FLORIDA PRISON LEGAL

Perspectives

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McDonough Resigns, New FDOC Secretary Takes Over

TALLAHASSEE- On January 9, 2008, without warning, but not a total surprise, it was announced that James McDonough was resigning as head of the Florida Department of Corrections (FDOC), effective at the end of that month. A few days later, Gov. Charlie Crist appointed former Tallahassee Police Chief, and for the past year—secretary of the Department of Juvenile Justice—Walter McNeil to replace McDonough.

James McDonough, 61, a retired Army colonel, West Point graduate, Vietnam combat veteran, recipient of three Bronze Stars and a Purple Heart, and former drug-policy czar in Florida, was appointed by then-Gov. Jeb Bush in 2006 as FDOC secretary after his predecessor, James V. Crosby, was indicted for corruption and following a string of scandals that exposed widespread corruption in the FDOC. McDonough quickly showed that he was the right man for the job.

McDonough brought a tough, no-nonsense, military-style approach to the department. He quickly let FDOC employees know that while he was in charge that there would be zero tolerance for corruption and abuse of prisoners.

McDonough fired or demoted dozens of prison officials, some of them wardens and other top administrators. He instituted random drug tests, loyalty oaths, dress codes and mandatory fitness requirements for FDOC's 28,000 employees. He repeatedly, clashed with a prison culture that is deeply entrenched with corruption. Yet, he made significant strides in cleaning the system up, or in at least putting abuse and corruption in remission, while he was in charge.

McDonough's clean-up offended forces such as the Police Benevolent Association, the politically active union that represents almost half of the department's prison guards. The PBA's problem? McDonough's random drug testing, including steroid testing, and physical fitness requirements for employees. The PBA claimed that such policies hurt morale. McDonough countered that it was his intent to boost confidence, integrity, and professionalism in the majority of FDOC workers.

Last June McDonough told The Associated Press that he had mostly accomplished what he was brought in to do. While there may still be intermittent wrongdoing by some employees, the institutionalized lawlessness at top levels of the department had been weeded out, he said.

There was no hesitation from McDonough in tackling other forms of corruption affecting prisoners and their families. Knowing that his predecessor, James Crosby, had been sent to federal prison with an eight-year sentence for taking kickbacks from a private vender who was operating the prison visiting park canteens and charging visiting families exorbitant costs for food and drinks, McDonough examined all of the FDOC's contracts with private companies.

In short order, new contracts were demanded by McDonough for the visiting parks and prisoner canteen

ON THE INSIDE

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operations, resulting in the private vendor, Keefe Commissary Network, having to reduce costs to a more reasonable level and stock better quality products *in July* 2007.

When McDonough learned that excessive fees were also being charged whenever money was placed into or spent out of prisoners' canteen bank accounts, he cut the fees down and eliminated them totally for prisoners who are honorably discharged military veterans.

McDonough was stunned when he learned how prisoners' families and friends were being robbed by the FDOC and MCI WorldCom over rates to accept collect phone calls from their incarcerated loved ones. Fifteen minute in-state calls were costing over $5 and out-of-state phone calls were averaging almost $20 for the same amount of time under the monopolistic system. Almost immediately McDonough cut the costs by reducing the amount of commission that FDOC would receive from the phone service contractor. And recently the contract was given to another company that has reduced the rates for prisoners' families and friends to under $2 for each fifteen minute collect in-state *or* out-of-state phone call. This change alone will have a tremendous benefit in helping families maintain relationships during incarceration, a proven way of reducing recidivism.

McDonough, who fought in two wars and who served 27 years on active duty in the Army, also realized that an important component of supervising large groups of people is supplying decent food. For several years the majority of Florida prisoners had been suffering under a private contract given to Aramark Corporation to feed the prison population. Under Aramark, food quality dropped greatly and food service sanitation became a joke at many institutions, with outbreaks of food poisoning becoming a fairly common problem in the prisons. McDonough took steps to correct that, and on October 1, 2007, Aramark was replaced by Trinity Food Service. The result has been better quality and prepared food and better sanitation.

Rehabilitation also concerned McDonough, and he tried to bring a renewed focus to education, vocational and drug treatment programs for prisoners. In recent years all such programs have been slashed in the Florida prison system in favor of building more and more prisons and simply warehousing prisoners until their eventual release back into the community, often in worse shape than when they entered prison.

Ninety percent of the state's 95,000 prisoners will be released at some point, McDonough knew, and he believed that preparing them for life in the real world made good ethical and business sense. McDonough made it clear that he intended to place more emphasis on mental health treatment and vocational training, especially on efforts to prepare prisoners to obtain construction jobs when released. He was reported as saying that such efforts would pay off in the long run by reducing recidivism rates significantly. State lawmakers, however, nixed those

plans, claiming a budget shortfall of $1 billion will mean less money for corrections, not more, except for funding new prisons. When McDonough said that in that case he could still work within the budget and implement his plans, it was met with silence from legislators.

Even more silence came when in October 2007 McDonough sent a letter to several key state lawmakers and the governor's office asking them to consider turning PRIDE over to the FDOC to run. PRIDE, the abbreviation for Prison Rehabilitative Industries and Diversified Enterprise, was formed by the Legislature in 1981 as a public-private nonprofit corporation to take over and operate industries in the prison system using prisoner workers. The Legislature intended that PRIDE would provide work training programs, reduce the cost of state government and stimulate a real-world working environment.

Instead, PRIDE is viewed as little more than sweat-shop labor among prisoners who can make up to $.55 an hour doing work that pays 20 times that, or more, on the outside of prison. Though billed as a nonprofit, PRIDE rakes in millions in "nonprofit" every year that is not used to create more industries or to provide more work opportunities for prisoners. Instead of growing, PRIDE employs only about 2.5 percent of Florida's approximately 95,000 state prisoners. And while the prison population has increased over the past decade, there has been a 40 percent decline in prisoner employment by PRIDE.

Over the years PRIDE has regularly been involved in financial scandals, most recently in 2004 when it was discovered that top PRIDE officials had siphoned millions out of the corporation to create other companies in which they had personal interests. PRIDE came close to bankruptcy from that malfeasance.

Citing those, and other failures, McDonough argued that the FDOC could do a better job fulfilling the mission that PRIDE was given, mainly giving prisoners meaningful vocational training to prepare them to survive and remain out once released from prison.

PRIDE officials responded to McDonough's suggestion by claiming that FDOC leadership has failed to support PRIDE by not buying the products that the corporation makes and pointing out that FDOC has had its own financial and leadership problems in recent years.

Regardless, the silence from lawmakers and Gov. Crist following that politically-sensitive suggestion by McDonough was ominous.

Although research can find no prior support for it, it is claimed that when Gov. Charlie Crist took office in 2007, he asked McDonough to stay on, and at that time, McDonough said he would stay for six months. But in August, the story goes, Crist ask him to remain through the rest of that year, to which McDonough agreed.

Perhaps tellingly, McDonough, who was never shy about his actions and future plans for the FDOC with the media, did not return calls for comment on why *he had* decided to leave, or what he intends to do next.

While McDonough was praised by Gov. Crist and some state lawmakers on his way out the door for the excellent job he did, it had been implied in a *St. Petersburg Times*, article in September 2007 that McDonough's reform plans were clashing with a "tough on crime" mind-set in the Legislature. Steve Bousquet, the *Times* Tallahassee Bureau Chief and author of that article, commented that McDonough, who works for a governor nicknamed "Chain Gang Charlie," may be just too compassionate for his boss, and for lawmakers who control FDOC's $2.3 billion budget.

The New Secretary

Gov. Crist's choice to replace McDonough was somewhat of a surprise. Instead of picking someone from within the FDOC, Crist picked Walter McNeil, a former police chief of Tallahassee, to run the nation's third largest prison system in the country's fourth largest state.

McNeil began his public career as a Tallahassee police officer in 1979. He rose through the ranks to become police chief in 1997, running a police department that had 345 sworn officers and a $42 million budget.

A year ago, newly elected Gov. Crist selected McNeil to take over the state's Department of Juvenile Justice, which at the time was dealing with its own problems, including the death of 14-year-old Martin Lee Anderson in a Panama City boot camp.

With his relatively limited experience McNeil, 52, will have his job cut out for him managing the agency with the most state workers, 95,000+ prisoners, 150,000 probationers, a $2.3 billion annual budget, a rapidly growing prison population and possibly overcrowded prisons. It is projected that Florida's prison population will reach almost 104,000 prisoners by summer 2009. McDonough recently warned legislators that the system is "danger close" to reaching its legal capacity. That could force Florida to have to consider releasing some prisoners early, a politically sensitive move.

Senator Victor Crist, who leads the criminal justice committee in the Senate, blew off McDonough's warning, saying he doesn't think overcrowding is imminent, not as long as new prison beds are funded. The FDOC's new budget request is for $3.2 billion, almost $1 billion more than in past years, which includes $650 million for construction of new prisons. It costs about $100 million to build a major institution and $40 million a year to operate it.

