilitative Industries and Diversified Enterprises - loaned the money to start up Industries Training Corporation, then hired the company to run prison work programs without seeking other bids. Given that all the board members of Industries Training Corp. are either current of former board members of PRIDE, auditors said, its difficult to make sure the money PRIDE makes is being properly circulated back into prisoner training and other PRIDE purposes.

PRIDE was created by the Legislature in 1981 to provide supplies and services to state agencies and at the same time provide job skills for inmates in the hope that recidivism would go down. Last fiscal year PRIDE had 1,995 work positions at 21 prisons and rang up $61 million in revenue on everything from printing and data entry to raising dairy calves and making furniture. Companies whose business has been affected by PRIDE often have complained of unfair competition.

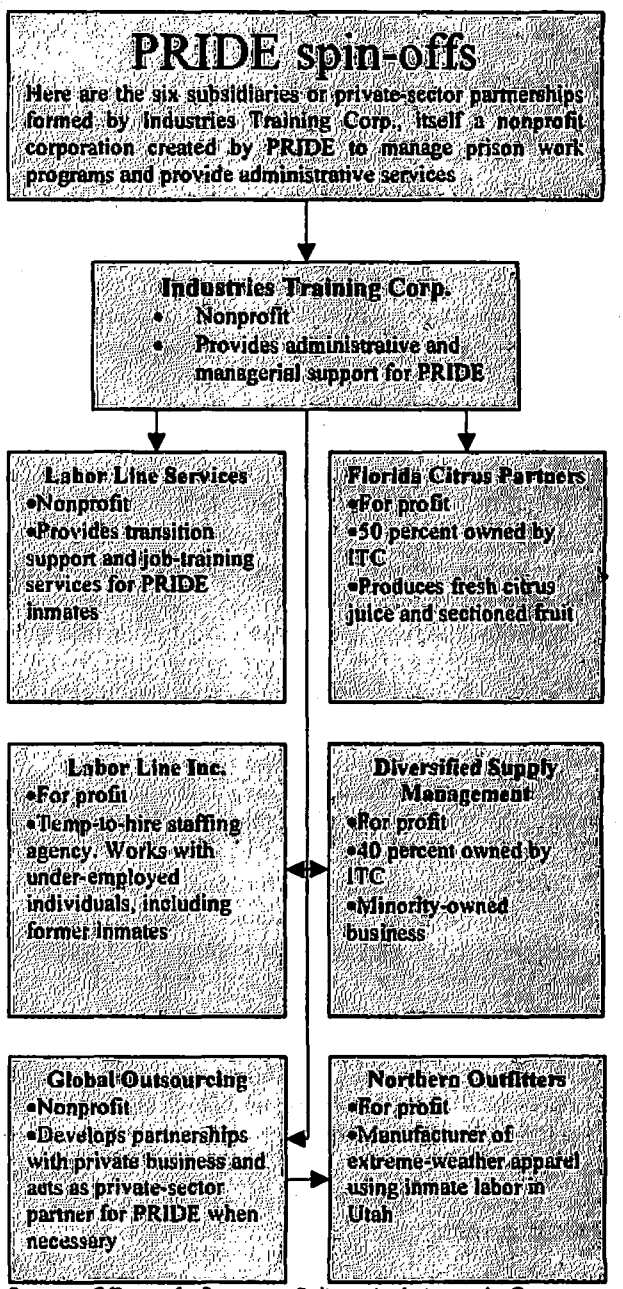
The report found not only that some state agencies try to avoid buying from PRIDE but also that its affiliate Industries Training Corp. created further spin-offs in part to erase the stigma of using "forced labor." The audit was done as part of OPPAGA's routine review of state programs, and the report called for more openness in PRIDE's activities and structure. The auditors said the corporate structure "produces benefits" for PRIDE but also created accountability problems.

"PRIDE paid ITC $6 million in 2002 and $9 million in 2001 for administrative services," the report said. "These services have not been placed out for bid on a regular basis to determine if another contractor could provide PRIDE with the same services at a lower cost.