McNeil said that he knows that the size of the prison population and providing more mental health care for prisoners are among the issues he *will* have to face. He pledged to continue McDonough's emphasis on rehabilitation and reducing recidivism. He said he would take on the problems "one step at a time."

A lobbyist for the Police Benevolent Association, David Murrell, said that McNeil will be a breath of fresh air. Apparently the PBA hopes McNeil will be more open to PBA concerns and pressure than McDonough was.

As long as McNeil doesn't allow career employees in the FDOC's central office to place him in a box where they control what information gets to him or manipulate him with their "experience" of what's right for the system or prisoners, then he should do okay. He does have a bachelor's degree from the University of Southern Mississippi and St. Johns University in Louisianna.

[Note: The FPLAO directors and staff wish Jim McDonough the best in whatever he moves on to. He did more for the FDOC, prisoners and their families in his short tenure than any other FDOC secretary in its long history. We also welcome Mr. McNeil to the post and look forward to working with and supporting him in the tremendous job that he has taken on. Like we did with Mr. McDonough, we are pleased to grant Mr. McNeil honorary membership with FPLAO and will ensure that he is sent all issues of FPLP as they are published. Sincerely, *Teresa Burns Posey, FPLAO Chairwoman.*]

McDonough Joins NY Foundation

In mid-February it was reported in *The Gainesville Sun* that former FDOC secretary, Jim McDonough, had accepted a position with a foundation based in New York City that promotes criminal justice reform.

After resigning as head of the Florida Department of Corrections, McDonough was named as a senior fellow for the JEHT Foundation, the acronym stands for justice, equality, human dignity and tolerance.

Created in 2000, the foundation has given grants totaling over $1 million to projects in Florida, including projects promoting juvenile justice reform and addressing the mental health needs of people caught up in the criminal justice system.

In an exclusive interview with CNN, McDonough, a native of Brooklyn, NY, also revealed more information about the corruption that lead to him being picked to clean up the FDOC almost two years ago. "It reminded me of the petty mafia I saw on the streets of Brooklyn when I was growing up in the late 1950s, early 1960s — petty, small-minded, thuggish, violent, dangerous, outside the law, and completely intolerable for a society such ours in the United States of America," he said.

For more information about the previous corruption within the FDOC, including video and photographs, check out "Ex-Florida prison boss: Drunken orgies tainted system" on www.cnn.com. ■

Civil Rights Restoration Slow Going

Six months after Gov. Charlie Crist and the state Cabinet, acting as the Clemency Board, changed the clemency rules to make it easier for most ex-felons to regain their civil rights, the system remained clogged with a backlog of over one hundred thousand cases awaiting review and processing.

Reportedly, incompetence's with one or both of the state agencies that screen ex-felons for rights restoration, the Department of Corrections and the Parole Commission, are behind the delay with the agencies disagreeing over which prisoners and ex-felons qualify for *review.*

"This just highlights the shortcomings of these new rules," said Muslima Lewis, and attorney with the ACLU and director of the Florida Rights Restoration Coalition. "They're so cumbersome, so bureaucratic and so prone to human error that some of the efficiencies we hoped for are not going to be seen."

Between April 5, 2007, when the rules were changed to allow many non-violent ex-felons to have their rights restored without going through a drawn-out clemency process, approximately 17,000 prisoners were released from state prison. Almost half that number automatically regained their right to vote, run for office, serve on a jury and apply for dozens of state-issued licenses.

However, other ex-prisoners, who did time for more serious crimes, from aggravated stalking, to manslaughter, must still undergo an investigation and ultimately be approved by the Governor and Cabinet. Those with murder or sex offense convictions must undergo full investigations and hearings before the Clemency Board to seek rights restoration. And, under the new rules, no one will have their rights restored, automatically or otherwise, until any restitution that may be owed has been paid. And in that last lies one significant roadblock, some say.

Randall Berg, an attorney with the Florida Justice Institute, says the restitution requirement is a Catch-22 that prevents ex-felons from becoming productive citizens. "If you can't get your civil rights restored, you can't get a job. And if you can't pay off the restitution, you can't get your civil rights restored," Berg said. "In essence, nothing has really changed."

The Parole Commission, an anachronistic agency that has repeatedly survived efforts by legislators to abolish it, claims that between April and October 2007 34,444 ex-felons had their rights restored under the new rules, more than in any other six-month period.

Yet, for many thousands of former prisoners, many released from prison years ago, the wait continues. The Department of Corrections says there are 298,000 ex-prisoners eligible for, but who have not been reviewed, under the new rules.

The commission says it is processing about 7,000 cases a month. The department says it is releasing about 3,000 people a month from prison. At that rate it will still take many years to resolve the backlog of cases.

Then there are other problems. The Department of Corrections is required to do an initial screening of all people who have been released from prison who are eligible for automatic rights restoration and send the list to the Parole Commission. The commission then is suppose to determine each ex-prisoner's eligibility under the new rules and make recommendations to the Clemency Board, for automatic restoration, hold pending restitution payment, hearing, etc.

However, the Parole Commission recently complained that as many as one-third of the cases on the DOC's lists shouldn't be there. Yet, when the DOC sought clarification from the commission as to why it thought cases shouldn't be on the lists, it couldn't get a meaningful response.

"I do not understand your error rate of 28.8%," FDOC staffer Tina Hayes wrote in an email to the Parole Commission. Over two weeks later she was still trying to get answers in a follow-up email, "If the error rate is going up as stated then this is the more reason I need the error messages" to explain the mistakes. Hopefully, Ms. Hayes had better luck than most people in trying to get a competent and straight response from the Parole Commission.

[**Editor's Note**: The Parole Commission is at it again. Since 1983 when parole-eligible sentencing was essentially abolished for most crimes in Florida and the commission was scheduled to be abolished as an agency, to prevent its demise the commission has collected additional job that have nothing to do with parole in order to make it harder to get rid of the agency, such as making conditional and medical release determinations, doing clemency investigations, etc.

The commission, running scared after recent, almost successful, attempts by the state House of Representatives to finally dissolve the agency, is now trying to get itself a "new" job—parole authority over juvenile offenders.

In January 2008 a bill was filed in the Florida legislature entitled the "Children in Prison Rehabilitation Act." Allegedly, a team at Florida State University drafted the bill in response to a growing body of research that show children are more amendable to treatment and less likely to understand the consequences of their actions than adults are.

The bill would give the Parole Commission parole authority over people who were 16-years-old or younger at the time of their offense, including those who received a life sentence, with some exceptions.

The bill, of course, is being backed by (and probably was inspired by) the Parole Commission and some state senators who support the commission.

While at first glance, the bill would appear to be a compassionate effort to save youngsters who just made a bad mistake in their lives.

In reality, the bill would sentence such children to a life of misery, manipulation and recidivism under a Parole Commission that cares nothing about rehabilitation or people, as long as it can continue to exist and the bloodsuckers who work for the agency can continue to suck the public's tit.

If this bill becomes law this year, the commission will feel safe that its future is secure for several more decades with new, young victims who it will never let go from its control until they die - Bob Posey.]

Overruling *Rainey*

by Richard Geffken

The U.S. Eleventh Circuit Court of Appeals recently overturned two prior decisions in *Ferreira v. Secretary, DOC*, 20 Fla. Law Weekly Fed. C943 (11th Cir. Aug. 7, 2007). The two cases struck down were *Rainey v. Secretary, DOC*, 443 F.3d 1323 (11th Cir. 2006) and *Ferreira v. Secretary, DOC*, 183 F. App'x. 885 (11th Cir. 2006).

The court's action was compelled by the per curiam decision reached in *Burton v. Stewart*, 127 S.Ct. 793 (2007).

The important issue in these cases concerned the finality which commences the AEDPA one-year statute of limitations period. The Eleventh Circuit initially was among those circuits which had held that any resentencing began a new one-year period in which federal habeas corpus relief could be sought from criminal convictions and sentences. However, confronted with criticism, in *Rainey* and its first *Ferreira* decision, the Eleventh Circuit had retreated into a position where a federally cognizable resentencing claim was required or nothing would be heard.

Burton held that there is no separation between judgment and sentence. Quoting *Berman v. U.S.*, 58 S.Ct. 164, the high court ruled that has been the law since 1937, stating, "Final judgment in a criminal case means sentence. The sentence is the judgment." *Burton, supra* at 798. Thus, this was not a new rule of law and any case holding differently was simply incorrectly decided.

In future, it appears any federal claim not procedurally barred should be cognizable on a §2254 application filed within a one-year AEDPA limitations period following a new sentencing.

The above noted cases should be carefully read by those prisoners assisting others with federal habeas corpus litigation and by those prisoners proceeding on their own in resentencing situations. ■

Former FDOC Warden Denounces Death Penalty

He always opposed the death penalty, even when as a Florida prison warden he oversaw executions, said Dennis O'Neill.

Now that he's retired from the prison system and is an Episcopal priest in Starke, Florida, O'Neill says he was always able to separate his prison warden job supervising executions from other parts of his life. "I was able to compartmentalize—psychologically, emotionally—the responsibility I had to efficiently kill another human being," he said.

O'Neill was an assistant warden for two years at Florida State Prison and warden for seven years at Union Correctional Institution, both of which house Death Row prisoners. He took part in two executions where he was responsible for everything except pulling the switch on the electric chair, he says.

He also recalls one time when he questioned his involvement in the prison system. He had read a paper by a UF researcher who reported that Florida had never executed a white person for killing a black person. "This was like someone picked up...a telephone pole and hit me square over the head," he said. "The only conclusions the pure, across-the-board systematic racism of the criminal justice system."

He also took part in helping victim's families during executions later in his career. He says that he found that executions didn't really provide any closure for families. "For the most part there was an emotional deadness—and that did not change when the execution was over," he said.

O'Neill left the prison system in 2001, and has now been a priest at St. Mark's Episcopal Church for four years.

He doesn't make his opposition to the death penalty a major part of his work there, but feels that his stance is consistent with his faith and shares his views whenever asked to speak on the subject.

Now O'Neill tells his listeners that, "When God says thou shalt not kill, that's the end of the story."

{Source: *Gainesville Sun*] ■

Florida Gets Sixth Private Prison

The people who live in and around the small town of Graceville, located in the Florid panhandle, were ecstatic this past September as the state opened its biggest for-profit prison there.

"It's epic," said City Manager Eugene Adams of the 1,500-prisoner prison, which already has a 384-bed expansion planned by the Legislature.

"It's a life-saver," commented Mayor Charles Holman. "It means so much to have these jobs." With 314 employees, 199 of them prison guards, the prison is expected to be an economic boon for the rural area. Graceville already has a 269-man state prison work camp and two juvenile facilities, but the new, big privately-operated prison will double the prison job rolls in t he area.

Warden Bill Willingham said Graceville will offer guards $12.10 an hour to start, and $1,450 in education expenses to get certified with the FDLE as correctional officers, which they will have a year to do. Then their salaries will go to $30,630 a year, which is about 10 percent lower than the average starting prison guard salary in the Department of Corrections.

The Graceville prison is being operated by GEO Group, Inc., formerly Wackenhut Corrections Corp., a private prison company, under a three-year, $61 million contract with the state.

Private prisons in Florida are required to operate at least 7-percent cheaper than state-operated prisons. Graceville's baseline $42.74 per day rate is $9.33 per prisoner lower than the daily average cost of the Department of Corrections.

Critics argue that private prisons operate cheaper by scrimping on pay and benefits, or cutting corners on staffing levels, health care and prisoner education programs. A 1999 comparison review by a legislative office did find that private-run prisons did offer lower employee health-care and pension benefits than DOC.

Graceville becomes the sixth private prison in Florida. Before it was opened, the five other private prisons had 6,244 prisoners.

GEO also operates prisons at Moore Haven and South Bay in South Florida. A rival private prison company, Corrections Corp. of America, has prisons in North Florida's Bay and Gadsden counties and near Lake City. Together, the two companies have a dozen lobbyist registered to promote their interests in Tallahassee.

[Source: *Tallahassee Democrat*] ■

NEWS IN BRIEF

CA- On November 27, 2007, a federal judge reversed the convictions of three correctional officers who had been convicted of abusing shackled prisoners and covering up the event. The incident took place while two prisoners from the California Institution For Men in Chino were being transported to a segregation unit.

FL- Manatee County investigators say they have arrested a man in connection with a 2004 murder which was displayed in cold case playing cards distributed to FDOC prisoners this year. The man was arrested on November 6, 2007, and charged with the murder of Ingrid Lugo. Authorities say Bryan Curry, 36, while serving time in Cross City Correctional Institution, gave details about the murder to another prisoner that only the killer would know. This prisoner in turn reported the crime. Authorities didn't release the name of the informant.

FL- A man being held in the Monroe County Detention Center died at a Florida Keys hospital after complaining of chest pains. James Pressler, 64, was charged with a murder that took place in 1976 in NY and was awaiting extradition. He died on November 11, 2007.

FL- On November 14, 2007, Craig Francis Hall, 58, who was a Gainesville attorney, entered a guilty plea to possessing child pornography. The sentencing hearing was set for Feb. 7, 2007, before a U.S. District Court. Hall faces a maximum of 10 years in federal prison. Hall was arrested after being discovered transmitting child pornography by the North Florida Internet Crimes Against Children Task Force. Officials found child pornography on CDs at his law office.

FL- Ralph L. Flowers, a former St. Lucie County judge, filed a lawsuit against the city of Stuart; the Martin County Sheriff, Bob Crowder; and others on November 9, 2007. The suit claims that two members of the Stuart Police Department unlawfully arrested his son, Michael Thomas Flowers, on November 8, 2005, and assaulted, battered, tasered, and used excessive force against him. Flowers, 39, at the time, hanged himself in a medical unit cell two days after his arrest in the Martin County Jail.

FL- The former Broward County Sheriff, Ken Jenne, 60, was sentenced to a year and a day in federal prison on November 16, 2007. The former sheriff was convicted on charges of tax evasion and mail fraud. Jenne was also a former state prosecutor, county commissioner, and a member of the Florida Senate for 20 years.

FL- A correctional officer was treated for minor cuts after a Broward County Jail inmate attacked the officer. Official say that Semil Alcena made a fake bomb threat, attacked the officer with a makeshift pick, and sprayed the officer's pepper foam at him. The incident took place on November 20, 2007.

FL- A tornado demolished one of two minimum security annex buildings the Paso County Jail on December 16, 2007. Officials say that while the jail building was destroyed, no inmates were injured because they had been evacuated into the main jail before the tornado hit.

FL- Eleven people, including nine who worked at Coleman Federal Penitentiary located in Lake County, were charged in Jan. '08 with taking bribes to bring contraband into prison and having sex with a prisoner. Federal prosecutors announced the case. All nine prison workers were either fired, suspended, or allowed to resign, said a BOP spokeswoman.

FL- During Nov. '07, Dennis Humphrey, a prison guard at Polk Correctional Institution, was arrested and charged with child molestation. The following day it was reported that another FDOC prison guard, Randall Waters, an employee at Hamilton Correction Institution had also been arrested for flashing children. Waters' flashing allegedly occurred while he was dressed in drag, sporting a woman's blond wig and makeup.

IL- On November 18, 2007, authorities made a brief statement that Carl Renfrow, 34, had been charged with attempted escape and criminal damage to state supported property. Officials say that Renfrow tried to escape from the Madison County Jail by using a metal disk off a shower wall to tunnel under the jail wall.

IL- Two Quiency County Jail inmates escaped on December 15, 2007 after overpowering guards. One of them, Richard Carr, 40, was arrested the next day after a sheriff's department team stormed a house where Carr hid. The second inmate, Jose' Olmeda, 32, was still on the run.

IN- Police arrested, Joseph Midyette, 48, after pulling him over for suspicion of driving under the influence on December 18, 2007. Midyette had escaped from a North Carolina prison in 1988 while serving a 60-year sentence. Officials

say that Midyette, who was under the name of Bruce Youngs when stopped, had married and started a demolition business since his escape.

IN- During Jan. '08, David Scott, 39, was exonerated and released from prison after having more than two decades of life stolen from him. Scott was cleared in the beating death of an 89-year-old woman by DNA evidence. Another man has now been arrested for the crime.

MD- On December 20, 2007, two prisoners, Brian Troxler, 25, and Donta Walker, 24, were convicted by an Anne Arundel County jury for attempted murder charges. The charges took place at the now closed Maryland House of Correction where the two prisoners stabbed two correctional officers. Sentencing has been scheduled for February.

MS- The DOC commissioner Chris Epps announced on November 19, 2007, that five new jails and one extension are being build that would add more than 1,500 beds which could increase the number of beds to 4,600 in 16 regional jails across the state. Officials plan to have these projects completed by April 2009. The estimated cost is over $55 million.

MT- During the first week of December 2007, DOC officials released a statement that 74 state prison workers had been disciplined. The discipline ranged from verbal warnings, written warnings, counseling and unpaid leave; one staff member resigned. This action by DOC officials came after an investigation concluded that said workers had misused e-mails. In some cases for inappropriate jokes and in others for excessive personal use.

MT- Jimmy Ray Bromgard filed a lawsuit alleging that his public defender and the state crime lab did shoddy work. Bromgard was exonerated after serving 15 years for rape. He seeks $16.5 million in the lawsuit filed during the third week of December 2007. The county wouldn't comment on the amount it offered Bromgard to settle the suit.

NE- Timothy Clinkenbeard, 44, a former county and state correctional officer, was sentenced to a four to five year sentence on December 19, 2007. Clinkenbeard was convicted for molesting a 12 year old girl over the course of a year. The former guard plead no contest in exchange for having other charges dismissed.

NJ- On December 15, 2007, two inmates, Jose Espinosa, 20, and Otis Blunt, 32, escaped from the Union County Jail. Officials say that the inmates broke out of the jail by removing cement blocks from two walls, and then squeezed through the opening, jumped to a roof, and make it over a 25-foot-high fence.