It was in 1999, the audit said, that PRIDE began creating more spin-offs. Industries Training Corp. created six entities, including some for-profit operations in citrus, temporary staffing, and manufacturing of extreme weather apparel using inmate labor in Utah. Meanwhile the percentage of Florida inmates getting job training through PRIDE has fallen by more than half since 1985.

PRIDE's sales also have been steadily declining over the years. The auditors found that despite legal requirements for purchasing preferences, some state agencies avoid buying from PRIDE because of dissatisfaction with delivery time and quality and a belief that they can get a better deal elsewhere.

The report praised PRIDE for helping reduce inmate idleness, increasing restitution to victims, providing incentives for good behavior, and helping inmates learn job skills. PRIDE reported a recidivism rate of 18.1 percent among its trainees in fiscal 2000 while the Department of Corrections had an overall recidivism rate of 83.8 percent.



Source: *Office of Program Policy Analysis and Government Accountability*

LEGISLATIVE WATCH

By John Hudson

The information contained in this section is compiled from published Session Laws and may be useful to or impact Florida prisoners. This section is an information source designed to provide accurate information concerning the latest in Florida law. Occasionally, Legislative Watch will publish other items of interest related to Florida's legislature such as upcoming bills, legislative history and bios on current legislators. New law and pending bills will be clearly identified to avoid confusion as to what is law and what is not.

INTRODUCTION OF A BILL IN BRIEF

Every law in Florida was once a bill. This short article covers a typical way in which Florida law is enacted by explaining what constitutes a bill and how the bill may eventually become law.

A "bill" is a term used for a proposition to enact law reduced to writing. Only members of the legislature may introduce a bill. It is a legislative proposal offered for debate and may originate in either chamber of the Legislature (the Senate or the House of Representatives), and after being passed in one chamber, may be amended in the other.

The Preamble of every measure introduced by a member of the legislature for enactment into law is: "A Bill to be Entitled an Act to ...". Bills that originate in the House of Representatives are designated H.B., those in the Senate as S.B., followed by a number assigned in the order they are introduced.

After numbering, the bill is read by its title only and publicly referred by the presiding officer to a committee, which will report recommendations that a bill "Do Pass" or "Do Not Pass." Many bills die in committees and do not pass.

A bill is "introduced " in only one chamber of the Legislature, though a duplicate may be offered in the other.

When a bill is passed by one chamber, it is transmitted, not introduced to the other for action thereon.

When the bill has received support of a majority of members present after a second and third reading, and final passage has been entered upon Journals of each chamber, the bill has passed. It is then a legislative "Act" by virtue of being passed in identical language in both chambers. The "Act" then becomes law if signed by the Governor, or should the Governor veto the bill, a two-thirds majority vote in both chambers to override veto and enact the law, or if allowed to become law without the Governor's signature.

The law is then filed with the Secretary of State, and becomes effective either 60 days after the date of Final Adjournment of the legislature or upon a special day fixed in the particular law.

However, a bill cannot be introduced in or passed by either chamber of the Legislature after the expiration of its final yearly session, nor can a bill be reconsidered or amended after the lapse of this period, since no legislative functions may be performed after the expiration of the session. To allow reconsideration or amendment after this period is improper.

A regular session of the Legislature may last a maximum of 60 calendar days. The Governor may summon the Legislature into special or extraordinary session. These sessions last 20 calendar days, except when called for the purpose of legislative reapportionment.

In convening a special session of the Legislature, other than for reapportionment, the Governor states the reason for the call and the Legislature is bound constitutionally not to consider other business except by a two-thirds vote of each chamber.

The exact rules governing the Legislative chambers of House and Senate are lengthy, too detailed to be considered here. But the basics are covered and hopefully you, the reader, have gained some knowledge on the subject of Legislative bills to law. ■

JEB PROPOSES PRISON EXPANSION

During January 2004 Florida Governor Jeb Bush sent his state budget proposal to the Legislature for this coming fiscal year. Bush proposed increasing the Florida Department of Correction's budget 9% over last year, which would give the department $2.16 billion for 2004-05 if agreed on by the Legislature. Bush also earmarked $99.6 million of his proposed increase for new prison construction (in addition to the prison construction approved in 2003) and $257.6 million to restore drug treatment and education programs that were slashed last year.