NJ- Gov. Jon Corzine signed legislation on December 17, 2007, that ended capital punishment in New Jersey. Since the US Supreme Court allowed states to restore the death penalty in 1976, this is the first state to end capital punishment by legislation. The bill replaced capital punishment with life without parole. There were 11 people on death row in NJ at the time the legislation was signed, one woman and ten men.

NV- In Dec. '07 the American Civil Liberties Union released a report claiming a pattern of "gross medical abuse" at Ely State Prison, Nevada's maximum-security prison. The report called for a meeting with NV's governor and prison director, Howard Skolnik. The report will be reviewed by the prison system's medical director, but until that's done "there's no need for a meeting at this time regarding an issue that I do not think exists," said Skolnik.

NY- On December 12, 2007, Leo Lewis, 60, was found guilty of attempted murder and two weapons charges in the Sloatsburg Village Court shooting that took place in May, 2007. Lewis smuggled a sawed-off rifle into the courtroom and fired one shot, which the ricochet just missed the judge. The small-town court had no metal detectors. The jury found that Lewis was trying to kill the woman who accused him of groping her.

OH- In Jan. '08, Ohio prison officials, claiming a severe overcrowding problem, said that statewide almost 50,000 prisoners are housed in 32 prisons that were designed to hold about 37,000.

OK- State inspectors released a report of their finding on December 27, 2007, after a Creek County Jail inmate filed a complaint against jail officials. The report found that Russell Mounger was improperly held in a restraint chair and was not provided with proper medical care. As a result, Mounger's legs had to be amputated due to an infection caused by blood clots. Jail officials claim that Mounger was faking mental health problems, said the report.

PR- A prisoner escaped during lunch from El Zarzal Prison in Rio Grande on December 23, 2007. Search teams scoured eastern Puerto Rico trying to capture, Jose' A. Sanchez Vega, 25. Sanchez was serving a 14 -year sentence when he escaped.

TN- As a result of an investigation by the Bureau of Investigation, three Bedford County Jail correctional officers were fired and one suspended on December 2, 2007. The investigation found that officers encouraged female inmates to put on a bikini mock fashion show. While the investigation found that there was no physical contact, officers did take pictures, and watched through security windows and cameras.

TN- The DOC announced on December 16, 2007, that it's paying

the American Lung Association of the state $10,000 to help prisoners stop smoking. This came after a ban in smoking that took effect on March 2007. The classes will offer medicated lozenges as part of the program.

TX- A former Hidalgo County Jail correctional officer, Jose' Armando Sanchez, 29, plead guilty on December 4, 2007, to trying to sell about 100 pounds of marijuana to a federal agent. Officials say that Sanchez offered to sell the marijuana for $16,000 to the undercover officer. Sentencing has been set for February 26, 2008. Sanchez faces up to five years in prison.

TX- Finally, it was announced in Jan. '08, that tens of thousands of TX prisoners are close to getting routine access to telephones for the first time. The TX Board of Criminal Justice approved new rules allowing such access and the TDOC said they are drawing up bid proposals for the phone contract to be let to private companies. Previously TX prisoners were lucky to get one 5-minute phone call every 3 months. Apparently, Texas is now more interested in making money off prisoners' families and friends who accept collect prison calls than it is in working to sever family and friends relationships with prisoners by restricting their communications.

VA- A prisoner who had escaped from Dillwyn Correctional Center in mid-November 2007 was captured on December 5, 2007. Officials say that Alonzo Logan was found in an abandoned house about 55 miles away from the prison. Logan was serving a 45 year sentence prior to his escape, including charges for a previous escape.

VA- DOC says that steps are being taken to improve security at the Lawrenceville Correctional Facility after a surprise search on December 27, 2007. Officials found several cell phones in the hand of prisoners. As a result, trained dogs that can detect cell phones and other contraband have been assigned to the prison, said officials. ■

From the editor...

It has been a while since I've had the time, space and ability to write this column and welcome members and readers to a new issue of *FPLP*. There have been some good reasons for that and most not within my control.

Briefly, in March 2007 I was transferred from Sumter CI to Mayo CI for no discernable reason. Okay, I thought, no problem, I can deal with the move; over the years I've traveled quite a bit within the FDOC and at first blush Mayo CI didn't seem too bad, I've certainly dealt with worse. Besides, with James McDonough cleaning the FDOC's house, I reasoned, most institutions had surely cleaned up their act and were going by the book, especially a rinky-dink place like Mayo. Wrong.

I hadn't been at Mayo long before it became obvious that the FDOC's rules, and state and federal laws, were largely unknown and/or ignored by the administration and staff there. Prisoners were routinely cursed at, called obscene and humiliating names, threatened, and had false disciplinary actions taken against them, if they dared to question or grieve such staff behavior.

Nepotism was rife at Mayo. I have never seen so many family members working at one institution, all vying with each other to be the nastiest. It was nothing for fathers and sons, mothers and daughters, husbands and wives, and assorted in-laws, to be working on the same shifts and in supervisory positions over one another. The result was an us-against-them insularity, combined with rural ignorance and a lack of integrity, leaving prisoners in a no-win situation no matter the abuse, wrongs or lies visited upon them by staff.

Programs at Mayo CI were either non-existent or among the worst that I've ever seen at any FDOC facility, except for one that I'll write about here shortly, Obviously the money that has been budgeted to the library there has been diverted to other non-prisoner-benefit areas—for several years. The book collection is largely garbage. The law library is stuffed into a room the size of an average bedroom, with prisoners trying to conduct research virtually sitting on top of each other, the few who can get in there that is. Which only adds to the problem that the law library consistently is open less than the 25 hours a week mandated by FDOC rules. But that's a result of the staff coffee and cigarette breaks called "count times" that routinely take one and a half to two hours several times each day.

Self-help programs, like A.A. and N.A., are a joke at Mayo, attended only because there are no other programs or to get out of the extremely noisy, and in the summer time—hot, Close Management-designed dormitories. Transition classes, which are supposed to help prisoners prepare for release, lack any substance at Mayo and mostly consist of watching movies.

The only program of substance at Mayo was the education department. Operating with almost no funding, in very limited space, a group of dedicated prisoner tutors and one supervisor work magic. Last year more prisoners obtained their GED at Mayo per student ration than at any other state prison. Truly amazing in that environment.

All together I was at Mayo a little over nine months. In January, with a stack of grievances pending in the FDOC central office, I was transferred to Union CI, where I am at this writing. The only good that I found at Mayo was among the prisoners and with a couple of the staff. I met some good, solid people who became friends, and again saw some old friends, which made it worthwhile. I wish you all the best.

Past members and readers will note with this issue of *FPLP* that the mailing address has changed. Teresa recently moved up to the Blue Ridge Mountains in North Carolina for family reasons, and the decision was made to move the mailing part of the organization up there also for efficiency. That's all that has changed, though. All other aspects of the organization will remain active here in Florida. Please note the new address.

If you haven't made a donation to FPLAO recently, and can do so, in any amount, your support is needed and deeply appreciated. And please encourage others to become a member of Your organization, working for prisoners and their families and friends.

Sincerely, Bob Posey. ■

FDOC Correctional Officer Fired For Battering Pregnant Wife

The spokeswoman for the FDOC, Gretel Plessinger, announced during the first week of January 2008, that a correctional officer, who had been working at Lowell Correctional Institution since May 2006, was fired on January 4th, 2008 for battering his seven months pregnant wife.

The officer, Arnold Brown, 40, was arrested by the Marion County Sheriff's deputies on January 3, 2008 at his Ocala home.

Brown was charged with aggravated domestic battery. Under Fla. Stat. ch. 784.045(1)(b), aggravated battery on a pregnant victim is punishable by up to 15 years in prison.

According to officials, Brown confronted his wife when she tried to leave the home and grabbed her by her jacket collar, causing her to fall to the ground. The officer then sat on her stomach and slammed her head into the floor.

In addition, Brown dragged the woman into a bedroom, saying he was going to kill her. The victim was able to lock herself in a bathroom, where she sent a text massage to a friend, who in turn notified authorities, said officials.

The woman was listed in good condition on January 4, 2008, after being taken to Munroe Regional Medical Center for evaluation. ■

[Sources: The *Ocala Star Banner;* the *Gainesville Sun*]

The FDOC Prisoner Investigation Procedure

by Melvin Pérez

This article will outline the prisoner investigation procedure, dispel many notions prisoners have concerning same, and point out remedies a prisoner can pursue should DOC officials fail to follow their own rules governing prisoner investigations.

Florida Administrative Code (hereinafter F.A.C.) 33-602.220(3)(e)(1)-(4) provides a number of reasons for which a prisoner can be placed in administrative confinement pending investigation. These are the following:

1) Pending an evaluation for placement in close management.

2) Special review against other inmates, disciplinary, program change or management transfer. Transfers for this reason shall be given priority.

3) Pending an investigation into allegations that the inmate is in fear of a staff member. The protection process outlined in subsection (d) above shall be utilized for this purpose. Paragraph (c) above shall not apply.

4) Any other reason when the facts indicate that the inmate must be removed from the general inmate population for the safety of any inmate or group of inmates or for the security of the institution.

Administrative confinement (hereinafter AC) is defined in 33-602.220(2)(a) as "a temporary confinement status that may limit conditions and privileges as provided in subsection (5) as a means of promoting the security, order and effective management of the institution. Otherwise the treatment of inmates in administrative confinement shall be as near to that of the general population as assignment to administrative confinement shall permit. Any deviation shall be fully documented as set forth in the provisions of this rule."

While this rule may sound good to many, we who have been there know that this is merely wishful thinking. The beatings, gassing, and atrocities that are carried out by some guards in these units have been well documented. But much more remains to be addressed.

Rule 33-602.220(3)(e) provides that the investigating officer shall have the authority to request that the senior correctional officer place the prisoner in administrative confinement for this reason.

Further, when a decision is made to place a prisoner in AC, the reason for such placement shall be explained to the prisoner and the prisoner shall be given an opportunity to present verbal comments on the matter. The prisoner shall also be allowed to submit a written statement. See: 33-602.220(a)(b). However, this rarely takes place.

Sub-section 220(2)(c) states that the Institutional Classification Team

(hereinafter ICT) shall review prisoners in AC within 72 hours.

The only exception to being reviewed within 72 hours is when the ICT cannot complete its review within the allotted timeframe due to a holiday. If the review cannot be completed with 72 hours, the action of the senior correctional officer shall be reviewed within 72 hours by the duty warden, documented on the DC6-22a, Daily Record of Segregation, and evaluated within five days by the ICT.

Investigation Time Frames

Under 33-602.220(3)(e) "the length of time spent in this status shall not exceed 15 working days unless one 5 working day extension is granted by the ICT. This extension shall be documented on the Daily Record of Segregation."

Keep in mind, that the ICT must grant this extension. ICT refers to the team consisting of the warden or assistant warden, classification supervisor, a correctional officer chief, and other members as necessary when appointed by the warden or designated by rule. See: 33-602.220(1)(h).

After this first extension, if it is necessary to continue the prisoner's confinement, written authorization must be obtained from the state classification office (hereinafter SCO) for a 30 day extension. This authorization shall be attached to the DC6-229. The SCO shall have the authority to authorize one additional 30 day extension. See: 33-602.220(3)(e).

SCO refers to a staff member at the central office level who is responsible for the review of prisoner classification decisions. Duties include approving or rejecting ICT recommendations. See: 33-602.220(1)(i)

If the prisoner remains in AC after the 15 working day limitation period, he or she should ask any ICT member (via request or confinement visits) if an extension beyond the 15 days limits was granted by the ICT. If one was granted, and the prisoner remains in AC confinement after the five days extension, the prisoner should ask, if an extension beyond the five days was granted by the SCO.

This can be done by submitting a request to any ICT member or by asking the AC officer or sergeant since the DC6-229, is at the AC unit and the additional extension must be attached thereto.

During any part of this process, if a prisoner feels or is able to prove that DOC officials have failed to follow their own rules and such has caused the prisoner to spend much more time in AC than DOC rules call for, the prisoner may pursue administrative remedies.

Administrative Remedies

Prisoners may challenge their continued retention in AC under F.A.C., 33-103.00(3)(a). The first step in this type of issue, is to file an informal grievance. An informal grievance shall be submitted to the staff member who is responsible in the particular area of the problem. See: 33-103.005(1). In this case, that would be the investigating officer (the inspector), who requested the prisoner to be placed in AC.

Arguments a prisoner should consider raising when filing the informal grievance are:

1) That the ICT never approved the five days extension or the SCO the thirty day extension;

2) That the time has passed for such extensions and the prisoner remains in AC;

3) That no security issues justify the prisoner's continued AC retention;

4) That mandatory language and substantive predicates in DOC rules, create a liberty interest for the prisoner to remain in the general population, rather than in AC; or,

5) That DOC has failed to follow their own rules and the prisoner should be released from AC for such failure.

The above grounds are just examples of issues a prisoner can raise. However, some may or may not apply depending on the particular circumstances that are present. Prisoners should raise any other issue that may provide a basis for relief.

Mandatory Language And Substantive Predicates

If the prisoner is raising this argument, he should consider the ruling made in *McQueen v. Tabah*, 839 F.2d 1525 (11th Cir. 1988), which held in relevant part that "mandatory language and substantive predicates in department of corrections rules and regulations concerning administrative segregation... create for inmates a liberty interest in remaining in the general prison population..."

A rule or regulation creates a liberty interest if it limits the discretion of officials. See: *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). The most common way of limiting discretion is to use "explicitly mandatory language in connection with requiring substantive predicates." See: *Hewitt v. Helms*, 459 U.S. 460, 472, (1983). Mandatory language often means words like shall, will, or must. See: *Flewitt*, supra, at 476. Substantive predicates are substantive limitations on official discretion. See: *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). They can also be procedures or standards that guide decision makers. See: *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 467.

How To File The Informal Grievance

When submitting the informal grievance, the prisoner shall use form DC6-236, Inmate Request. On top of the page, on the first line of the word "Request," or on the first line of the request section, the prisoner shall print the words "Informal Grievance." Failure to do this will cause the request to be handled routinely and it will not be

considered an informal grievance. See: 33-103.005(2)9b).

Likewise, this will also cause the form to be unacceptable as documentation of having met the informal step if it is attached to a formal grievance submitted at the next step. Id.

Prisoners cannot ask questions, seek information, guidance or assistance in their grievance or it will be considered a request and not an informal grievance. See: 33-103.005(2)(b)(1).

Further, section (2)(b)(2) states that "when completing the inmate request form for submission as an informal grievance, the inmate shall ensure that the form is legible, that included facts are accurately stated, and that only one issue or complaint is addressed. If additional space is needed, the inmate shall use attachments and not multiple copies of form DC6-236. Attachments that are a continuation of the grievance statement shall be submitted in triplicate." (DOC has proposed rulemaking that seeks to eliminate this requirement).

Thereafter, 33-103.005(4) provides that "[t]he recipient shall respond to the inmate following investigation and evaluation of the complaint within 10 days..."

Furthermore, "[t]he recipient shall state that the grievance is either approved, denied, or returned without action. The response shall also state the reason or reasons for the approval, denial, or return."See: 33-103.005(4)(b).

The response to the informal grievance shall include the following statement, or one similar in content and intent if the grievance is denied: You may obtain further administrative review of your complaint by obtaining form DC1-303, Request for Administrative Remedy or Appeal, completing the form as required by Rule 33-103.006, F.A.C., attaching a copy of your informal grievance and response, and forwarding your complaint to the warden or assistant warden. See: 33-103.005(4)(d).

The prisoner has 15 days from the response to seek further review. See: 33-103.011(1)(b)(1). If this review is denied, then the prisoner has 15 days from the response to file an appeal to the secretary. The appeal must include a copy of the informal grievance and response, also the copy and response of the review sought with the warden to the DC1-303, Request for Administrative Remedy or Appeal. The same requirements regarding attachments apply at these steps.

Issues appealed should raise any counter arguments to the responses received and address any claim overlooked or sidestepped by the respondent.

Time Frames For Responding

The following time frames apply to the grievances discussed heretofore:

- Informal Grievances-within 10 calendar days following receipt of an informal grievance by the staff member.
- Formal Grievances-20 calendar days from the date of receipt of the grievance to take action and respond.
- Grievance Appeals to the secretary-shall be responded to within 30 calendar days from the date of the receipt of the grievances. See: 33-103.011(3)(a)-(c).

Prisoners should keep in mind that unless the grievant has agreed in writing to an extension, expiration of a time limit at any step in the process shall entitle the prisoner to proceed to the next step of the grievance process.

If this occurs, the prisoner must clearly indicate this fact when filling at the next step. See: 33-103.011(4).

Knowing how much time officials have to respond to your grievances is important, since many grievances are thrown away by DOC staff with the intention of hindering the prisoner from pursuing any remedy and exposing their violations to DOC rules.

DOC officials are aware of this fact and after many years of allowing this practice adopted Rule 33-103.017 which states in pertinent part "[s]taff found to be obstructing an inmate's access to the grievance process shall be subject to disciplinary action ranging from oral reprimand up to dismissal in accordance with Rules 33-208.001-.003, F.A.C."

Prisoners should also note, that grievances filed through an official grievance procedure are constitutionally protected. See: *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1999).

Further, that retaliation against prisoner for pursuing grievance violates right to petition government for redress of grievances guaranteed by first and fourteenth Amendments and is actionable under § 1983. See: *Gayle v. Lucas*, 133 F. Supp. 2d 266 (S.D.N.Y. 2001).