Lax Security Contributed To Prison Guard's Death

by Bob Posey

PUNTA GORDA, Fla.- Negligence by top prison officials at Charlotte Correctional Institution contributed to the death of a female prison guard during a botched escape attempt, according to a uniquely candid internal investigation report released January 20, 2004. Among the numerous security policies violated by Charlotte CI officials, according to the report: allowing a single female guard to monitor five prisoners inside a dormitory under construction at night, failing to make required security checks, and ignoring rules about when and where certain tools are allowed to be used and stored.

The report, from the Department of Corrections' Office of the Inspector General, provides a detailed synopsis of extremely sloppy security policies being practiced at the prison on the night in June 2003 when rookie prison guard Darla Lathrem was killed. (See: FPLP, Vol. 9, Iss. 4, "Female Prison Guard Killed.") Three prisoners on a five-man work crew allegedly attacked and killed the 38-year-old guard, who became the first female guard killed inside a Florida prison. Her body was later discovered in a locked closet inside the dormitory that was being renovated after three of the five prisoners she was supervising were caught trying to scale the perimeter fences at the prison. She apparently had been bludgeoned to death with a sledgehammer.

Officials had decided in a meeting prior to construction beginning on the dormitory that at least two guards would be needed to supervise the prisoner work detail, according to Daryl McCasland, the FDOC inspector who authored the department's internal investigation review. However, "no one from Charlotte's administration appeared to monitor the construction project beyond the normal duty hours to ensure that manpower was being utilized properly," McCasland wrote in the 12-page report. Warren Cornell, the warden at that time, said he was never approached with security issues regarding the construction.

Lt. Rick Orzechowski, one of the officers in charge on the night of Lathrem's murder, claims he was never told he should have more than one officer inside the dormitory. He, along with Capt. Jody Davis, the two supervisors of the night shift on June 11, were both demoted to sergeant before the internal report was released. Neither works at Charlotte CI anymore, a local source reports.

Prisoners Dwight T. Eaglin, Michael Jones, and Stephen Smith, three of the five men on the work crew that night, are each facing two counts of murder for Lathrem's death and the killing of one of the other prisoners on the work squad, Charles Fuston, whose family claims he tried to help Lathrem. The other prisoner, James Beaston, has not had any charges filed against him. None of the five prisoners were restrained that night although all had high security ratings, another policy violation, according to the internal report. The main control room also failed to make regular checks with Lathrem, a mandatory policy, and Lathrem was not wearing a "body alarm," an electronic device that sends out an alert of a fallen officer, another violation of department policy.

Warren Cornell, the warden on the night Lathrem was killed has resigned and was replaced by Chester Lambdin. The internal report also spurred a string of other administrative changes that included the further demotion of the prison's former assistant warden, William Boyett, who had been transferred and demoted to colonel following Lathrem's death, is now a sergeant at Brevard Correctional Institution. A department spokesman, Sterling Ivey, says Boyett's initial demotion to colonel was not tied to Lathrem's murder, but the demotion to sergeant is a result of the internal investigation. ■

AZ – The state's female prison population is rapidly growing. It has increased nearly 58% in the past five years and has more than tripled in the past 15 years. Yet 80% of the women are imprisoned for non-violent crimes, compared with 57% of men.

AZ – Private prison companies are pushing the Legislature to consider using their services to solve the state's overcrowded prison system. AZ is short 4,000 beds and needs an additional 16,000 beds right away. The Legislature will be considering the issue during a special session.

AZ – On Oct. 1, 2003, Gov. Napolitano announced that that a 3,200 bed privately-operated women's prison would not be built after a coalition of Arizona organizations, including the AZ American Friends Service Committee and the AZ Advocacy Network, rallied to oppose the construction. The coalition protested at a public hearing about the prison, getting statewide media coverage and generating hundreds of phone calls against the construction to the governor's office. Arizona's prison population has ballooned from just over 3,000 in 1978 to over 30,000 today. The majority of AZ prisoners are either non-violent offenders, first time offenders, or both.