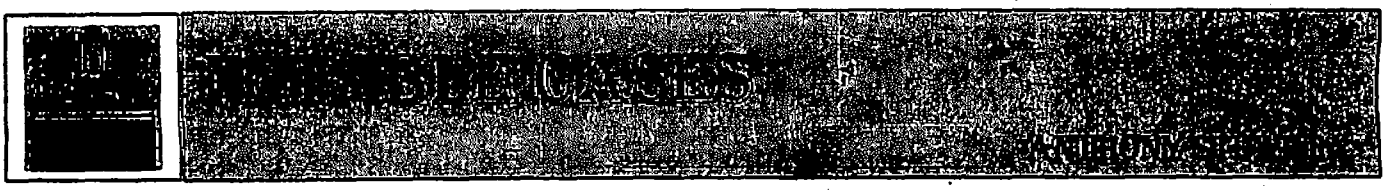
Likewise, a prisoner has a right not to be subjected to bogus disciplinary reports in retaliation for his exercise of a constitutional right. See: *Nunez v. Goord*, 172 F. Supp. 2d 417 (S.D.N.Y. 2001).

While retaliation is used by DOC staff as a tool to discourage prisoners from filing grievances, as shown above, it is contrary to DOC rules and clearly established decisional law.

End Note

Judicial remedies on this issue will not be discussed in this article, since the likelihood that the prisoner will still be in AC by the time he or she goes through this process is unlikely.

Hopefully, the information provided in this article, has cleared many misconceptions prisoners have concerning the prisoner investigation procedure, and will be very useful to law clerks providing assistance to a prisoner with this type of issue. ■



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

Polite v. State, 32 Fla. L. Weekly S576 (Fla. 9/27/07)

In Gary Lamar Polite's case, the Florida Supreme Court held that knowledge that the victim is a law enforcement officer is an essential element of the offense of resisting an officer with violence under section 843.01, Florida Statutes, which makes it unlawful to "knowingly and will fully resist, obstruct, or oppose' and officer in the execution of legal process or in the lawful execution of any legal duty.

Based upon the findings, the Florida Supreme Court quashed the conflicted opinion of the Third District Court of Appeal in *Polite v. State*, 933 So.2d 587 (Fla. 3d DCA 2006), and approved the opinion in *A.F. v. State*, 905 So.2d 1010 (Fla. 5th DCA 2005)

In Re: Amendments to the Florida Rules of Civil Procedure, The Florida Rules of Criminal Procedure, The Standard Jury Instructions in Civil Cases, and The Standard Jury Instructions in Criminal Cases—Implementation of Jury Innovations Committee Recommendations, 32 Fla. L. Weekly S600 (Fla. 10/4/07)

The Florida Supreme Court noted that in 1999 the Jury Innovations Committee (Committee) of its Judicial Management Council embarked on the most comprehensive review and thorough evaluation of Florida's jury system in the history of the State. This Committee identified and reviewed, among other things, current use of juries, issues facing jury managers, accessibility issues, and proposals for jury improvement and innovations in other states.

The Committee began its task to advocate reform and innovations, and after reviewing every aspect of the jury system, it submitted a final report to the Florida Supreme Court that contained comprehensive recommendations for improving Florida's jury system.

After receiving the Committee's report and other recommendations from the numerous committees of each subject involved, the Florida Supreme Court amended the Florida Rules of Civil Procedure, The Florida Rules of Judicial Administration, and the Florida Rules of Criminal Procedure. These amendments were ordered to become effective January 1, 2008, at 12:01 a.m.

Further, publication was authorized on and use of new and revised civil and criminal jury instructions, which were also ordered to become effective January 1, 2008.

[Note: A complete review of the amendments, and the new and revised jury instructions can be found in the above cite's appendix in Vol. 32, Issue 41, of the Oct. 12, 2007, Fla. L. Weekly beginning on page S602 and ending on page S606.]

State v. Sigler, 32 Fla. L. Weekly S607 (Fla. 10/11/07)

The State presented Jay Junior Sigler's case to the Florida Supreme Court t o review the decision of the Fourth District Court of Appeal that declared a state statute, section 924.34, Florida Statutes (2001), invalid. See: *Sigler v. State*, 881 So.2d 14 (Fla. 4th DCA 2004).

After discussions on the issue, it was concluded that section 924.34, Florida Statutes, which allows an appellate court to reverse a judgment and direct the trial court to enter a judgment for a lesser included offense, is unconstitutional to the extent that it can be read to allow the appellate court to direct entry of judgment for a lesser included offense when all elements of the lesser included offense have not been found by the jury beyond a reasonable doubt.

Accordingly, the Fourth District's decision in *Sigler, Id.*, was affirmed.

Lawson v. State, 32 Fla. L. Weekly S659 (Fla. 10/25/07)

The Fifth District Court of Appeal in Sammy Lee Lawson's case, *Lawson v. State*, 941 So.2d 485 (Fla. 5th DCA 2006), presented the certified question: "Does a trial court abuse its discretion in finding a defendant, who is discharged from a court-ordered drug treatment program for nonattendance, in willful violation of probation when the sentencing court did not specify the number of attempts the defendant would have to successfully complete the program and impose a time period for compliance?"

The Fifth District had answered the question in the negative in Lawson's case, which conflicted with several Second District's decisions: *Singleton v. State*, 862 So.2d 931 (Fla. 2nd DCA 2004); *Salzano v. State*, 664 So.2d 23 (Fla. 2nd DCA 1995); and as well as others.

After a lengthy analysis, the Florida Supreme Court agreed with

the Fifth District's opinion and disapproved the Second District's decisions.

Brooks v. State, 32 Fla. L. Weekly S664 (Fla. 10/25/07)

In James L. Brooks' case, the Florida Supreme Court held that the could-have-been-imposed harmless error standard applies to claims of sentencing score sheet errors raised by rule 3.800(a) motions. Further, it was held, the would-have-been-imposed standard, which requires resentencing unless the record conclusively shows that the same sentence would have been imposed using a correct score sheet, would defeat the purposes of preserving issues for review and would circumvent the appellate process if applied to sentencing issues raised under rule 3.800(a).

District Courts of Appeal

Woods v. State, 32 Fla. L. Weekly D2022 (Fla. 4th DCA 8/22/07_

Herbert Lynn Woods appealed the summary denial of his rule 3.850 motion, where the lower court had denied the motion for failure to provide a jurat (notarized/un-notarized oath showing the claims in the motion were sworn to).

The appellate court opined it was error for the lower court to summarily deny Woods' motion without allowing him to correct the insufficiency. Thus, Woods' case was reversed and remanded, with instructions to allow the correction and the lower court to rule on the merits of the corrected motion.

Beasly v. State, 32 Fla. L. Weekly D2042 (Fla. 2nd DCA 8/24/07)

John Beasly appealed the denial of his rule 3.850 motion, where, in pertinent part, he had claimed that his trial counsel was ineffective for not informing him of the consequences involved with a habitual offender notice.

Initially, Beasly was offered a plea deal of a 15-year PRR prison sentence. Beasly's counsel however, advised Beasly that he did not qualify for a PRR sentence and to not accept the offer.

Subsequently, immediately before jury selection the State served notice that it intended to seek a habitual offender sentence. The effect of such notice increased Beasley's exposure from the favorable PRR 15-year offer to that of a 30-year habitual offender prison sentence.

However, because of the timing of the State's notice, Beasley's counsel was unable to inform Beasley of the ramifications involved with such a notice being filed. Beasley contended in his rule 3.850 motion that had he known of the ramifications involved, he would have taken the plea offer and would not have "rolled the dice" with a jury. Beasley's counsel did not refute the allegations.

The appellate court found that the lower court's denial was not supported by competent, substantial evidence. Accordingly, the lower court's order of denial was reversed and the case was remanded.

In the appellate court's conclusion it was further noted that although it did not have the authority to require the State to re-offer its original plea offer on remand, it *suggested* that the parties should engage in a "good faith resumption of plea negotiations." See: *Feldpausch v. State*, 826 So.2d 354, 357 (Fla. 2nd DCA 2002); *Rudolf v. State*, 851 So.2d 839, 841-42 (Fla. 2nd DCA 2003); and *Eristma v. State*, 766 So.2d 1095, 1097 (Fla. 2nd DCA 2000). If negotiations took place but failed, it was instructed that Beasley would be given a new trial.

Harrell v. State, 32 Fla. L. Weekly D2054 (Fla. 2nd DCA 8/29/07)

The appellate court in Michael Harrell's case pointed out that a writ of mandamus petition is the proper vehicle to use in the lower court to compel a former counsel to turn over court documents in that counsel's possession.

If was further stressed that the mandamus petition should specifically identify the items that are being sought. See: *Potts v. State*, 869 So.2d 1223, 1225 (Fla. 2nd DCA 2004).

Marrero v. State, 32 Fla. L. Weekly D2101 (Fla. 2nd DCA 9/31/07)

In Jose Marrero's case, the appellate court stressed that a filing of rule 9.141(c) petition alleging ineffective assistance of appellate counsel does not toll time for filing a rule 3.850 motion.

It was further noted that even if the rule 9.141(c) petition resulted in a re-sentencing on a conviction, it does not re-open the expired time period for filing a rule 3.850 motion as to matters that could have been timely raised. See: *Foseph v. State*, 835 So.2d 1221 (Fla. 5th DCA 2003). Also see: *Johnson v. State*, 536 So.2d 1009, 1011 (Fla. 1988); *State v. Green*, 944 So.2d 208, 217 (Fla. 2006); and *Baker v. State*, 878 So.2d 1236, 1238-44 (Fla. 2004) (explaining the history of rule 3.850).

Lago v. State, 32 Fla. L. Weekly D2104 (Fla. 3rd DCA 9/5/07)

Miguel Lago appealed the denial of his rule 3.800(a) in which he had claimed that his consecutive sentences for his 1990 convictions for robbery with a firearm and unlawful possession of a firearm while engaged in a criminal offense were violative of his constitutional protection against double jeopardy.

The lower court, although finding Lago's sentences to be "patently illegal," denied the rule 3.800(a) motion on grounds of "law of the case." This was subsequent to Lago's unsuccessful direct appeal and several unsuccessful pro se rule 3.850 motions where he had no counsel. Lago, for the first time had counsel with the rule 3.800(a) motion.

On appeal, the appellate court opined that it agreed that Lago's

sentences were" patently illegal" and found that such was manifestly unjust. It was also opined that the denial of the rule 3.800(a) was proper on law of the case grounds. However, such did not preclude a correction of Lago's sentences. See: *Strazulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965).

Accordingly, Lago's appeal was treated as a habeas petition and was granted. See: *Ross v. State*, 901 So.2d 252 (Fla. 4th DCA 2005). Therefore, Lago's case was remanded with instructions to resentenced Lago.

Collazo v. State, 32 Fla. L. Weekly D2124 (Fla. 4th DCA 9/5/07)

Jose A. Collazo was sentenced to a Mandatory minimum of thirty years for a second degree felony, third-degree murder with a firearm, and he appealed.

The appellate court opined it was error to sentence Collazo to a thirty-year mandatory minimum for a second degree felony. It was explained that because section 775.087, Florida Statutes, subjected Collazo to a minimum mandatory enhancement of twenty-five years to life and the second degree statutory maximum of fifteen-years is less than the twenty-five minimum mandatory, the lower court could only impose that minimum mandatory.

Accordingly, Collazo's sentence was reversed and the case was remanded for re-sentencing.

[Note: In prior ruling, *Collazo v. State*, 936 So.2d 782, 784 (Fla. 4th DCA 2006), the appellate court had opined that the lower court had the discretion to sentence Collazo to more than twenty-five years. In the above FLW case the appellate court ruled en banc and receded from its prior opinion.]

Beckford v. State, 32 Fla. L. Weekly D2158 (Fla. 4th DCA 9/12/07)

On direct appeal, Trace Beckford asserted that the trial court erred in failing to grant his motion for judgment of acquittal because the evidence presented by the State was entirely circumstantial and did not rebut a reasonable hypothesis of innocence.

Beckford was charged with burglary of an occupied dwelling or structure. The appellate court found that the circumstantial evidence that a neighbor saw Beckford walking down a driveway of the burglarized premises ws insufficient to prove he committed or attempted to commit a burglary or to refute a reasonable hypothesis that Beckford was merely soliciting and, finding nobody home, proceeded to walk down the driveway.

Accordingly, the appellate court agreed with Beckford's assertion and, reversed and remanded the case with directions that his conviction be vacated.

Hebert v. State, 32 Fla. L. Weekly D2164 (Fla. 4th DCA 9/12/07)

In Kenneth Nelson Hebert's appeal, on motion for rehearing/clarification, the appellate court opined that Hebert's escape conviction could not be sustained where he was never placed under arrest before he fled from the officer.

An escape conviction requires the actual or constructive seizure or detention of a person to be arrested by a person having present power to control the person arrested. Furthermore, there can be no arrest without either a touching or a submission to authority. The evidence that was presented in Hebert's case demonstrated nothing more than a show of authority on part of the officer, who shouted to Hebert that he was under arrest and to put his gun down, and in response, Hebert continued to flee up until he was shot.

The appellate court opined that even if the officer's striking Hebert with a bullet were characterized as a "physical touching," such touching could not sustain escape conviction because after he was shot with the bullet he never attempted to escape or flee.

Accordingly, Hebert's conviction for escape ws reversed and the case was remanded with instructions.

Latson v. State, 32 Fla. L. Weekly D2166 (Fla. 4th DCA 9/12/07)

Robert Lee Latson appealed an order summarily denying his habeas petition where he sought to file a belated rule 3.850 motion as a consequence of appellate counsel's failure to inform him of the outcome of his direct appeal and of his right to postconviction relief.

The appellate court opined that it was error to summarily deny Latson's petition. Therefore, the case was reversed and remanded for the lower court to hold an evidentiary hearing on Latson's claim that the appellate lawyer failed to inform him of the direct appeal outcome and, should it be found credible, Latson should be permitted to file a belated rule 3.850 motion.

Newkirk v. State, 32 Fla. L. Weekly D2223 (Fla. 2nd DCA 9/19/07)

Gene David Newkirk appealed his convictions and sentences for burglary of a dwelling, grand theft of a firearm, carrying a concealed firearm, possession of a short-barreled shot gun, and possession of a firearm by a delinquent.

Newkirk had pleaded no contest to those charges after the trial court denied his dispositive motion to suppress. The dispositive testimony at the suppression hearing came from the arresting officer (officer). The officer testified that while he ws serving civil process he saw two boys running from a wooded area. Although the officer did not have any reasonable suspicion the boys had committed, were committing, or were about to commit a crime, he turned on his emergency lights to stop the boys, one being Newkirk, and question them "about what was going on."

The trial court found that the officer conducted a proper

investigatory stop, thus denying Newkirk's motion to suppress. On appeal, Newkirk contended that such finding was erroneous.

In the appellate court, the State argued that the initial stop of the two boys was a consensual encounter. The appellate court opined that the problem with the State's argument was twofold. It went on to explain that Florida law consistently holds that when an officer activates his emergency lights, that act initiates an *investigatory* stop, not a consensual encounter. Further, it was also opined that the State's argument was contradicted by its own witness's testimony. The officer testified that the initial contact was not a citizen encounter. He further testified that the moment he activated his lights, Newkirk and his companion were not free to leave.

Accordingly, based upon the appellate court's findings, the trial court should have granted Newkirk's motion to suppress. Thus, the appellate court reversed Newkirk's convictions and sentences and remanded for discharge.

O'hara v. State, 32 Fla. L. Weekly D2214 (Fla. 2nd DCA 9/19/01)

In Mark O'hara's case, the appellate court opined that where a defendant has presented evidence that the drugs he possesses were prescribed by a physician and had been obtained from a pharmacy, the defendant would be entitled to request a jury instruction in that it was not illegal to possess hydrocodone if it had bee prescribed.

It was further noted that sections 499.03 and 893.13 of the Florida Statutes allow a person to legally possess either a legend drug or a controlled substance when the drug was obtained pursuant to a valid prescription. These statutes apply even when a person possesses a trafficking amount.

Boyd v. State, 32 Fla. L. Weekly D2290 (Fla. 1st DCA 9/25/07)

Judgment had been entered in the lower court against Calis Lee Boyd for attempted possession of a firearm by a convicted felon, and he was sentenced to a 3-year minimum term under section 775.087(2) (a) 1., Florida Statutes (2005). Boyd challenged the sentencing on appeal.

The appellate court depicted what 775.087(2)(a)1. reads and opined that attempted possession of a firearm by a convicted felon is not included in it, nor was it believed the legislature intended to include the attempts of the listed crimes after the word "except" in the statute.

Accordingly, Boyd's sentence was reversed and remanded for resentencing.

Gray v. State, 32 Fla. L. Weekly D2309 (Fla. 2nd DCA 9/26/07)

The appellate court reversed Randall Carlton Gray's sentence for his conviction of manslaughter because it opined that the trial court had erred in considering details of pending charges that were alleged to have occurred after the manslaughter offense. See: *Seays v. State*, 789 So.2d 1209 (Fla. 4th DCA 2001).

Accordingly, Gray's case ws remanded for resentencing by a different judge.

Walker v. State, 32 Fla. L. Weekly D2313 (Fla. 2nd DCA 9/26/07)

Alexander Walker's sentence of life in prison as a habitual offender was reversed.

The appellate court opined that the lower court had erred in sentencing Walker as a habitual offender where the State did not present sufficient proof of qualifying prior convictions. It agreed with the defense counsel's argument in the lower court during objection of the State's documentation of prior convictions: "[T]here was no finger print comparison and no identifying marks to show that this defendant was the same person sentenced to the prior offenses." See: *Rivera v. State*, 825 So.2d 500, 501 (Fla. 2nd DCA 2002).

Accordingly, and because an appropriate objection in the lower court had been made, Walker's case was remanded for resentencing under the Criminal Punishment Code. See: *Walker v. State*, 835 So.2d 1281 (Fla. 2nd DCA 2003).