GA – An Atlanta grand jury indicted Michael Little, 35, Gary Barnes, 36, Ricky Davis, 41, and his wife, Angie Davis, 29, on charges of attempting to defraud the U.S. government of $2.4 million by filing false income tax returns. The indictments were handed down Aug. 14, 2003. All of the men are prisoners at the Federal Correctional Facility in Jesup Georgia.

FL – Starke – On Oct. 30, 2003, the stretch of State Road-16 between Starke, Fla., and State Road-121 in Union County was formally designated with a sign as "Correctional Officers Memorial Highway." The state Legislature had authorized the naming of the road, which passes Florida State Prison and Union Correctional Institution, during 2003. FDOC officials say the dedication will serve as a reminder to Floridians of the approximately 30 prison guards who have died in the line of duty.

FL – Raiford – Bad turkey may be to blame for making 168 prisoners sick at Union Correctional Institution on Christmas day, claims health and prison officials. A spokesman for the Department of Corrections, Sterling Ivey, said that the prisoners were treated for diarrhea and other symptoms common to food poisoning and that all had recovered. Food at the prison is prepared by Aramark Corporation, a private contractor that provides food services to the majority of Florida prisoners.

FL – A state review following the death of a Miami youthful offender found dozens of state Juvenile Justice Department employees with arrests and convictions. Two supervisors at the juvenile lockup where Omar Paisley, 17, died in June, 2003, had arrest records. Statewide, 48 employees had convictions or other resolutions of criminal charges.

FL – a Florida Department of Corrections prison sergeant was arrested and charged with aggravated battery and possession of less than 20 grams of marijuana December 28, 2003. Marion County detectives arrested Donald Kleinmeyer, 33, of Ocala, saying he shot Brain Case, 38, three times, once in the arm and twice in his back, at Kleinmeyer's ex-girlfriend's house. Reportedly Case, the woman's new boyfriend, unexpectedly went to the woman's house and after a search found Kleinmeyer hiding in a closet. When Case punched Kleinmeyer in the face, Kleinmeyer pulled a gun and shot Case. Kleinmeyer had been a prison guard since June 1995 and his entire career had been spent at Marion Correctional Institution. [Source: Ocala *Star Banner*, 1/1/04]

FL – On Sept. 26, 2003, a guard at the private prison Moore Haven Correctional Facility was arrested and charged with two counts of sexual battery on a child and one count of lewd and lascivious exhibition of a child. The arrested guard, John Brock, 42, is also the former police chief of Zolfo Springs, Florida. The Moore Haven Facility is operated by Wackenhut Corrections Corporation.

MT – Prerelease centers, intensive supervision, and treatment programs are helping slow the prison population growth. The Department of Corrections reported the prison population is growing at the rate of 2.6%, compared with 8% in 2002 and 5.7% in 2001. But officials also warn that crimes related to methamphetamine use could reverse declines.

OK – A state law that required violent offenders to serve longer sentences may be contributing to an increase in the number of inmate attacks on prison guards. Although that may be part of the problem, the growth in prison population and understaffing also play a role, according to a state report release in November.

PA – During Aug. 2003, Tammy Swittenberg-Edwards, 31, was arrested for child endangerment after locking her 3-year-old daughter in the trunk of her car while she visited her husband at a state prison in Huntingdon. The child was locked in the trunk after being denied entrance to visit because she was not on the prisoner's visiting list. The mother was arrested after prison guards heard crying and yelling from the trunk of the car and found the child locked inside.

SC – Effective Aug. 13, 2003, the South Carolina Department of Corrections cut visiting hours at all 29 state prisons by half, and to only four hours on Saturday and Sunday. Prison officials claim the cut was necessary due to budget shortages.

VA – On Aug. 28, 2003, Federal Judge Robert Payne had a warrant issued for disbarred attorney Thomas Smolka, 56, after he failed to show up for a sentencing hearing after pleading guilty to wire and mail fraud charges for bilking prisoner clients out of money for legal work he never performed. Payne had already revoked Smolka's bail in June when he refused to meet with probation officers to set his restitution payments. Prosecutors claim Smolka had not been cooperative in identifying his victims. Smolka was declared a fugitive. ■

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