The appellate court further acknowledged that its conclusion in Walker's case, as well as in *Rivera, Id.*, and *Wallace, Id.*, is in conflict with decisions of the First, Fourth, and Fifth Districts, in that it has not afforded the State a second opportunity on remand to demonstrate that the defendant meets the habitual criteria. As such, and as it did in *Collins v. State*, 893 So.2d 592 (Fla. 2nd DCA 2004), the Second District certified conflict with the above mentioned Districts.

Tumblin v. State, 32 Fla. L. Weekly D2331 (Fla. 4th DCA 9/26/07)

Tavorris Tumblin appealed the denial of his rule 3.800(a) motion where he had argued that his PRR sentence was illegal based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *State v. Overfelt*, 475 So.2d 1385 (Fla. 1984).

Tumblin was found guilty of burglary of a dwelling with an assault or battery, and he was sentenced to life in prison as a PRR. In his rule 3.800(a) motion, he contended that the facts required to support the enhanced sentence were not submitted to the jury. The jury did not make a specific finding that the dwelling was occupied. And, Tumblin's offense was committed before the PRR statute was amended in response to *State v. Huggins*, 802 So.2d 276 (Fla. 2001), to include burglary of an unoccupied dwelling.

Tumblin's case was remanded for resentencing.

Whittey v. State, 32 Fla. L. Weekly D2345 (Fla. 2nd DCA 9/28/07)

James A. Whittey appealed the summary denial of his rule 3.850 motion, in which the appellate court affirmed but, wrote only to comment upon the lower court's denial of

Whittey's motion to extend the time for filing his motion for rehearing.

Before Whittey's time had run out to file a motion for rehearing, he filed a motion for extending the time to do so. In that extension motion, Whittey contended that he was entitled to additional time to frame facially sufficient claims because his access to the prison law library was limited. Whittey specifically alleged that he was required to schedule law library time "via request slip" and that access was limited because the library's capacity is twenty-six people for an institution housing approximately thirteen hundred inmates. The lower court decided that Whittey did not demonstrate good cause for an extension. See: *State v. Boyd*, 846 So.2d 458 (Fla. 2003).

Whittey cited to *Daniels v. State*, 892 So.2d 526 (Fla. 1st DCA 2004) (where it was opined that Daniels' motion for extension should have been granted because his reasons for needing the additional time stated good cause: the "need to schedule time in the prison library and to obtain the assistance of an inmate law clerk." Although Whittey similarly alleged the need to schedule law library time, he did not state that he needed the assistance of a law clerk.

As a result, the appellate court opined that the lower court did not abuse its discretion in denying Whittey's motion for extension of time. Thus, the lower court's denial was affirmed.

Ramsey v. State, 32 Fla. L. Weekly D2349 (Fla. 2nd DCA 9/28/07)

The appellate court opined that the lower court erred in dismissing Howell M. Ramsey's rule 3.850 as untimely, although it was filed in June 2005, and his conviction and sentence became final in April 1997.

Ramsey's case was not a usual one on this issue. As the appellate court opined: "Under usual circumstances, Mr. Ramsey would have been required to file [his rule 3.850 motion] within two years...." However, Ramsey had been imprisoned in New York State from the date his judgment and sentence became final until June 2003, during which time he was unrepresented by counsel and had no access to Florida law materials. See: *Demps v. State*, 696 So.2d 1296, 1298-99 (Fla. 3rd DCA 1997).

Accordingly, it was found Ramsey's motion was timely, thus, the case was reversed and remanded for the lower court to consider it on the merits.

Powell v. State, 32 Fla. L. Weekly D2418 (Fla. 2nd DCA 10/10/07)

Kevin Dewayne Powell filed a pro se brief, subsequent to his appellate counsel filing an *Anders* brief (*Anders v. California*, 386 U.S.738 (1969)) that posed an arguable issue: "Whether the trial court erred in permitting the use of Mr. Powell's statements at trial."

Powell contended that the *Miranda* warning (*Miranda v. Arizona*, 384 U.S. 436 (1966)) that was given him prior to the statements he made, and subsequently used at trial, did not adequately inform him of his right to have counsel present during questioning. After the alleged inadequate *Miranda* warning given by Tampa (Hillsborough County, Florida) police detectives, Powell gave incriminating statements.

It was argued that the standard, Tampa, police department Form 310, read verbatim, informs the defendant/suspect that they "have the right to talk to a lawyer *before* answering any of our questions" and " have the right to use any of these rights at any time you want during this interview" was adequate.

The appellate court opined that the ability to talk to a lawyer before answering questions, which Powell was told was his right, was derivative of Powell's, and every suspect's, greater right to have an attorney present at all times during custodial interrogation. As a result, it was opined that the warnings provided in Powell's case were constitutionally deficient, under the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida, and failed to comply with the *Miranda* requirements.

Accordingly, Powell's conviction was reversed and the case was remanded for further proceedings.

[Note: In Powell's case the appellate court issued the certified question: "Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer 'before questioning' and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" to the Florida Supreme Court.] ■

POST CONVICTION CORNER

by Loren Rhoton, Esq.

Events can occur at a trial which necessitate the declaration of a mistrial so that the case can be tried again. However, a mistrial should not be unilaterally declared by a trial court unless there is an absolute necessity therefor. Occasionally a trial court will unnecessarily declare a mistrial without considering other options. If a jury is discharged for legally insufficient reasons and without an absolute necessity and without the defendant's consent, such discharge is equivalent to an acquittal and precludes a subsequent trial for the same offense." State v. Grayson, 90 So.2d 710 (Fla. 1956). In such a case, the defendant should not be brought to trial on the same charges.

The wishes of a defendant to continue the trial must control when manifest necessity has not been demonstrated. Thomason v. State, 620 So.2d 1234 (Fla. 1993). Doubts about whether the mistrial declaration is appropriate should be resolved in favor of the liberty of the citizen. Id. When a judge fails to consider and reject alternatives, manifest necessity does not exist. In such a case, if a defendant strongly expresses his desire to continue the trial a judge would err in declaring a mistrial. Id.

Occasionally trial counsel will not understand the application of double jeopardy principles to an improperly declared mistrial and will either consent to said mistrial or fail to raise a double jeopardy claim at the proper time. If and when a trial court improperly declares a mistrial (i.e., where there is no absolute necessity and in the absence of a request from the defendant) the best possible thing would for defense counsel to stand mute. A defendant's silence when a trial court *sua sponte* grants a mistrial cannot be construed as consent to mistrial. Feria v. Spencer, 616 So.2d 84 (Fla. 3rd DCA 1993); and, Allen v. State, 52 Fla. 1 (Fla. 1906). If trial counsel consents to a mistrial after it has been improperly ordered or if counsel fails to challenge a retrial thereafter, this may amount to ineffectiveness of counsel sufficient to justify overturning a judgment and sentence.

In order to demonstrate ineffective assistance of counsel a defendant must prove both that his counsel performed deficiently and that the performance actually prejudiced the defendant. Strickland v. Washington, 466 U.S. 668 (1984). The two prongs of the ineffectiveness inquiry are independent of one another, and thus, must both be proved to establish a claim of ineffective assistance of counsel. Id. at 697. In order to satisfy the "performance" prong of the Strickland test a

defendant must show that his counsel's representation fell below an objective standard of reasonableness. Id. at 687-688. In order to demonstrate the prejudice prong of Strickland "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In Lockhart v. Fretwell, 506 U.S. 364 (1993), The United States Supreme Court further explained that "the 'prejudice' component of the Strickland test... focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *See also*, Robinson v. State, 770 So.2d 1167, 1171-73 (Fla. 2000) (Anstead, J., specially concurring) [a demonstration of prejudice under Strickland need only show that the attorney's deficient performance put the whole case in such a different light as to undermine the court's confidence in the outcome of the proceedings].

In a situation where defense counsel actually consents after the mistrial has been improperly ordered or where defense counsel fails to thereafter raise a double jeopardy claim, an argument can be made that defense counsel was ineffective and that said ineffectiveness prejudiced the defendant. In such case counsel's ignorance of a substantial body of case law is objectively unreasonable and falls below prevailing professional norms, for purpose of an ineffective assistance of counsel claim. Tomlin v. McKune, 516 F.Supp. 2d 1224 (D.Kan., 2007). In Tomlin, defense counsel essentially consented to an improper order of mistrial when there was no manifest necessity for the mistrial. The Tomlin Court noted concern about when an error that forms the basis for the relief cannot be corrected in further proceedings. The Tomlin Court wrote, "[f]or example, when a trial would violate the Double Jeopardy Clause of the Fifth Amendment, barring the trial may be the only remedy for the violation." Tomlin at 1242. Thus, in a situation where defense counsel has either consented to, or failed to challenge, a double jeopardy violation due to the improper granting of a mistrial, the proper relief should be to put the defendant in the position which he would have been but for the ineffectiveness of counsel. In other words, the relief should be to bar retrial on the grounds that such a retrial would violate the prohibition against double jeopardy.

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. ■

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